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“THE” RULE: MODERNIZING THE POTENT, BUT OVERLOOKED, RULE OF WITNESS SEQUESTRATION

DANIEL J. CAPRA* & LIESA L. RICHTER**

ABSTRACT

Starting with its illustration in the Apocrypha and continuing into the modern day both in courtrooms and in ubiquitous criminal procedurals, one evidence rule has proven so powerful that it has become known as “THE” Rule of Evidence. The rule of witness sequestration demands that multiple witnesses to the same events be examined separately from one another to prevent them from, consciously or subconsciously, tailoring their testimony to ensure that it remains consistent. Witness sequestration is conceptually simplistic and famously mighty. Yet, this bedrock protection against inaccurate trial testimony is imperiled by conflicting interpretations of Federal

* Philip Reed Professor of Law, Fordham Law School. Reporter to the Judicial Conference Advisory Committee on Evidence Rules. All views expressed are those of the authors individually and do not represent the official views of the Advisory Committee on Evidence Rules.

** George Lynn Cross Research Professor, Floyd & Martha Norris Chair in Law, University of Oklahoma College of Law. Academic Consultant to the Judicial Conference Advisory Committee on Evidence Rules. Our sincere appreciation goes to Cameron Molis, J.D., Columbia Law School, 2021, for his invaluable volunteer research support.

Rule of Evidence 615, the Rule that provides sequestration protection in federal court. In some circuits, the Rule is narrowly construed in accordance with its plain language to prohibit witnesses only from remaining physically present in the courtroom during testimony. Under this view, the Rule offers no protection against testimonial tailoring outside the courtroom. Yet, remaining physically present during the testimony of other witnesses is not the only means by which a prospective witness might adapt her testimony to match that of other witnesses. Although extra-tribunal witness coordination has always been possible, the explosion in technology and the recent specter of COVID-19 have multiplied exponentially options for testimonial tailoring beyond the courtroom doors. For this reason, some circuits construe terse “Rule 615” orders broadly to prohibit witness collaboration and access to testimony beyond the trial setting. Although these circuits afford the full complement of sequestration protection, their expansive construction of succinct “Rule 615” orders generates fairness concerns about inadequate notice of proscribed witness behavior. This Article details the competing interpretations of Rule 615 orders adopted by the federal courts and examines the merits and demerits of each approach. It further elucidates the philosophical divide reflected in the circuit split, exposing the textualist and purposive theories of rule construction animating the opposing views. The Article ultimately proposes detailed alternatives for revising Rule 615, offering draft language that could be adopted to memorialize either of the federal approaches to witness sequestration in amended rule text.

“[S]equestration is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.”¹

1. 6 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 1838 (Arthur Best ed., 4th ed. 2021).

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INTRODUCTION

Starting with its illustration in the Apocrypha and continuing into the modern day both in courtrooms and in ubiquitous criminal procedurals, one evidence rule has proven so powerful that it has become known as “THE” Rule of Evidence.² The rule of witness sequestration demands that multiple witnesses to the same events be examined separately from one another to prevent them from, consciously or subconsciously, tailoring their testimony to ensure that it remains consistent.³

Suppose that a defendant is on trial for arson in federal court.⁴ He claims that he was innocently walking by the building in question when he heard an explosion and ran from the fire. But the government has two witnesses—friends who were originally detained as suspects in the arson investigation after they were found together in the vicinity of the burning building. These two witnesses quickly implicated the defendant and offered to cooperate with the prosecution, claiming that they observed the defendant running out of the building shortly before it erupted in flames. Their testimony will be critical to the defendant’s fate. The defendant moves to sequester the government witnesses until they testify at trial, and the court states, “Yes, I am invoking the Rule. All government and defense witnesses shall be excluded from trial until they testify.” The first government eyewitness testifies and gives a detailed account of when and where he spotted the defendant running from the building. Consistent with the trial court’s sequestration order, the second witness is not present in court during this testimony. After the court recesses for the evening, however, the first eyewitness texts his friend and describes his testimony in detail. The next day, the friend testifies, adhering closely to the details provided in the text.

2. CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA L. RICHTER, EVIDENCE § 6.71 (6th ed. 2018) (“In courtroom parlance, excluding or sequestering witnesses is known as invoking ‘the rule on witnesses.’”).

3. See 3 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 615.03 (12th ed. 2019).

4. Assume the hypothetical defendant is charged under 18 U.S.C. § 844(i).

Has there been a violation of the rule of witness sequestration? In many jurisdictions, the answer is yes because one witness communicated the substance of his trial testimony to another excluded witness, enabling him to tailor his testimony.⁵ In many others, there is no violation of the witness sequestration rule simply because both government witnesses remained physically absent from the courtroom during the trial.⁶ In these jurisdictions, testimonial tailoring is permissible notwithstanding the trial court’s invocation of “the Rule”—so long as it occurs beyond the courtroom doors.⁷

The principle of witness sequestration or separation ensures accurate fact finding by enabling litigants to uncover deception or error revealed by distinctions among witness accounts.⁸ The credibility of the key testimony given by the government witnesses in the illustration above would have been seriously undermined had they offered differing descriptions of the man they saw running from the building or varying versions of the time and place at which they observed him. For this reason, American courts have long recognized the importance of witness sequestration to the fair operation of trial proceedings: “it will make available the raw reactions and the individual recollection of each witness unaided by the stimulation of the evidence of any other witness.”⁹

Witness sequestration is, thus, conceptually simplistic and famously mighty. Perhaps due to its time-honored pedigree and universal acceptance, sequestration is somewhat taken for granted—commonly invoked at the inception of hearings or trial proceedings with only a brief reference to “the Rule” or a court order of “separation” or “sequestration.”¹⁰ Once the Rule has been invoked, lawyers know that prospective witnesses—with a few notable exceptions—must exit the courtroom until called to testify.¹¹ Federal Rule of

5. *See, e.g.*, *United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018); *United States v. Greschner*, 802 F.2d 373, 375 (10th Cir. 1986).

6. *See, e.g.*, *United States v. Sepulveda*, 15 F.3d 1161, 1176-77 (1st Cir. 1993).

7. *Id.*

8. WIGMORE, *supra* note 1, § 1838.

9. *Dunlap v. Reading Co.*, 30 F.R.D. 129, 131 (E.D. Pa. 1962); *see also* *Queen City Brewing Co. v. Duncan*, 42 F.R.D. 32, 33 (D. Md. 1966) (“Defendants’ purpose in seeking the order is to secure the independent recollection of each deponent without that recollection having been influenced, properly or improperly, by the depositions previously taken.”).

10. *See, e.g.*, OHIO R. EVID. 615 staff note to 2003 amendment.

11. *See id.*

Evidence 615 sets forth the right to sequestration applicable in federal proceedings.¹² Consistent with its common law ancestors, Rule 615 demands that testifying witnesses be “excluded” from a trial or hearing upon request so that they cannot “hear” the testimony of other witnesses.¹³

Remaining physically present during the testimony of other witnesses is, of course, not the only means by which a prospective witness might adapt her testimony to match that of other witnesses. Prospective witnesses might coordinate outside of the trial proceeding prior to testifying. Or a witness who has already given testimony might communicate the substance of her testimony to an upcoming witness during a recess in the proceedings, as exemplified by the illustration above. As technology has advanced, the potential methods available for extra-tribunal access to trial testimony have multiplied exponentially. A witness might email, text, or tweet about the content of her testimony. Daily trial transcripts can be churned out at warp speed, providing prospective witnesses with a real-time window into court proceedings.¹⁴ Moreover, the recent specter of COVID-19 has spawned new and creative methods for trying cases and holding hearings in a socially distanced manner—and these new methods can provide new ways to access trial testimony.¹⁵ Now, a prospective witness might obtain the Zoom invitation to a virtual trial proceeding and listen in on daily testimony. Some districts have posted trial proceedings on YouTube for anyone to watch.¹⁶ Or a prospective witness might enter a courtroom into which remote trial proceedings are being streamed to maintain distance among trial participants.

Witness exclusion from trial proceedings utterly fails to provide the important safeguard against testimonial tailoring if prospective witnesses are permitted to access trial testimony from outside the courtroom. Indeed, in the famous case of *Sheppard v. Maxwell*,¹⁷ the

12. FED. R. EVID. 615.

13. *Id.*

14. *See, e.g., What is Realtime?*, NAT'L CT. REPS. ASS'N, http://ncra.org/home/professionals_resources/professional-advantage/captioning/realtime [<https://perma.cc/L5KU-2J3Q>].

15. *See, e.g., Mia Armstrong, Justice, Livestreamed*, SLATE (Aug. 14, 2020, 12:09 PM), <https://slate.com/technology/2020/08/zoom-courts-livestream-youtube.html> [<https://perma.cc/5GQN-ZGLU>].

16. *Id.*

17. *See Sam Sheppard, the Inspiration for “The Fugitive,” Dies*, HISTORY (Sept. 8, 2020),

Supreme Court recognized that witness sequestration is undermined when prospective witnesses are given access to the content of trial testimony:

[T]he court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. *Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge’s imposition of the rule.*¹⁸

For this reason, several federal circuits hold that a trial judge’s invocation of Rule 615 not only requires the physical exclusion of prospective witnesses from the courtroom, but also operates automatically to preclude witnesses from accessing or being provided trial testimony while they remain outside of court.¹⁹ These courts emphasize the fundamental purpose of sequestration and an interpretation of Rule 615 that allows litigants to realize the full and intended benefit of a witness sequestration order.²⁰ Without such protection beyond the courtroom doors, these courts posit that the time-honored and fundamental sequestration right becomes a dead letter.²¹

Not all federal courts interpret Rule 615 so broadly. Several circuits have adopted a textualist or plain language approach to the meaning and scope of Rule 615.²² In these federal courts, an order entered under “Rule 615” accomplishes only what the terminology chosen for the Rule describes: the physical exclusion of prospective

<https://www.history.com/this-day-in-history/sam-sheppard-dies> [<https://perma.cc/W4Y5-CTUC>] (noting that the sensational trial of Dr. Sam Sheppard was rumored to have inspired the television series and movie THE FUGITIVE).

18. 384 U.S. 333, 359 (1966) (emphasis added).

19. *See, e.g.*, United States v. Robertson, 895 F.3d 1206, 1215 (9th Cir. 2018) (“An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing.”).

20. *Id.*

21. *Id.*

22. *See, e.g.*, United States v. Sepulveda, 15 F.3d 1161, 1176 (1st Cir. 1993).

witnesses from the courtroom.²³ These courts highlight the notice problem created by an expansive interpretation of orders entered under Rule 615 that proscribes extra-tribunal witness conduct not covered in the language of the Rule.²⁴ According to these circuits, punishing litigants or witnesses for transgressing unexpressed restrictions on their conduct outside the courtroom raises problems of fundamental fairness.²⁵ Thus, in the circuits adopting a plain language interpretation of Rule 615, trial courts must do more than invoke Rule 615 to extend protection beyond the courtroom doors; they must enter specific orders detailing the precise witness conduct that they intend to limit.²⁶ In these jurisdictions, our hypothetical arson defendant's conviction would not be subject to attack, even though the second key witness against him received trial testimony.

Accordingly, there is a divide among the federal courts about the import of an order entered pursuant to Rule 615 that threatens the fundamental sequestration right as well as the uniform application of the Federal Rules of Evidence. The sequestration protection enjoyed by litigants in one federal circuit differs sharply from that enjoyed by litigants in another operating under an identical district court order. And neither approach to trial court orders entered under the existing language of Rule 615 is satisfactory. The textualist approach to Rule 615 allows witnesses to obtain trial testimony freely so long as they do so outside the courtroom. The broader purposive approach to the Rule gives litigants and witnesses inadequate notice of the restrictions on witness conduct and access to testimony outside of court. Although this conflict and the threat it poses to the fundamental right of witness sequestration have persisted for many years, no progress has been made in the courts toward harmonizing and unifying the approach to Rule 615.²⁷ This is not surprising given the irreconcilable tension between the limited text of Rule 615 and its broader purpose. The inherent problem with Rule 615 can be rectified only by an amendment that

23. *See id.*

24. *See id.* at 1176-77.

25. *See id.* at 1177.

26. *Id.* at 1176.

27. *See* Sarah Chapman Carter, Comment, *Exclusion of Justice: The Need for a Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615*, 30 U. DAYTON L. REV. 63, 90 (2004) (arguing that federal courts should uniformly apply the expansive approach to sequestration that limits witness access to testimony outside the courtroom).

clarifies the full scope of a federal court’s sequestration order and extends the power outside the courtroom.²⁸

Part I of this Article briefly traces the history of witness sequestration and of Federal Rule of Evidence 615. Part II details the competing interpretations of Rule 615 orders adopted by the federal courts and examines the merits and demerits of each approach. Part II further elucidates the philosophical divide reflected in the circuit split, exposing the textualist and purposive theories of rule construction animating the opposing views. Part III explores the application of sequestration protections outside the confines of the courtroom, to counsel preparing witnesses and the competing federal approaches to attorney regulation. Part IV highlights yet another Rule 615 circuit split, this one over the number of testifying witnesses permitted to remain in the courtroom, notwithstanding a sequestration order, as designated representatives of entity parties. Part IV illustrates the importance of repairing minor flaws in a federal rule that may not justify a rule revision in their own right when proposing other, more weighty amendments. Finally, Part V gets down to brass tacks and proposes detailed alternatives for revising Rule 615, offering draft language that could be adopted to memorialize either of the federal approaches to witness sequestration in rule text. We close with a discussion of the comparative merits of each of the two proposals.

I. “THE” RULE: A BRIEF HISTORY

Sequestration of witnesses is one of the oldest and most time-honored staples of the trial process. As noted above, Dean John Henry Wigmore famously described sequestration as “one of the greatest engines that the skill of man has ever invented for the detection of

28. Such an amendment has been approved by the Judicial Conference Advisory Committee on Evidence Rules and has been released for public comment. *See* Comm. on Rules of Prac. & Proc. of the Jud. Con. of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence: Request for Comment 2 (2021) [hereinafter Preliminary Draft of Proposed Amendments], <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment> [<https://perma.cc/2F78-8RGZ>]. If ultimately approved, the amendment would go into effect on December 1, 2023. *Id.* at 3. The Advisory Committee’s proposal will be discussed below.

liars in a court of justice,” second only to cross-examination.²⁹ Sequestration of witnesses is critical to ensuring that the all-important confrontation of witnesses is meaningful.³⁰ The trademark of successful cross-examination is striking while the iron is hot and before a witness has an opportunity to anticipate a line of inquiry or attack.³¹ Ensuring that witnesses are sequestered so they are unable to shape their testimony to accommodate that of other witnesses furthers meaningful cross-examination and effective truth-seeking.³² Cross-examination of separated witnesses that reveals significant variation in their versions of the same event may powerfully undermine their testimony.

Witness sequestration may be known as “THE” Rule of Evidence due to its Biblical origins. As told in the book of Daniel, two elders accused Susanna of adultery.³³ Both claimed to see her committing adultery under the shade of a tree.³⁴ Suspecting that the elders falsely accused Susanna, Daniel ordered separate examinations, with the second elder excluded from the tribunal while the first one testified.³⁵ When asked to provide details regarding the incident and the tree in question, the elders differed in their accounts.³⁶ The tribunal acquitted Susanna and beheaded the elders for giving false testimony.³⁷ Such is the power of sequestration.

In *Geders v. United States*, the Supreme Court observed that witness sequestration dates back to “our inheritance of the common Germanic law,” and that it serves two purposes: “[i]t exercises a restraint on witnesses ‘tailoring’ their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than

29. WIGMORE, *supra* note 1, § 1838.

30. *Crawford v. Washington*, 541 U.S. 36, 42-44 (2004) (tracing history of Sixth Amendment confrontation right and its importance as a procedural guarantee).

31. See MUELLER ET AL., *supra* note 2, § 6.62 (“Cross-examination is so highly regarded as a mechanism for testing the meaning and limits of testimony ... that it is considered a fundamental right.”).

32. WIGMORE, *supra* note 1, § 1838.

33. *Apocrypha*, in THE NEW OXFORD ANNOTATED BIBLE 1548, 1550 (Michael D. Coogan, ed., 4th ed. 2020); see also *Daniel* 13:36-64 (Douay-Rheims 1899 American Edition); WIGMORE, *supra* note 1, § 1837 (quoting the Apocrypha).

34. *Daniel* 13:36-64.

35. *Id.*

36. *Id.*

37. *Id.*

candid.”³⁸ Under pre-Rules practice, witness sequestration was discretionary with the trial judge.³⁹ As sequestration’s greatest champion, Dean Wigmore strongly advocated making sequestration mandatory upon request, arguing that it would be the parties, and not the judge, who would be aware of the risk of tailoring—a risk that might not be easily described to the judge.⁴⁰ Exclusion is “simple and feasible” and “powerful and practical,” so no contingency justifies denying it.⁴¹ If perjury is contemplated, exclusion is “almost the only hope,” and nobody, including judges, can know whether exclusion is actually needed; a party who thinks he needs it “must be allowed to have the benefit of the chance.”⁴²

When witness sequestration was enshrined in Federal Rule of Evidence 615, the drafters adopted the mandatory approach urged by Wigmore, noting that:

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position.⁴³

In its current form, Rule 615 reads as follows:

At a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;

38. 425 U.S. 80, 87 (1976) (quoting WIGMORE, *supra* note 1, § 1837); *see also* Perry v. Leeke, 488 U.S. 272, 281-82 (1989) (“[W]itnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections.”).

39. *See, e.g.*, United States v. Robinson, 502 F.2d 894, 897 (7th Cir. 1974) (noting that the matter of sequestration “rests within the discretion of the trial judge”).

40. WIGMORE, *supra* note 1, § 1839.

41. *Id.*

42. *Id.*

43. FED. R. EVID. 615 advisory committee’s note (citation omitted).

- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) a person authorized by statute to be present.⁴⁴

Under this provision, sequestration is mandatory upon request, and a trial judge may order witnesses excluded *sua sponte*.⁴⁵

The Rule contains three mandatory exceptions to exclusion. First, it permits a party who is a natural person to remain in the courtroom.⁴⁶ "Excluding such a person would raise questions of fundamental fairness and, in criminal cases, constitutional issues relating to confrontation and effective assistance of counsel."⁴⁷ Second, the Rule requires an exemption for the designated representative of a party that is not a natural person.⁴⁸ This exemption is designed to create "parity of treatment" for parties that are not natural persons and that may require the assistance and support of a party agent during trial.⁴⁹ The Advisory Committee Note to Rule 615 justifies the exemption for a party's designated agent "[a]s the equivalent of the right of a natural-person party to be present."⁵⁰ If entities did not have an absolute right to designate an agent, they would have a disadvantage as compared to individual litigants.⁵¹ "[T]he courts

44. FED. R. EVID. 615. Rule 615 was restyled in 2011, implementing stylistic, but not substantive, changes to the Rule. FED. R. EVID. 615 advisory committee's note to 2011 amendment.

45. See *United States v. Williams*, 136 F.3d 1166, 1168-69 (7th Cir. 1998) ("The rule codified a well-established common law tradition of sequestering witnesses 'as a means of discouraging and exposing fabrication, inaccuracy, and collusion.'") (citing *United States v. Jackson*, 60 F.3d 128, 133 (2d Cir. 1995)).

46. FED. R. EVID. 615(a).

47. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 6:109 (4th ed. 2020).

48. FED. R. EVID. 615(b).

49. FED. R. EVID. 615 advisory committee's note.

50. *Id.*

51. Tellingly, the committee note states that "[m]ost of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness." *Id.*; see also *infra* Part IV (discussing conflict in the case law on the number of witnesses that can be automatically excluded under Rule 615(b)).

have applied the exception to an FBI agent, a postal inspector, a DEA agent, and state or local police officers. Of course, the exception also applies to officers or employees of other parties that are not natural persons, such as corporations.⁵² Finally, the mandatory sequestration exemption for persons authorized to remain in the courtroom by statute⁵³ was added to Rule 615 in 1998 after Congress passed protections for victims in criminal cases, permitting them to view trial proceedings.⁵⁴

In addition to these three mandatory exemptions from sequestration, Rule 615 provides the trial judge discretion to permit any witness “whose presence a party shows to be essential” to remain in the courtroom.⁵⁵ Although this discretionary exemption may apply to any witness so long as the party makes the requisite showing of essentiality, it has been applied most commonly to expert witnesses and to case agents in criminal cases.⁵⁶

Witness sequestration during a hearing or trial is thus conceptually simplistic and its importance is uniformly accepted. Perhaps because of sequestration’s uncontroversial application and historical acceptance, trial courts routinely issue sequestration orders that are short and sweet.⁵⁷ Trial courts commonly invoke “the Rule” or “Rule 615” or order witnesses “sequestered” orally on the record without elaborating on the specific scope of their orders.⁵⁸ The Ohio Advisory Committee described the process as follows:

In practice, it is most common for trial courts to enter highly abbreviated orders on the subject. Normally a party will move for the “separation” (or “exclusion”) of witnesses, and the court will respond with a general statement that the motion is granted. This is usually followed by an announcement to the gallery

52. See 29 CHARLES ALAN WRIGHT & VICTOR GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6245 (2d ed. 2016) (citations omitted).

53. FED. R. EVID. 615(d).

54. WRIGHT & GOLD, *supra* note 52, § 6245 (noting that the Oklahoma City bombing trial of Timothy McVeigh sparked congressional concern over the rights of victims to be present in the courtroom); see also the Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(3) (2020).

55. FED. R. EVID. 615(c).

56. MUELLER & KIRKPATRICK, *supra* note 47, § 6:109 (“Experts are perhaps the most likely candidates for this exemption, since Rule 703 lets experts testify to opinions or inferences based on facts or data made known to the expert by observing a trial or hearing.”).

57. See, e.g., *United States v. Sepulveda*, 15 F.3d 1161, 1176 (1st Cir. 1993).

58. See *id.*

that prospective witnesses should leave the courtroom and by a statement that the parties are responsible for policing the presence of their own witnesses. Though some courts then orally announce additional limitations on communications to or by witnesses, the far more usual approach is simply to assume that the generic order of “separation” adequately conveys whatever limitations have been imposed.⁵⁹

Importantly, Rule 615 does not address expressly the many forms of witness conduct outside the courtroom that could enable witnesses to tailor their testimony. The plain language of the Rule references only physically “excluding” witnesses from the courtroom proper so that they cannot “hear” the testimony of other witnesses.⁶⁰

But witnesses clearly may tailor their testimony one to another without physically sitting in the courtroom during trial. Witnesses may read daily transcripts of a trial,⁶¹ be housed together in the same cell or share transportation to and from the courthouse,⁶² or simply chat about their testimony over lunch or in the hallways of the courthouse.⁶³ As noted above, COVID-19 restrictions forced trial courts to experiment with new processes that allow for virtual witness testimony.⁶⁴ These new processes may increase exponentially the possibility of access to trial testimony by prospective witnesses. A witness may obtain a Zoom link to a virtual trial and listen in from the comfort of home.⁶⁵ Some courts stream trial testimony from one courtroom into others to allow for greater social

59. OHIO R. EVID. 615 staff note to 2003 amendment.

60. FED. R. EVID. 615.

61. *See, e.g.*, *United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018).

62. *See, e.g.*, *Sepulveda*, 15 F.3d at 1175.

63. *See, e.g.*, *United States v. Binetti*, 547 F.2d 265, 269 (5th Cir. 1977), *rev'd on rehearing on other grounds*, 552 F.2d 1141 (5th Cir. 1977).

64. *See, e.g.*, *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 970-71 (D. Minn. 2020) (finding that the global pandemic created good cause for remote testimony in ongoing civil trial and that the court's discretion to order remote testimony is supplemented by its “wide latitude” in determining the manner in which evidence is presented under Rule 611(a)).

65. Bonnie Eslinger, *McDermott Faces SRA Review After Sharing Trial Zoom Link*, LAW360 (Aug. 6, 2020, 7:54 PM), https://www.law360.com/cybersecurity-privacy/articles/1299010?utm_source=shared-articles&utm_medium=email&utm_campaign=shared-articles [<https://perma.cc/ZT2H-MMBZ>] (“McDermott Will & Emery LLP ... [mistakenly allowed] a restricted Zoom link for its client's trial ... to be distributed to individuals outside of the case.”).

distancing of participants.⁶⁶ A sequestered witness, though absent from the primary courtroom, may access the testimony in another courtroom through a live stream.⁶⁷

When trial courts simply invoke “The Rule,” federal appellate courts differ sharply over whether the order regulates such witness conduct beyond physical exclusion from the courtroom. This disagreement generated a circuit split about the foundational sequestration right among the federal courts.

II. CONSTRUING RULE 615: STRICT VS. EXPANSIVE CONSTRUCTION

As noted above, trial court sequestration orders are notoriously succinct. Judges frequently invoke “The Rule” or order witnesses “sequestered” pursuant to Rule 615.⁶⁸ Some circuits limit Rule 615 to its plain meaning and interpret terse Rule 615 orders only to prohibit witnesses from remaining physically present in the courtroom during the testimony of other witnesses.⁶⁹ Others interpret Rule 615 orders more expansively to limit witness interaction and access to testimony beyond the courtroom doors.⁷⁰ Lurking beneath this conflict is the age-old debate regarding a “textual” or “plain language” approach to statutory and rule construction, as opposed to a “purposive” reading of statutory and rule text that gives effect to the legislative intent and policy underlying the plain language.

A. *The Plain Language Approach*

Rule 615 mandates that trial judges “order witnesses *excluded* so that they cannot *hear other witnesses’ testimony*.”⁷¹ Some circuits take the Rule at its word and find that a Rule 615 order requires only that witnesses be physically excluded from the courtroom.⁷² Under this view, a Rule 615 order does not prevent witnesses from

66. Minutes from the Evid. Advisory Comm. Meeting 17 (Nov. 13, 2020), <https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-evidence-rules-november-2020> [<https://perma.cc/UP63-MAQW>].

67. *See id.*

68. *See, e.g.,* United States v. McMahon, 104 F.3d 638, 640 (4th Cir. 1997).

69. *See, e.g.,* United States v. Sepulveda, 15 F.3d 1161, 1176 (1st Cir. 1993).

70. *See, e.g.,* United States v. Robertson, 895 F.3d 1206, 1215-16 (9th Cir. 2018).

71. FED. R. EVID. 615 (emphasis added).

72. *See, e.g.,* United States v. Collins, 340 F.3d 672, 680-81 (8th Cir. 2003).

talking to each other about testimony *outside* the courtroom and does not prevent a prospective witness from obtaining the courtroom testimony of another witness.⁷³ These courts acknowledge the trial judge's common law authority to extend sequestration protections to witness behavior outside the courtroom.⁷⁴ To extend protections beyond the courtroom in these plain language circuits, however, a trial judge must do more than invoke "the Rule" or order "sequestration." She must enter a specific court order describing regulation of witness conduct beyond the courtroom.⁷⁵

This restrictive view of Rule 615 orders is well-illustrated by the First Circuit's opinion in *United States v. Sepulveda*.⁷⁶ In *Sepulveda*, the defendants were charged with participation in a drug trafficking conspiracy.⁷⁷ Prior to trial, defendants moved for sequestration of witnesses.⁷⁸ In granting the motion, the trial court directed counsel to "monitor sequestration" and ordered that "witnesses who are subject to [the court's] order are not to be present in the courtroom at any time prior to their appearance to render testimony."⁷⁹ After they were convicted, the defendants argued that the government violated the sequestration order by housing three key prosecution witnesses in a single cell throughout the trial, allowing them to share testimony shortly after testifying.⁸⁰

The First Circuit held that the government had not violated the trial court's "basic sequestration order" by housing key witnesses together.⁸¹ According to the court, the trial court's sequestration order "ploughed a straight furrow in line with Rule 615 itself, [and] did not extend beyond the courtroom."⁸² In so holding, the First Circuit explained that "the common law supported sequestration beyond the courtroom," but "Rule 615 contemplates a smaller reserve; by its terms, courts must 'order witnesses excluded' only from the

73. *See id.*

74. *See, e.g.,* *United States v. Smith*, 578 F.2d 1227, 1235 (8th Cir. 1978).

75. *See id.*

76. 15 F.3d 1161, 1175-76 (1st Cir. 1993).

77. *Id.* at 1172.

78. *Id.* at 1176.

79. *Id.*

80. *Id.* at 1175.

81. *Id.* at 1176.

82. *Id.*

courtroom proper.”⁸³ The court acknowledged that trial judges possess the common law power to innovate “beyond the perimeters of that which the rule explicitly requires,” but found that the defendants had not requested “any specific extra-courtroom prophylaxis” and that the trial judge’s Rule 615 order did not afford any relief beyond the physical exclusion from the courtroom mandated by the plain language of the Rule.⁸⁴

Similarly, the Eighth Circuit traditionally interprets Rule 615 orders narrowly to restrict only the physical courtroom presence of a witness.⁸⁵ In *United States v. Collins*, the court held that the government had not violated a Rule 615 sequestration order by placing two trial witnesses in the same holding cell before either had testified.⁸⁶ In *United States v. Smith*, the court found that a nontestifying police officer had not violated the district court’s Rule 615 order when he “took notes throughout the trial and relayed this information to government witnesses waiting to testify.”⁸⁷ Most recently, in *United States v. Collier*, a defendant convicted of sex trafficking argued that the government had violated the district court’s Rule 615 order when one government witness talked to another government witness during a break in the latter’s direct testimony.⁸⁸ Rejecting the defendant’s argument, the court explained that “‘sequestration orders ... do not forbid all contact with all trial witnesses at all times,’ unless otherwise specified.”⁸⁹

83. *Id.* at 1175-76.

84. *Id.* at 1176.

85. *See, e.g.*, *United States v. Engelmann*, 701 F.3d 874, 879 (8th Cir. 2012) (Gruender, J., dissenting); *United States v. Calderin-Rodriguez*, 244 F.3d 977, 984-85 (8th Cir. 2001) (“[Rule 615] does not by its terms forbid an attorney from conferring with witnesses during trial.”).

86. 340 F.3d 672, 681 (8th Cir. 2003).

87. 578 F.2d 1227, 1235 (8th Cir. 1978).

88. 932 F.3d 1067, 1077 (8th Cir. 2019).

89. *Id.* (quoting *Engelmann*, 701 F.3d at 877). The Eighth Circuit opinion in *Engelmann* reveals confusion even within the Circuit about the proper scope of a Rule 615 order. In that case, the majority held that “it would be illogical to hold that [the witness], excluded from the courtroom pursuant to a sequestration order, could wait outside the courtroom doors and then discuss with [another witness] the testimony which [the other witness] had just given.” 701 F.3d at 878. The dissent in *Engelmann* took the majority to task for ignoring the narrow interpretation of a Rule 615 order in the Eighth Circuit. *Id.* at 879 (Gruender, J., dissenting) (arguing that there is no need for an evidentiary hearing to assess prejudice to the defendant resulting from a conversation between two government witnesses outside the courtroom because “neither Rule 615 nor the district court’s sequestration order prohibited such out-of-

Recently, the District Court for the Southern District of New York also articulated a narrow view of Rule 615 consistent with its plain language.⁹⁰ In that case, a defendant was prosecuted for bank and wire fraud.⁹¹ At the beginning of trial, defense counsel made a specific sequestration request: “when a potential witness has yet to testify, ... they can’t sit in the room to hear other witnesses, or opening statements, or something of that nature.”⁹² The district court granted the defense request and the government’s parallel request.⁹³ Toward the end of the trial, defense counsel learned that a prosecutor and a case agent, who was also a witness that the defense expressed intent to call, spoke with another government witness about communications the witness had with the case agent.⁹⁴ After his conviction, the defendant sought a new trial, arguing that this communication between witnesses outside the courtroom violated the court’s Rule 615 sequestration order.⁹⁵

Rejecting the defense’s sequestration objection, the district court noted the lack of clarity in the circuit courts with respect to the purview of Rule 615.⁹⁶ Stating that the Second Circuit has not extended a Rule 615 order beyond the courtroom, the district court found that the out-of-court communication did not violate the language of Rule 615 or defense counsel’s specific sequestration request, both of which referenced physical absence from the courtroom only.⁹⁷ Like the First and Eighth Circuits, the district

court contact”). The Third Circuit follows a similar approach. *See United States v. Brown*, 547 F.2d 36, 37 (3d Cir. 1976) (refusing to sequester witnesses during opening statements because the plain language of Rule 615 relates only to the time of “testimony”).

90. *United States v. Teman*, 465 F. Supp. 3d 277, 325-26 (S.D.N.Y. 2020).

91. *Id.* at 299.

92. *Id.* at 321.

93. *Id.*

94. *Id.*

95. *Id.* at 324-25.

96. *Id.* at 322 (“While the purpose of [Rule 615] is apparent, its purview is not.”) (quoting *United States v. Solorio*, 337 F.3d 580, 592 (6th Cir. 2003)).

97. *Id.* at 325. As will be discussed *infra*, the Second Circuit’s opinion in *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988), could be read to foreclose out-of-courtroom communication of testimony to witnesses. *See infra* notes 131, 135 and accompanying text. The district court in *Teman* acknowledged *Friedman* but read it only to afford the district court’s discretion to extend sequestration orders beyond the courtroom. *Teman*, 465 F. Supp. 3d at 324 n.32, 326.

court clearly favored a narrow reading of Rule 615 in keeping with its plain language.⁹⁸

B. An Expansive Reading of Rule 615

Most circuits reject the plain meaning approach and interpret Rule 615 orders more broadly to preclude witness access to testimony outside the courtroom doors. These circuits emphasize Rule 615’s fundamental purpose—to prevent witnesses from coordinating their trial testimony in order to preserve the integrity of the truth-seeking process.⁹⁹ Dean Wigmore, evidence titan and enthusiastic advocate of sequestration, supported just such a comprehensive approach to sequestration.¹⁰⁰ Wigmore opined that the effective sequestration of witnesses necessarily requires that witnesses not listen to the testimony of other witnesses, that prospective witnesses not consult with each other prior to testifying, and that a witness who has left the stand not consult with a prospective witness.¹⁰¹ Wigmore admonished that “nothing should sanction any indirect method of conveying to the prospective witnesses information of the testimony already given. For example, it would seem obvious to good sense that the perusal of journals reporting the testimony should be forbidden.”¹⁰² Circuits reading Rule 615 expansively find Wigmore’s extra-tribunal protections embedded or implied in the language of the Rule.¹⁰³

98. See also *State v. Buchholz*, 678 N.W.2d 144, 150-51 (N.D. 2004) (holding that the state did not violate the sequestration order by meeting simultaneously with claimant and claimant’s high school friend because the order did not address out-of-court communications among sequestered witnesses).

99. See, e.g., *United States v. Robertson*, 895 F.3d 1206, 1215-16 (9th Cir. 2018).

100. See WIGMORE, *supra* note 1, § 1840.

101. *Id.*

102. *Id.*

103. See, e.g., *Weeks Dredging & Contracting, Inc. v. United States*, 11 Cl. Ct. 37, 50, 53 (1986) (“[W]e believe the word ‘hearing’ in Rule 615 was intended by the FRE drafters to include the precise three-step process outlined by Wigmore.... We recognize that the *plain language* of Rule 615 refers only to the ‘hearing of testimony.’ But as we previously explained, that phrase has had a long-standing and consistent judicial construction of prohibiting all prospective witnesses from hearing, overhearing, being advised of, reading, and discussing, the previously given in-court testimony of witnesses on their own side as well as the opposite side.”).

The Ninth Circuit's opinion in *United States v. Robertson* is typical of those that construe Rule 615 sequestration orders expansively in keeping with Wigmore's vision.¹⁰⁴ The defendant in *Robertson* was a United States postal employee charged with theft of mail.¹⁰⁵ Before trial, the district court entered an order sequestering witnesses pursuant to Rule 615.¹⁰⁶ Nonetheless, during the trial, the prosecution permitted two government witnesses to review a transcript of testimony given by the case agent who was a key witness for the prosecution.¹⁰⁷ When the defense charged the government with violating the sequestration order, the district court expressed uncertainty about whether the provision of transcripts outside the courtroom violates a Rule 615 order that only speaks to witness presence in the courtroom.¹⁰⁸

On appeal, the Ninth Circuit tackled the issue identified by the district court. In so doing, the court rejected the plain language interpretation of a Rule 615 order as inconsistent with the purpose of sequestration:

[A]n interpretation of Rule 615 that distinguishes between hearing another witness give testimony in the courtroom and reading the witness's testimony from a transcript runs counter to the rule's core purpose—"to prevent witnesses from tailoring their testimony to that of earlier witnesses." The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript. An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing.¹⁰⁹

The court therefore held that "[a] trial witness who reads testimony from the transcript of an earlier, related proceeding violates a Rule

104. 895 F.3d at 1214-16.

105. *Id.* at 1209.

106. *Id.* at 1214.

107. *Id.* at 1215.

108. *Id.* The district court concluded that cross-examination of the government witnesses about their exposure to the transcript was an appropriate remedy, even assuming a violation occurred. *Id.*

109. *Id.* (citations omitted).

615 exclusion order just as though he sat in the courtroom and listened to the testimony himself.”¹¹⁰

In *United States v. McMahon*, the Fourth Circuit evaluated the important question of whether a witness can be held in criminal contempt for accessing daily transcripts and information about trial proceedings from outside the courtroom in the face of a straightforward Rule 615 order.¹¹¹ The defendant in *McMahon* was convicted of criminal contempt for violating the court’s sequestration order during his son’s criminal trial.¹¹² In the son’s trial, the district court granted the defense’s request “to sequester the government’s witnesses ‘so that they cannot hear the testimony of other witnesses’” and the reciprocal government request.¹¹³ When the trial began with witnesses excluded, defense counsel asked the court to permit the defendant’s father to remain in the courtroom.¹¹⁴ The prosecution objected, noting the father’s “critical” role as a witness in the case, and the court ordered the father excluded.¹¹⁵ Thereafter, the prosecution observed the father’s personal secretary sitting in the courtroom throughout the trial taking voluminous notes.¹¹⁶ Upon examining her, the court learned that the secretary was documenting the trial testimony, as well as exhibits admitted at trial, in her notes, and providing those notes and daily trial transcripts to the defendant’s sequestered father.¹¹⁷ The court ultimately found the father in criminal contempt for willful violation of the court’s sequestration order.¹¹⁸

On appeal of his conviction, the father argued that the district court erred in finding him in criminal contempt because it never instructed counsel and witnesses on the “intended scope” of the court’s basic Rule 615 order.¹¹⁹ The Fourth Circuit noted that, in

110. *Id.* at 1216. Notwithstanding the Rule 615 violation by the government, the court found that the district court did not abuse its discretion in allowing cross-examination as a remedy. *Id.*

111. 104 F.3d 638, 639-40 (4th Cir. 1997).

112. *Id.* at 639.

113. *Id.* at 640.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 644.

119. *Id.* at 642 (“McMahon’s chief claim is that the sequestration order was not sufficiently specific to provide the basis for a finding of criminal contempt.”).

order to be held in criminal contempt, a defendant must have violated a decree which was “‘definite, clear, and specific’ enough so that it leaves ‘no doubt or uncertainty in the minds of those to whom it was addressed.’”¹²⁰ Upholding the criminal contempt conviction, the Fourth Circuit found the district court’s sequestration order “stunningly simple” and “[t]he interest protected ... clear: to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial.”¹²¹ The court upheld the finding of the district court that an instruction to the defendant “that he could not circumvent the sequestration order by reviewing trial transcripts or receiving reports from his secretary would simply have stated the obvious.”¹²² Thus, the Fourth Circuit found evidence of the defendant’s receiving and reviewing daily transcripts sufficient to uphold the criminal contempt conviction even though the district court issued only a straightforward Rule 615 order limited to physically excluding witnesses from the courtroom.¹²³

However, the en banc opinion in *United States v. Rhynes* muddied the scope of Rule 615 orders in the Fourth Circuit.¹²⁴ As will be discussed further *infra*, the key issue in *Rhynes* was whether *attorneys* violate sequestration orders entered under Rule 615 when they communicate trial testimony to witnesses during trial preparation.¹²⁵ Determining that attorneys are not bound by sequestration orders, a five-judge plurality voiced a plain language interpretation of Rule 615: “It is clear from the plain and unambiguous language of Rule 615 that lawyers are simply not subject to the Rule. This Rule’s plain language relates only to ‘witnesses,’ and it serves only to exclude witnesses from the courtroom.”¹²⁶ Both concurring and dissenting judges cited *McMahon* with approval, however.¹²⁷ And Judge Niemeyer in dissent described the Fourth Circuit’s purposive approach to Rule 615:

120. *Id.* at 642 (quoting *Richmond Black Police Officers Ass’n. v. City of Richmond*, 548 F.2d 123, 129 (4th Cir. 1977)).

121. *Id.* at 643 (quoting *United States v. Leggett*, 326 F.2d 613, 613 (4th Cir. 1964)).

122. *Id.* at 644.

123. *Id.*

124. *See* 218 F.3d 310, 312 (4th Cir. 2000) (en banc).

125. *See infra* note 184 and accompanying text.

126. *Rhynes*, 218 F.3d at 316.

127. *Id.* at 324 (Wilkins, J., concurring); *id.* at 329 (Wilkinson, C.J., dissenting).

While the express directive of Rule 615—that witnesses be “excluded so that they cannot *hear* the testimony of other witnesses”—suggests most immediately the exclusion of witnesses from the courtroom, it has always been understood also to preclude the discussion among witnesses of testimony that has taken place in the courtroom. Common sense commands that if a rule prohibits a witness from “hearing” the testimony of other witnesses, the prohibition is violated if the testimony of a prior witness is repeated and heard in the courthouse corridor or outside on the street.¹²⁸

Judge Niemeyer also interpreted the plurality’s opinion to maintain a common-sense purposive approach to communications among witnesses outside the courtroom, finding that the plurality’s limitation on Rule 615 related to counsel only.¹²⁹ Thus, the proper interpretation and scope of Rule 615 has caused confusion within a single circuit, as well as conflicts among them.

The Second, Fifth, Tenth, and Eleventh Circuits similarly adopted an expansive reading of Rule 615 orders to prohibit access to testimony outside the courtroom.¹³⁰ In *United States v. Friedman*, the Second Circuit emphasized that the reading of daily transcripts outside the courtroom could amount to a violation of a Rule 615

128. *Id.* at 334 (Niemeyer, J., dissenting).

129. *Id.* at 335 (“[T]he plurality does not seem to take issue with the notion that Rule 615 prohibits one witness from speaking with another witness or with anyone else.”).

130. *See, e.g.*, *United States v. Jimenez*, 780 F.2d 975, 980 n.7 (11th Cir. 1986) (*per curiam*) (concluding that a witness violated a Rule 615 exclusion order by reading the testimony of another agent witness from a prior mistrial); *United States v. Greschner*, 802 F.2d 373, 375 (10th Cir. 1986) (“On appeal the defendants argue that Rule 615 requires not only that prospective witnesses be excluded from the courtroom, but also that they be prohibited from discussing the case with other witnesses. We agree.”); *United States v. Green*, 293 F.3d 886, 892 (5th Cir. 2002) (assuming that it would be “a violation of Federal Rule of Evidence 615” for witnesses housed together in a prison facility to discuss their testimony outside of court); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373 (5th Cir. 1981); *see also* *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978) (“[A] circumvention of the rule does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify.”); *United States v. Baca*, 447 F. Supp. 3d 1232, 1238 (D.N.M. 2020) (interpreting Rule 615 broadly to require witness exclusion during voir dire although the language of the Rule speaks only to exclusion during the “testimony” of other witnesses and stating that “[t]he Court agrees with those courts taking broad approaches to rule 615. Permitting witnesses to overhear the substance of others’ testimony in argument or any other form would defeat rule 615’s anti-tailoring, anti-fabrication, and anti-collusion aims.”).

order.¹³¹ Similarly, in *United States v. Jimenez*, the Eleventh Circuit rejected the government's attempt to rely on the plain language of Rule 615:

The government argues that reading a witness' testimony from a prior trial does not constitute a violation of the order. It relies on Rule 615's language prohibiting the "hearing" of testimony. As this circuit held in *Miller v. Universal City Studios, Inc.*, there is no difference between reading and hearing testimony for purposes of Rule 615. Either action can violate a sequestration order.¹³²

And in *United States v. Greschner*, the Tenth Circuit found that Rule 615 "requires not only that prospective witnesses be excluded from the courtroom, but also that they be prohibited from discussing the case with other witnesses."¹³³

Courts that adopt an expansive reading of Rule 615 appropriately recognize that access to testimony outside of court may be more harmful than listening to it in court.¹³⁴ If a witness has a transcript, that witness can pore over it for details, and even memorize it. As the Fifth Circuit in *Miller v. Universal City Studios, Inc.* stated, reading a transcript enables a witness to "thoroughly review and study [previous testimony] in formulating his own."¹³⁵

In sum, the majority of federal circuits take an expansive approach to Rule 615, notwithstanding its textual coverage of physical exclusion only, and find witness collaboration or access to trial testimony outside the courtroom prohibited.

C. A Clash of Titans: A Textualist vs. A Purposive Approach to Rule Construction

Lurking beneath the conflict in the federal courts regarding the scope of Rule 615 is the age-old debate over a "plain language" or "textualist" approach to construing a statute or rule and an "expansive"

131. 854 F.2d 535, 568 (2d Cir. 1988).

132. 780 F.2d at 980 n.7 (citation omitted).

133. 802 F.2d at 375.

134. See, e.g., *Miller*, 650 F.2d at 1373.

135. *Id.* The Second Circuit cited this portion of the *Miller* opinion with approval in *United States v. Friedman*. See 854 F.2d at 568.

or "purposive" one. A strict textual approach to statutory construction can be described as "the view that a text can and should be understood purely by examining its structure and meaning of its words, without the assistance of extratextual materials as interpretive aids."¹³⁶ Noted adherents to this approach, such as the late Justice Antonin Scalia, eschew reliance on legislative history or intent in interpreting statutory text, due to concerns over "separation of powers and notions about the rule of law as a system of constraining rules."¹³⁷

The Supreme Court has applied this plain meaning method of construction to the Federal Rules of Evidence in various contexts. In *United States v. Salerno*, the prosecution immunized grand jury witnesses, who then unexpectedly testified favorably for the defendants.¹³⁸ When the defense sought to introduce those favorable grand jury statements against the government at trial under the former testimony exception to the hearsay rule, the district court refused, holding that the government lacked a "similar motive" to examine the witnesses as the government had in the grand jury proceedings, as required by the exception.¹³⁹ Ignoring the "similar motive" requirement in the former testimony exception, the Second Circuit found the statements admissible, reasoning that it would be unfair to allow the government to immunize witnesses in the hope of obtaining damaging testimony and then hide behind the hearsay rule if the testimony actually exculpated the defendant.¹⁴⁰ The Supreme Court reversed, finding that the Second Circuit had no authority to ignore the plain meaning of the former testimony exception and its "similar motive" requirement, in the name of adversarial fairness.¹⁴¹ Writing for the Court, Justice Clarence

136. Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401, 405 (1994); see also Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2182 (2017) ("[A]dvocates of this view typically maintain that courts should rely primarily on textual sources of meaning, including the ordinary understanding of the operative provisions, related parts of the same act or the whole code, and established canons of statutory interpretation, to ascertain the objective meaning of the statutory text to a reasonable user of English.").

137. Karkkainen, *supra* note 136, at 403.

138. 505 U.S. 317, 319 (1992).

139. *Id.* at 321.

140. *Id.* at 320.

141. *Id.* at 321.

Thomas explained that Congress “presumably made a careful judgment as to what hearsay may come into evidence and what may not” and “[t]o respect its determination, we must enforce the words that it enacted.”¹⁴²

The Court also followed a textualist road to its destination in interpreting the coconspirator exception to the hearsay rule in *Bourjaily v. United States*.¹⁴³ In that case, the defense argued that a common law proscription on “bootstrapping”—that prohibited a trial judge from considering the hearsay statement itself in assessing its admissibility under the coconspirator exception—survived the codification of the exception in Rule 801(d)(2)(E).¹⁴⁴ Despite the common law pedigree of the bootstrapping prohibition and policy arguments in its favor, the Court turned to the plain language of Rule 104(a) in rejecting the defense’s arguments: “Rule 104, on its face, appears to allow the court to make the preliminary factual determinations relevant to Rule 801(d)(2)(E) by considering any evidence it wishes, unhindered by considerations of admissibility. That would seem to many to be the end of the matter.”¹⁴⁵ The Court held that a trial court could consider anything it deemed appropriate in deciding admissibility, including the hearsay statement in question, because the plain and unambiguous language of Rule 104(a) so provided.¹⁴⁶

Circuit judges interpreting Rule 615 have relied on this plain meaning approach and its supporting rationale to limit the reach of the Rule to the physical exclusion of witnesses from the courtroom. For example, in his concurrence in the en banc opinion in *United States v. Rhynes*, Judge J. Michael Luttig advocated for strict construction of Rule 615, opining, “[o]bedience to the language of law is not to engage in ‘clever wordplay’ or to indulge in ‘literalistic construction,’ and it must never be mistaken as such. It could not be

142. *Id.* at 322.

143. 483 U.S. 171, 178 (1987).

144. *Id.*

145. *Id.* (citations omitted).

146. *Id.*; see also *United States v. Bauzó-Santiago*, 867 F.3d 13, 18 (1st Cir. 2017) (explaining that interpretation of the Federal Rules of Evidence “start[s] with the text of the rule” and that courts “must give effect to the rule’s plain meaning, ‘unless it would produce an absurd result or one manifestly at odds with the [rule’s] intended effect’” (quoting *Cólon-Marrero v. Vélez*, 813 F.3d 1, 11 (1st Cir. 2016))).

further from these. It is, rather, the very essence of law.”¹⁴⁷ Under this view, Rule 615 may not be read to regulate witness behavior or access to trial testimony beyond the courtroom because the language of the Rule expressly requires only that witnesses be “excluded so that they cannot hear other witnesses’ testimony.”¹⁴⁸ This language clearly refers to *physical* exclusion from the courtroom during trial and the direct observation of trial testimony by prospective witnesses.

Notwithstanding the strict constructionist’s allegiance to the text of a statute, there is acknowledgement that it is a “fundamental judicial function [to] read ... the body of enacted laws in such fashion as to cause none of them to be pointless.”¹⁴⁹ Indeed, the Supreme Court has recognized that a Federal Rule of Evidence should not be read literally if strict adherence to its text would lead to an “absurd” result.¹⁵⁰ In *Green v. Bock Laundry Machine Co.*, the Court examined Rule 609, which regulates impeachment of a witness with a prior felony conviction.¹⁵¹ At the time of *Green*, Rule 609 provided a protective balancing test that made it more difficult to impeach “defendant[s].”¹⁵² Although this balancing test appeared designed to protect *criminal* defendants from prejudicial impeachment with their prior felonies, the plain language of the Rule covered *all* defendants, including defendants in civil cases.¹⁵³ Because a literal interpretation of Rule 609’s text would offer an inexplicable and unfair advantage to civil defendants over civil plaintiffs, the Court refused to take the Rule at its word: “[n]o matter how plain the text of the rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary’s testimony that it grants to a civil defendant.”¹⁵⁴

Such analysis could be used to support a more expansive view of Rule 615, even accepting the legitimacy of a textual approach to

147. *United States v. Rhynes*, 218 F.3d 310, 328 (4th Cir. 2000) (Luttig, J., concurring).

148. FED. R. EVID. 615.

149. Karkkainen, *supra* note 136, at 408 (quoting *U.S. Dep’t of Just. v. Julian*, 486 U.S. 1, 15 (1987) (Scalia, J., dissenting)).

150. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

151. *Id.* at 505 (majority opinion).

152. *Id.* at 509.

153. *Id.*

154. *Id.* at 510.

construction. Numerous circuits that interpret Rule 615 to extend beyond the courtroom have noted that the physical exclusion of witnesses from the courtroom is a futile and empty exercise if witnesses may, consistent with the Rule, obtain trial testimony outside the courtroom.¹⁵⁵ Arguably, a “strict” construction that renders a Rule 615 order meaningless is “absurd” and should be avoided. It should also be noted that the strict construction of the Rule is even more pointless in the increasingly frequent situations in which witnesses testify remotely; in those situations, an order excluding a witness from the “courtroom” is not only ineffective, it is irrelevant.

Furthermore, even noted textualists like Justice Scalia have looked to the policy or purpose that generated an enactment to resolve ambiguities in statutory language.¹⁵⁶ On the one hand, a true textualist would likely argue that the language of Rule 615 is anything but ambiguous. The First Circuit noted the language of Rule 615 clearly “contemplates a smaller reserve; by its terms, courts must ‘order witnesses excluded’ only from the courtroom proper.”¹⁵⁷ But Rule 615’s admonition that witnesses should not “hear” the testimony of other witnesses could be deemed ambiguous as to witness communications about testimony outside the courtroom doors. Even courts preferring the textual interpretation might resolve such ambiguity by reference to the clear policy underlying Rule 615: the threat to the truth-seeking process if testifying witnesses are permitted to tailor their testimony one to the other.¹⁵⁸ Therefore, it could be argued that the Rule’s prohibition on witnesses “hearing” testimony should be read to extend beyond the courtroom’s entrance to best serve the purpose for which the rule was enacted.¹⁵⁹

On the other side of the coin, the more expansive approach to the construction of Rule 615 reflects a purposive method of rule interpretation. The purposive school of thought emerged most

155. *See, e.g.*, *United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018).

156. *See Karkkainen, supra* note 136, at 408.

157. *United States v. Sepulveda*, 15 F.3d 1161, 1176 (1st Cir. 1993).

158. FED. R. EVID. 615 advisory committee’s note.

159. Of course, the counterargument is that the reference to “hearing” testimony is within the context of physical exclusion. The Rule provides that witnesses be “excluded so that they cannot hear other witnesses’ testimony.” FED. R. EVID. 615.

prominently following World War II and the passage of the New Deal.¹⁶⁰ Although also tethered to the notion of legislative supremacy, the purposive approach to statutory construction prioritizes effectuating a particular provision's underlying policy over linguistic and semantic purity.¹⁶¹ A purposive philosophy of construction seeks "to identify the objective purposes that a reasonable person would attribute to a statute and its operative provisions, and to determine the best way to carry out those purposes under the circumstances presented in each case."¹⁶² Although this school of thought values outcomes that effectuate the goal behind a particular enactment, it also seeks to "avoid results that could not be squared with the statutory text."¹⁶³ Still, when the plain meaning of a text would lead to a problematic result, purposivists are willing to follow the "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."¹⁶⁴

The Federal Rules of Evidence may be uniquely suited to purposive construction.¹⁶⁵ Federal Rule of Evidence 102 specifically blesses a flexible interpretation of the Rules: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."¹⁶⁶ While this directive should certainly not be

160. See Mulligan & Staszewski, *supra* note 136, at 2182.

161. *Id.*

162. *Id.*

163. *Id.* at 2194.

164. *Id.* (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)); see also Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 571 (1996) ("Sometimes we must look beyond the words of the Rules to understand evidentiary doctrine. We must do so when the Rules are not definitive or are ambiguous ... but sometimes even when the text is clear.").

165. See Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 867 (1992) ("[T]here is a growing recognition that generalized, global theories of statutory interpretation are less helpful than approaches tailored to individual statutes."); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 762-81 (1990) (identifying several situations in which a plain meaning approach will reach a result that is simply wrong on the merits, either because it is unfair or not fully thought out by Congress).

166. FED. R. EVID. 102.

interpreted to give trial courts carte blanche to ignore clear and unambiguous requirements in the Rules, such as the “similar motive” requirement analyzed in *Salerno*, it is in keeping with the general tenor of the Rules. The Federal Rules of Evidence are often intentionally ambiguous, purposely leaving ample room for judicial discretion in the administration of a trial.¹⁶⁷ Given that the Rules are designed to afford significant judicial flexibility, a strict, plain language approach to their interpretation seems a poor fit:

Many of the Rules, however, although “clear” and “plain,” are purposely flexible. For example, whether information will “assist” or “confuse” the trier of fact is a quintessential judicial judgment call. Where Congress purposely left a point open or vague, attempts to justify various interpretations by resort to plain meaning are disingenuous.¹⁶⁸

Especially when a Rule is silent with respect to a particular requirement or a specific limitation, a purposive interpretation that reinforces a “generally shared interpretation of the Rules deriving from preexisting common law traditions” may be most appropriate.¹⁶⁹ As one evidence treatise puts it, “[i]f a Rule says nothing about a particular requirement ... [o]ne must resort to the policy behind the Rules ..., the entire body of text of the Rules, and relevant legislative history to determine whether the requirement should be imposed.”¹⁷⁰

Federal courts have applied the purposive approach to the Federal Rules of Evidence when a rule is silent with respect to certain requirements or limitations. In *Tome v. United States*, for example, the Supreme Court found a “pre motive” requirement implied within Rule 801(d)(1)(B) that permits admission of certain prior consistent statements for their truth, although the text of the Rule includes no

167. See, e.g., FED. R. EVID. 403 (providing that a trial judge “may exclude relevant evidence” if she finds its “probative value is substantially outweighed by” various dangers).

168. Becker & Orenstein, *supra* note 165, at 867-68.

169. *Id.* at 868.

170. See SALTZBURG ET AL., *supra* note 3, § 102.02 (citing Eileen A. Scallen & Andrew E. Taslitz, *Reading the Federal Rules of Evidence Realistically: A Response to Professor Imwinkelried*, 75 OR. L. REV. 429, 440 (1996) (“While careful consideration of rules passed by Congress suggests that the text deserves the greatest relative weight when it is clear, where there is any ambiguity, other indicators of intent, such as legislative history, must be examined precisely to show appropriate deference to legislative authority.”)).

such limitation.¹⁷¹ The Court did so to effectuate the Rule’s purpose to admit only prior consistent statements that serve to rehabilitate an impeached testifying witness, reasoning that only premotive, consistent statements possess the requisite rehabilitative effect.¹⁷² Similarly, in *United States v. Webster*, Judge Richard Posner found that a party may not call a witness only to impeach her with a prior inconsistent statement when the party knows that the witness will not provide helpful trial testimony.¹⁷³ Judge Posner reasoned that it would be “an abuse of [Rule 607]” to allow such a tactic— notwithstanding the plain language of Rule 607 that expressly permits any party “including the party that called the witness” to “attack the witness’s credibility” without limitation.¹⁷⁴

Given Rule 615’s silence with respect to witnesses learning of trial testimony outside the courtroom, a similar purpose-oriented approach to its interpretation may be justified. The underlying goal of the Rule is to prevent witnesses from coordinating their testimony in a manner that undermines the accuracy of the trial process.¹⁷⁵ The purposive courts recognize that Rule 615’s textually mandated physical exclusion from the courtroom is inadequate to fulfill that purpose and that further protections are necessary to regulate witness collaboration and contamination beyond the courtroom. “[A]n interpretation of Rule 615 that distinguishes between hearing another witness give testimony in the courtroom and reading the witness’s testimony from a transcript runs counter to the rule’s core purpose.”¹⁷⁶ Because rigid adherence to the letter of Rule 615 would defeat the important purpose behind the Rule, some federal courts have found that the Rule’s text implies extra-tribunal protections:

We recognize that the *plain language* of Rule 615 refers only to the “hearing of testimony.” But as we previously explained, that phrase has had a long-standing and consistent judicial

171. 513 U.S. 150, 157, 160 (1995).

172. *Id.* at 162-63.

173. 734 F.2d 1191, 1192 (7th Cir. 1984). This limitation applies only to prior inconsistent statements that are offered solely for impeachment and are not admissible for their truth. *Id.* at 1193.

174. *Id.* at 1192; *see* FED. R. EVID. 607.

175. *See* *United States v. Robertson*, 895 F.3d 1206, 1214 (9th Cir. 2018).

176. *Id.* at 1215.

construction of prohibiting all prospective witnesses from hearing, overhearing, being advised of, reading, and discussing, the previously given in-court testimony of witnesses on their own side as well as the opposite side.¹⁷⁷

As is always the case, there are some clear benefits, and corresponding downsides, to the interpretations of Rule 615 on both sides of the current circuit split.

The principal benefit of a strict, textual approach to the interpretation of Rule 615 orders relates to notice. If a trial judge simply alerts parties that she is invoking “Rule 615” or is ordering witnesses “sequestered” according to the Rule, parties consulting the Rule—or their counsel—will find only a prohibition on the physical presence of witnesses in the courtroom. Other restrictions on witness conduct beyond the confines of the courtroom remain unexpressed and uncertain; parties operating under typically terse Rule 615 orders may not appreciate that a casual conversation over lunch could run afoul of the court’s mandate or that a shared ride to the courthouse with a fellow witness could constitute a violation. Depriving parties of the use of important witnesses due to the violation of such latent proscriptions can be said to penalize the parties without proper advance notice. Even more troubling, punishing a witness through contempt for transgressing unexpressed limitations violates important due process considerations.¹⁷⁸ Therefore, a narrow interpretation of Rule 615 that extends the Rule to the courtroom doors, but no further, may maximize fairness to parties and witnesses from a notice perspective. While more is required to regulate the risk of tailoring, those extra proscriptions can be provided by additional orders that specifically prohibit witnesses from accessing or obtaining testimony while outside the courtroom.

177. *Weeks Dredging & Contracting, Inc. v. United States*, 11 Cl. Ct. 37, 53 (1986).

178. *Cf. RMH Tech LLC v. PMC Indus., Inc.*, 352 F. Supp. 3d 164, 195-96 (D. Conn. 2018) (finding that an expert witness did not violate the express terms of the sequestration order by “participat[ing] in after-Court briefing sessions where testimony of the other witnesses was freely and openly discussed” because “nothing in the Court’s order provided for more than fact witnesses’ exclusion from the courtroom during testimony”). *But see United States v. McMahon*, 104 F.3d 638, 644-45 (4th Cir. 1997). In this case, the witness was a defendant in a criminal contempt proceeding for a Rule 615 violation. *Id.* at 642. The Court ultimately rejected the defendant’s argument that the boilerplate Rule 615 sequestration order at issue failed to provide the requisite notice for criminal contempt, reasoning that it was “obvious” that the sequestration order prohibited access to testimony. *Id.* at 644-45.

Requiring trial judges to utilize common law powers to extend anti-tailoring measures beyond the courtroom could provide the crucial notice to parties and witnesses about the precise conduct regulated.

On the other hand, as suggested above, a cramped and narrow reading of Rule 615 that permits witnesses operating under a Rule 615 order to leave the courtroom proceedings during a recess and to collaborate freely with prospective witnesses clearly frustrates the important purpose of the provision.¹⁷⁹ Notwithstanding the literal language of Rule 615, sequestered witnesses who claim ignorance when confronted about purposely communing with other prospective witnesses or about otherwise accessing trial testimony bring to mind a teenager (call him “Technicality Tim”) who claims that he did not realize that an admonition not to “take a *car* out” included his mother’s *minivan*. As noted by the Fourth Circuit, an instruction to a sequestered witness “that he could not circumvent the sequestration order by reviewing trial transcripts or receiving reports from his secretary would simply have stated the obvious.”¹⁸⁰ And if parties protected by a Rule 615 order reasonably assume that their adversary’s witnesses are forbidden from collaborating outside the courtroom, they may not appreciate the need to request more specific court orders and protections.

Importantly, the conflict in the courts about the extent of a Rule 615 order is not about whether they *can* prevent prospective witnesses from talking to other witnesses or reading trial transcripts. The courts clearly have the power to do so.¹⁸¹ The conflict is over whether a party must obtain a supplemental order (or supplemental language in a Rule 615 order) to prevent access to trial testimony, or whether it is sufficient simply to invoke “the witness rule” or impose a Rule 615 order.¹⁸²

In actuality, neither of the existing approaches to the scope of a Rule 615 sequestration order is satisfactory. A plain language approach that limits the order to physical departure from the courtroom permits witnesses to access testimony freely and tailor

179. MUELLER ET AL., *supra* note 2, § 6.71 (noting that an order removing a witness from the courtroom “is largely ineffective unless he is also sequestered (separated from other witnesses outside the courtroom)”).

180. *McMahon*, 104 F.3d at 644.

181. *See* United States v. Sepulveda, 15 F.3d 1161, 1175-76 (1st Cir. 1993).

182. *See id.* at 1176.

away so long as they do so outside the courtroom. Although trial courts in jurisdictions following this approach remain free to enter additional orders expressly extending protections beyond the courtroom, the longstanding custom is to enter brief orders tracking only Rule 615. In these circuits, therefore, the important policy of preventing tailored testimony is undermined. But the expansive interpretation of brief sequestration orders entered under the textual authority of existing Rule 615 (that automatically extends protections beyond the courtroom) is not an ideal solution either. A prospective witness learning only from counsel that Rule 615 requires that she remain outside the courtroom may not fully appreciate the dangers of casually conversing with another witness during a shared ride or meal. The problem of adequate notice plagues the expansive reading of sequestration orders given the current language of Rule 615.

Artful interpretation of the existing Rule, therefore, will not satisfactorily resolve the proper scope of a federal sequestration order. There is an inherent tension between the text of Rule 615 and its clear policy that courts cannot eliminate. The language of Rule 615 creates an irreconcilable conflict that can only be resolved by amending the Rule to bring its text and its animating policy into alignment.

III. THE ATTORNEY PARADOX

When sequestration protections *are* extended beyond the courtroom, federal courts disagree on the application of such prohibitions to counsel. One obvious way prospective witnesses might access trial testimony outside the courtroom is through a discussion with trial counsel. Attorneys trying a case commonly prepare witnesses before putting them on the stand.¹⁸³ Trial counsel is thus in a position to convey the content of testimony given by prior witnesses to prospective witnesses during their preparation. Federal courts also conflict as to whether attorneys' transmission of testimony during witness preparation constitutes a sequestration violation. In amending Rule

183. See John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 278-79 (1989) ("American litigators regularly use witness preparation, and virtually all would, upon reflection, consider it a fundamental duty of representation and a basic element of effective advocacy.").

615, rulemakers must determine whether and how to deal with the application of sequestration protections to counsel.

A. A Sequestration Free Pass for Attorneys: The Fourth Circuit Approach

In *United States v. Rhynes*, a plurality of the Fourth Circuit sitting en banc held that sequestration prohibitions do not apply to counsel and that a trial judge may *not* forbid a lawyer from preparing a witness with trial testimony.¹⁸⁴ *Rhynes* was a criminal prosecution involving a large-scale drug conspiracy.¹⁸⁵ At the beginning of trial, the district court gave a sequestration order that did purport to extend beyond the courtroom:

Well, I do grant the usual sequestration rule and that is that the witnesses shall not discuss one with the other their testimony and particularly that would apply to those witnesses who have completed testimony not to discuss testimony with prospective witnesses, and I direct the Marshal's Service, as much as can be done, to keep those witnesses separate from the-those witnesses who have testified separate and apart from the witnesses who have not yet given testimony who might be in the custody of the marshal.¹⁸⁶

When a lawyer for one of the defendants sought to have his investigator excepted from the sequestration order, the court granted the exception, reiterating the prohibition on communicating testimony to prospective witnesses: “[s]o long as your investigator observes Rule 615 and does not talk to the witnesses about testimony that has just concluded.”¹⁸⁷

Once the trial began, a prosecution witness, Davis, testified that a man by the name of Alexander was involved in defendant Rhynes's drug transactions.¹⁸⁸ This testimony apparently came as a surprise to Rhynes's defense counsel who had planned to call

184. 218 F.3d 310, 316 (4th Cir. 2000).

185. *Id.* at 310.

186. *Id.* at 313 n.1.

187. *Id.* at 313.

188. *Id.* at 314.

Alexander as Rhynes's sole supporting witness.¹⁸⁹ In preparing Alexander for his testimony, Rhynes's counsel directly told Alexander that Davis had testified and had implicated him in drug dealing.¹⁹⁰ When the defense counsel's disclosure of Davis's testimony came to light during Alexander's trial testimony, the district court held that counsel had violated his sequestration order.¹⁹¹ Accordingly, the district court granted the prosecution's motion to strike Alexander's testimony and to exclude him as a witness, expressing frustration with defense counsel: "It's very unprofessional. It's an absolute breach of the Rule 615, and I don't see how you think you can get that just because you think you are preparing a witness."¹⁹² Rhynes was convicted, and a panel of the Fourth Circuit upheld his conviction.¹⁹³ Thereafter, the Fourth Circuit granted rehearing en banc solely on the issue of Alexander's exclusion due to defense counsel's sequestration violation.¹⁹⁴

On rehearing, a plurality of the Fourth Circuit held that the trial judge's invocation of "the usual sequestration rule" was "an obvious invocation of Rule 615."¹⁹⁵ The appellate court examined the text of Rule 615 and observed that "[i]t is clear from the plain and unambiguous language of Rule 615 that lawyers are simply not subject to the Rule. This Rule's plain language relates only to 'witnesses,' and it serves only to exclude witnesses from the courtroom."¹⁹⁶ Thus, the appellate court concluded that the trial judge's invocation of "the rule" did not prohibit defense counsel from revealing testimony to prospective witnesses, noting that nothing in the language of the trial judge's order covered counsel.¹⁹⁷ Furthermore, the plurality cited authorities interpreting Rule 615 stating that "court decisions and the leading commentators[] agree that sequestration orders prohibiting discussions between witnesses should, and do, permit witnesses to discuss the case with counsel for either party."¹⁹⁸ Most

189. *Id.* at 313-14.

190. *Id.* at 314.

191. *Id.* at 315 n.4.

192. *Id.* at 314 n.2.

193. *Id.* at 312-13.

194. *Id.* at 313.

195. *Id.* at 316.

196. *Id.*

197. *Id.* at 316-17.

198. *Id.* at 317.

significantly, the plurality found that Rhynes’s counsel’s revelation of witness testimony to a prospective defense witness was necessary to fulfill “his duties, both constitutional and ethical, as a lawyer.”¹⁹⁹ The court stated that a criminal defense attorney “must be free to interview defense witnesses and to discuss with them all appropriate matters, without being subjected to an overbroad sequestration order.”²⁰⁰ In sum, the plurality found that Rule 615 does not, and that trial courts may not, limit counsel’s ability to convey trial testimony to prospective witnesses during witness preparation.²⁰¹

Three Fourth Circuit judges joined in dissent, arguing that an attorney exception to sequestration protections would be “contrary to precedent and common sense.”²⁰² The dissent emphasized that an attorney exception would eviscerate sequestration protections in every case by allowing attorneys to act as “go-betweens” in transmitting trial testimony to sequestered witnesses.²⁰³ Notwithstanding the literal language of Rule 615 governing the physical presence of witnesses in the courtroom, the dissent urged that “[c]ommon sense commands that if a rule prohibits a witness from ‘hearing’ the testimony of other witnesses, the prohibition is violated if the testimony of a prior witness is repeated and heard in the courthouse corridor or outside on the street.”²⁰⁴ The dissent pointed to precedent upholding a sequestration violation involving counsel.²⁰⁵ Finally, the dissent observed that counsel may fulfill its constitutional and ethical duties to prepare witnesses without revealing trial testimony to them.²⁰⁶ Indeed, Rhynes’s defense counsel acknowledged as much in his colloquy with the district court:

Your Honor, as I told you in chambers, I now realize that the proper thing for me to do in interviewing Alexander and preparing him to testify was that I could have asked him all the details of whether he had been a dealer and whether he had

199. *Id.* at 319.

200. *Id.* at 321.

201. *Id.*

202. *Id.* at 332 (Niemeyer, J., dissenting).

203. *Id.* at 334.

204. *Id.*

205. *Id.* at 335 (citing *Jerry Parks Equip. Co. v. Se. Equip. Co.*, 817 F.2d 340 (5th Cir. 1987)).

206. *Id.* at 336.

done drug deals with Michael Rhynes and that sort of thing without telling him that Davis had said that he had done that.²⁰⁷

No other circuit court has expressly adopted the *Rhynes* plurality's approach exempting lawyers from sequestration orders. Only a few federal district courts appear to accept the *Rhynes* attorney exemption. In *Minebea Co. v. Papst*, a district court held that a lawyer could not be precluded from using courtroom testimony to prepare witnesses.²⁰⁸ Still, the district court cautioned counsel that "if any lawyer in this case inappropriately 'coaches' a witness or helps a witness 'tailor' his testimony or fabricate or dissemble, there will be consequences."²⁰⁹ The court opined that courts "must trust and rely on lawyers' abilities to discharge their ethical obligations."²¹⁰

In *Cruz v. Maverick County*, a district court found no sequestration violation even where witnesses on the second day of trial appeared to have tailored their testimony to testimony given on the first day of trial, after consultation with counsel.²¹¹ The court stated that because "[t]he right to counsel, even in civil cases, 'is one of constitutional dimensions and should thus be freely exercised without impingement' ... [a]pplying [Rule] 615 to attorney-client communications would thus violate the Plaintiffs' due process right to retain counsel."²¹² Similarly, the defendant in *R.D. v. Shohola, Inc.*, requested that the trial court "sequester witnesses at trial and instruct witnesses not to discuss their testimony with counsel, or with one another."²¹³ The court declined, however, to regulate witness preparation by counsel "beyond observing that no counsel may endeavor to communicate with witnesses while they are testifying during breaks in their testimony."²¹⁴ However, the plurality opinion in *Rhynes* constitutes the lone circuit precedent for an attorney "exception" to sequestration protection.²¹⁵

207. *Id.* at 329 (Wilkinson, C.J., dissenting).

208. 374 F. Supp. 2d 231, 236 (D.D.C. 2005).

209. *Id.* at 237.

210. *Id.* (quoting *Rhynes*, 218 F.3d at 320).

211. No. DR-14-CV-050-AM, 2018 WL 8897808, at *7 (W.D. Tex. Mar. 30, 2018).

212. *Id.* (quoting *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980)).

213. No. 3:16-CV-01056, 2019 WL 6133748, at *1 (M.D. Pa. Nov. 19, 2019).

214. *Id.* at *2.

215. 218 F.3d 310, 317 (4th Cir. 2000).

B. Counsel Bound by Sequestration Protections

As noted by the dissent in *Rhynes*, federal precedent does not support a sweeping attorney exemption from sequestration.²¹⁶ Indeed, very few federal opinions squarely address the issue of attorney adherence to sequestration proscriptions. The federal opinions that note the issue suggest that attorneys should take care *not to reveal trial testimony to witnesses during preparation*. For example, in *United States v. Buchanan*, the Tenth Circuit emphasized counsel’s obligation to protect sequestration: “Counsel know, and are responsible to the court, not to cause any indirect violation of the Rule by themselves discussing what has occurred in the courtroom with the witnesses.”²¹⁷ Ironically, the *Rhynes* plurality cited *Buchanan* for the proposition that sequestered witnesses may nonetheless talk to counsel, ignoring this important caveat that counsel *is bound* to uphold sequestration protections in discussions with witnesses.²¹⁸ Indeed, the federal opinions stating that sequestered witnesses may still talk to counsel do not involve scenarios like the one in *Rhynes* in which counsel directly conveyed trial testimony to a prospective witness.²¹⁹

Other federal courts have found counsel bound by sequestration protections in order to avoid tailored witness testimony. *United States v. Binetti* was a criminal prosecution for cocaine distribution in which credibility issues were central to the jury’s determination of the defendant’s guilt.²²⁰ The trial judge admonished the jury that a sequestration violation by defense counsel should be taken into account in weighing the credibility of the defense witnesses.²²¹ The defendant argued that the finding of a sequestration violation based upon counsel’s conduct and the resulting admonition were

216. *Id.* at 332 (Niemeyer, J., dissenting).

217. 787 F.2d 477, 485 (10th Cir. 1986); *see also* *United States v. Guthrie*, 557 F.3d 243, 248-49 (6th Cir. 2009) (emphasizing that counsel may not coach witnesses or disclose trial testimony in discussions with them).

218. 218 F.3d at 317 (citing *Buchanan*, 787 F.2d at 485).

219. *See, e.g.*, *United States v. Walker*, 613 F.2d 1349, 1354-55 (5th Cir. 1980) (finding no sequestration violation when a nonlawyer disclosed information).

220. 547 F.2d 265, 268-69 (5th Cir. 1977), *rev’d on rehearing on other grounds*, 552 F.2d 1141 (5th Cir. 1977).

221. *Id.* at 269.

erroneous.²²² The Fifth Circuit affirmed his conviction and found that the trial judge had not abused his discretion:

The witnesses had been advised not to discuss the case with one another during the course of the trial. Yet the defense attorney, the defendant and two witnesses discussed the trial at lunch. The defendant contends that the trial judge's instructions in invoking the rule were unclear, and did not put the defense on notice that it was prohibited to converse outside of the courtroom with the witnesses who had not yet testified. He claims the rule on its face applies only to exclusion of witnesses from the courtroom, and that he was not given the parameters of any expansion of that scope.

The instruction given by the court upon invocation of the rule was sufficient. His remedial action of comment to the jury was within the discretionary power of the court.²²³

More recently, in *United States v. Robertson*, the Ninth Circuit held that government witnesses violated the trial court's Rule 615 order by reading transcripts of a pretrial evidentiary hearing at which another prospective government witness testified.²²⁴ Significantly, it was the prosecutors who provided the transcript to their prospective witnesses to help prepare them for trial.²²⁵ The Ninth Circuit upheld the trial court's finding of a sequestration violation.²²⁶

Federal courts have similarly found sequestration violations due to attorney conduct in civil cases. In *Jerry Parks Equipment Co. v. Southeast Equipment Co.*, the defendant Southeast invoked Rule 615, and all nonparty witnesses were ordered excluded from the courtroom.²²⁷ Southeast called witness William Dann during its case.²²⁸ When cross-examined, Dann admitted that he had briefly discussed trial testimony with Southeast lawyers in preparation for

222. *Id.*

223. *Id.*

224. 895 F.3d 1206, 1215-16 (9th Cir. 2018).

225. *Id.* at 1215.

226. *Id.* at 1216.

227. 817 F.2d 340, 342 (5th Cir. 1987).

228. *Id.*

his testimony.²²⁹ The trial judge struck Dann’s testimony and the court of appeals affirmed, finding no exception for counsel under Rule 615.²³⁰ Similarly, in *Reeves v. International Telephone & Telegraph Corp.*, the Fifth Circuit affirmed a lower court’s finding of a sequestration violation when counsel met for three hours with at least eleven prospective witnesses to discuss their case and prepare for testimony.²³¹ The Court emphasized that this was a “direct and flagrant violation of a previously entered sequestration and separation order.”²³²

In *Weeks Dredging & Contracting, Inc. v. United States*, a government contractor brought suit against the government seeking an equitable adjustment to a dredging contract.²³³ During trial, it came to light that the government’s defense counsel set up a conference room in a hotel where witnesses were staying to brief government witnesses on the progress of the trial, including testimony given by the plaintiff’s witnesses.²³⁴ The defendant argued that “sequestration orders cannot be read or fashioned to interfere with the preparation of a case for trial” and may not prevent necessary activities by counsel to make adjustments to a case as trial proceeds.²³⁵ The court noted that the trial testimony was provided to prospective witnesses *directly* by defense counsel.²³⁶ After reviewing federal authorities, the court found trial counsel’s conference room briefings to prepare witnesses to be “gross violations” of the court’s Rule 615 order.²³⁷ The court emphasized that prohibiting counsel from revealing trial testimony would not preclude counsel from preparing witnesses: “There is no prohibition by any ruling this Court has made, Mr. Casey, that will preclude either counsel from conferring with [his] witnesses. The prohibition is

229. *Id.*

230. *Id.* at 342-43.

231. 616 F.2d 1342, 1355 (5th Cir. 1980), *rev’d on other grounds by* McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133-34 (1988).

232. *Id.*

233. 11 Cl. Ct. 37, 39 (1986).

234. *Id.* at 41.

235. *Id.* at 52.

236. *Id.* at 50.

237. *Id.* at 51.

divulging to such witnesses who have not testified the testimony of any witness who has previously testified. That's the prohibition."²³⁸

Finally, in *Paradigm Alliance, Inc. v. Celeritas Technologies, LLC*, defense counsel also violated the trial court's Rule 615 order by preparing a defense witness with previously given testimony.²³⁹ The court reasoned that to allow counsel to prepare a witness with trial testimony "would ultimately serve to largely nullify the purpose for which Rule 615 exists."²⁴⁰

Accordingly, the weight of the case law authorizes trial courts to prohibit counsel from disclosing trial testimony to prospective witnesses. While counsel is surely expected to prepare witnesses, it does not follow that counsel is allowed to—or needs to—disclose trial testimony in doing so.

C. Allowing Counsel to Disclose Trial Testimony to a Prospective Witness: The Merits and Demerits

The courts that prohibit counsel from using trial testimony to prepare witnesses have the better side of the argument. First and foremost, allowing attorneys to disclose trial testimony to witnesses would essentially render Rule 615 meaningless. Trial counsel could set up a war room akin to the one described in the *Weeks* case where they could provide daily transcripts and witness updates to prospective witnesses.²⁴¹ Such an arrangement—set up in the name of effective witness and trial preparation—would be justified under the relentless logic of the *Rhynes* plurality.²⁴² Allowing attorneys to act as conduits for trial testimony would foster the tailoring of testimony decried as unjust since Biblical times.²⁴³ An attorney exception to Rule 615 sequestration would thus come at a prohibitive cost. It makes no sense to have a rule guarding against witness tailoring that is so easily evaded.²⁴⁴

238. *Id.* at 53; *see also* *Zeigler v. Fisher-Price, Inc.*, 302 F. Supp. 2d 999, 1018 (N.D. Iowa 2004) (finding that counsel's preparation of a trial witness with testimony presented the day before constituted a sequestration violation that justified exclusion of the witness).

239. 722 F. Supp. 2d 1250, 1273 (D. Kan. 2010).

240. *Id.*

241. *See* 11 Cl. Ct. at 41.

242. *See* *United States v. Rhynes*, 218 F.3d 310, 319 (4th Cir. 2000).

243. *See supra* notes 33-36 and accompanying text.

244. *See Rhynes*, 218 F.3d at 335 (Niemeyer, J., dissenting) ("[I]f Rule 615 precludes a

Further, the benefit of allowing attorneys to prepare witnesses with trial testimony is scant. As many courts have acknowledged, counsel may prepare a prospective witness by discussing and inquiring about underlying facts.²⁴⁵ To prepare a witness competently for her trial testimony, counsel need not directly relate the testimony already given by prior witnesses. Even the defense attorney who ultimately benefitted from the attorney exemption created by the *Rhynes* plurality acknowledged that he could have prepared the defense witness to deal with allegations that the witness was himself a drug dealer effectively without referencing trial testimony.²⁴⁶

The *Rhynes* plurality rejected a distinction between counsel communicating with a prospective witness about underlying facts and counsel relating trial testimony to a prospective witness, opining that such a distinction “fails because it is simply—and unnecessarily—splitting hairs.”²⁴⁷ Query whether it really is “splitting hairs” to allow counsel to ask a prospective witness “have you at any time been involved in drug dealing?” but not to allow counsel to relate that “a witness testified that you are a drug dealer.” The danger regulated by sequestration is the tailoring that occurs from *listening to what others have said at trial*. A direct question from a lawyer about a fact does not raise the same risk of tailoring from witness testimony. Of course, it is true that direct questions from a lawyer could, in some cases, constitute impermissible coaching, but that is a separate wrong unrelated to Rule 615. Simply put, if the witness does not hear, directly or through a conduit, what was actually said at trial, there is no risk of tailoring that is regulated by Rule 615. To the extent this is splitting hairs, then it can be said that splitting hairs is what lawyers do, especially under the Rules.

person from acting as an intermediary to relate to one witness the testimony of another, how can we exempt an attorney from the proscription? Just as a discussion among witnesses outside the courtroom would frustrate the rule that one witness cannot hear the testimony of another, a discussion between a witness and an attorney about another witness’ testimony frustrates the rule.”)

245. *Id.* at 336.

246. *Id.* at 329 (Wilkinson, C.J., dissenting) (“I now realize that the proper thing for me to do in interviewing Alexander and preparing him to testify was that I could have asked him all the details of whether he had been a dealer and whether he had done drug deals with Michael Rhynes and that sort of thing without telling him that Davis had said that he had done that.”).

247. *Id.* at 320 n.11.

Of course, it is possible that a wily witness would figure out from a lawyer's question that the lawyer gleaned the information from trial testimony. But surely figuring out whether such circumstances are a violation of an order should be left to the discretion of the court. The fact that a lawyer might take advantage of a "just the facts" exception does not mean that there should be a broader exception that allows a lawyer to directly and without limitation disclose trial testimony to a prospective witness.

For these reasons, an amendment to Rule 615 that resolves the scope of a federal sequestration order could also expressly make sequestration prohibitions applicable to counsel. Indeed, Maryland Rule of Evidence 615 does just that: "A party *or an attorney* may not disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence."²⁴⁸

But, while allowing counsel to prepare witnesses with trial testimony is seriously problematic, amending Rule 615 to cover counsel expressly is probably ill-advised. First, at least in criminal cases, limitations on counsel's communications with prospective witnesses would have constitutional implications. As the *Rhynes* plurality noted, "sequestration orders that prevent attorneys from performing their duties as counsel, including discussing trial proceedings with future witnesses, may well violate a criminal defendant's Sixth Amendment rights."²⁴⁹ Furthermore, counsel's ethical obligations demand competent representation and thorough preparation.²⁵⁰ Curtailing counsel's ability to prepare prospective witnesses with a concrete evidence rule could create tension with this professional obligation in some instances. In addition, rules of professional conduct impose a duty of candor upon attorneys as officers of the court—"that duty both forbids an attorney from knowingly presenting perjured testimony and permits the attorney to refuse to offer evidence he or she reasonably believes is false."²⁵¹

248. MD. R. EVID. 615(d)(1) (emphasis added); *see also* *Jones v. State*, 520 S.E.2d 454, 456 (Ga. 1999) ("The rule does not prohibit discussions between an attorney to the case and a prospective witness, at least so long as the attorney talks to him separately from the other witnesses *and does not inform him of previous testimony.*") (emphasis added) (quoting *Ross v. State*, 326 S.E.2d 194 (Ga. 1985)).

249. *Rhynes*, 218 F.3d at 318 n.9.

250. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2019).

251. *Rhynes*, 218 F.3d at 318; *see also* MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR

These ethical duties limit the risks associated with attorney revelation of trial testimony to prospective witnesses—rendering it less necessary to regulate by rulemaking.²⁵²

Even if a Rule 615 sequestration order *can* be applied against counsel, such an order raises complex questions of professional responsibility, and in criminal cases it raises thorny questions about the right to effective assistance of counsel.²⁵³ These sensitive issues are generally beyond the ken of evidence rulemaking and may best be dealt with on a case-by-case basis, without having an evidence rule seeking to control or influence their resolution. Moreover, the “hair-splitting” referred to above—allowing witness preparation with an underlying fact or allegation but without attributing it to trial testimony—may be challenging to impart effectively in rule text.

It is typically wise to resolve any underlying conflicts in the application of an evidence rule in connection with other amendments to the same rule.²⁵⁴ As illustrated above, there is indeed a conflict in the federal case law with respect to counsel’s obligations under a sequestration order. Moreover, the majority of federal courts that prohibit attorneys from acting as conduits for trial testimony in the name of witness preparation appear to be on the right side of the conflict. But all that said, the conflict concerning attorney compliance with sequestration restrictions may be best left to the federal courts to resolve on a case-by-case basis due to the constitutional and ethical issues tangled up in the equation. An optimal amendment to Rule 615 that resolves the proper scope of a federal court’s sequestration order may seek to bypass the vexing issue of attorney compliance. To ensure that trial courts and counsel are attuned to the problem, however, a committee note to an amended Rule 615 should highlight the issue and note that it is to be regulated by the courts on a case-by-case basis.²⁵⁵

ASS’N 2019).

252. See *Rhynes*, 218 F.3d at 318.

253. See Applegate, *supra* note 183, at 288.

254. Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U.L. REV. 1873, 1886 (2019) (“[W]hen a conflict is long-standing, shows no signs of being resolved, and creates divergent standards for litigants operating within the same court system, it is a drafting committee’s responsibility to resolve the impasse.”).

255. This is the solution proposed by the Advisory Committee. The committee note to the

IV. GOOD HOUSEKEEPING: THE DESIGNATED REPRESENTATIVE EXCEPTION

There are sometimes textual imperfections or interpretive conundrums in a Federal Rule of Evidence that do not cause sufficient disruption to justify a costly amendment to the rule in their own right. When other, more weighty concerns about the provision's operation necessitate a revision, however, these lesser nettlesome issues should be addressed by the resulting amendment. The rulemaking process is deliberate and lengthy.²⁵⁶ It would make little sense to undertake the cumbersome amendment process and leave defects capable of correction untouched. Furthermore, once a rule has been amended (or has been considered for an amendment that is not proposed), it may be a decade or more before the same provision is taken up by an advisory committee for reconsideration.²⁵⁷ Therefore, rulemakers should not waste an opportunity to recommend needed clarifications to a provision when proposing other, more significant amendments. The designated representative exemption found in Rule 615(b) should be clarified as part of a broader amendment that resolves the scope of a sequestration order.

Just such a housekeeping amendment was included in the recent amendment to Rule 404(b).²⁵⁸ The Rule 404(b) amendment focused on the admissibility of evidence of other crimes, wrongs, or acts offered against criminal defendants.²⁵⁹ The amendment ultimately

proposed amendment to Rule 615, currently out for public comment, provides as follows: "Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. However, an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis." See Preliminary Draft of Proposed Amendments, *supra* note 28, at 306.

256. See Mulligan & Staszewski, *supra* note 136, at 2190 ("[T]he current seven-step rulemaking process is by most assessments ... overly ossified, taking two and a half years to promulgate rules.").

257. See, e.g., Memorandum from Daniel J. Capra to Advisory Committee on Evidence Rules, Proposed Amendment to Rule 106 8 n.5 (Oct. 1, 2017), http://www.uscourts.gov/sites/default/files/a3_0.pdf [<https://perma.cc/7VKE-QKKC>] (noting that the possibility of amending Rule 106 had previously come before the Committee in 2002 and 2006).

258. See FED. R. EVID. 404(b).

259. See, e.g., Memorandum from Daniel J. Capra to Advisory Committee on Evidence Rules, Consideration of Possible Changes to Rule 404(b) (Apr. 1, 2018), <https://www.uscourts.gov>.

proposed and created a more muscular notice requirement with respect to such evidence in criminal cases.²⁶⁰ In considering the notice amendment, the Evidence Advisory Committee noted that the word “other” in the heading attached to Rule 404(b) had been relocated during the restyling of the Rules in 2011, such that then-Rule 404(b) covered the admissibility of “Crimes, Wrongs, or Other Acts.”²⁶¹ Because the Rule 404(b) standard governs admissibility only of crimes, wrongs, or acts *other* than the charged offense in a criminal case, the modifier “other” was misplaced, seeming to reference “acts” only.²⁶² This misplaced modifier did not appear to be responsible for defects in the Rule 404(b) precedent; however, federal courts have long understood that the limitations in Rule 404(b) apply only to crimes, wrongs, or acts *other* than those charged or claimed in a particular case. Accordingly, this grammatical snafu would have been insufficient to justify a costly amendment to Rule 404(b) standing alone. Still, after several years of deliberation resulted in a proposal to amend the notice provision in Rule 404(b), it made good sense to relocate the modifier “other” to its proper place as part of the amendment package to accurately capture the intended operation of the Rule.²⁶³

A similar irregularity exists in the interpretation of Rule 615(b) that merits consideration as an add-on to an amendment clarifying the scope of a federal court’s sequestration order. As described above, certain witnesses are permitted to remain in the courtroom as of right under Rule 615 notwithstanding a sequestration order.²⁶⁴ The Rule contains mandatory exemptions from exclusion for “a party who is a natural person” (subdivision (a)), and for “an officer or employee of a party that is not a natural person” who is designated as the party’s representative (subdivision (b)).²⁶⁵ The trial judge lacks authority to exclude from trial any witness falling

gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf [https://perma.cc/BEA9-YGQL].

260. See FED. R. EVID. 404(b)(3).

261. FED. R. EVID. 404(b) (2019 version).

262. Of course, Rule 404(b) also applies to the admissibility of other crimes, wrongs, or acts offered in civil cases. See *id.*

263. See *id.*

264. See *supra* Part II.B.

265. FED. R. EVID. 615(a)-(b).

within one of these exemptions.²⁶⁶ These exemptions make sense. Excluding a party would be fundamentally unfair and, in criminal cases, would raise “constitutional issues relating to confrontation and effective assistance of counsel.”²⁶⁷ The exemption for entity representatives in Rule 615(b) was properly designed to create “parity of treatment” for parties that are not natural persons.²⁶⁸ The Advisory Committee Note to Rule 615 justifies the exemption for a party’s designated agent “[a]s the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present.”²⁶⁹ If entities did not have an absolute right to designate an agent, they would be disadvantaged compared to individual litigants.²⁷⁰

In addition to the mandatory exemptions from sequestration, Rule 615 maintains the discretion of the trial judge to permit a person “whose presence a party shows to be essential” to remain in the courtroom.²⁷¹ This exemption is not automatic or self-executing like the others. A party seeking to have a witness remain in the courtroom under this discretionary exemption bears the burden of demonstrating to the court that the witness is “essential” to its ability to present its case.²⁷² Relevant considerations in determining whether a witness is “essential” include:

266. Although the trial judge lacks authority to sequester such witnesses pursuant to Rule 615, she enjoys the discretion to exclude persons falling within these Rule 615 exemptions on other grounds. For example, even a criminal defendant with a constitutional right to confrontation who is exempt from sequestration pursuant to Rule 615(a) may be removed from the courtroom for disrupting the proceedings. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (“Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, *he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.*” (emphasis added) (citation omitted)).

267. MUELLER & KIRKPATRICK, *supra* note 47, § 6:109.

268. *Id.*

269. FED. R. EVID. 615 advisory committee’s note.

270. Tellingly, the committee note states that “[m]ost of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness.” *Id.*

271. FED. R. EVID. 615(c).

272. *Id.*

the case’s complexity, the trial’s length, the extent of the witness’s knowledge or expertise, the risks posed by not excluding the witness, and whether others are already present or available to help counsel, such as non-witnesses or witnesses exempt from required exclusion under the first two exceptions to Rule 615.²⁷³

There appears to be a conflict in the federal cases concerning the mandatory sequestration exemption for entity representatives in Rule 615(b). Most federal courts have held that an entity party may designate only a single officer, employee, or agent to serve as the courtroom representative for the entity under Rule 615(b) and must bear the burden of demonstrating “essentiality” under Rule 615(c) for any additional witnesses remaining in the courtroom.²⁷⁴ Others have suggested that an entity—usually the government in a criminal case—might designate more than one agent to represent it in the courtroom during testimony under the mandatory exemption in Rule 615(b).²⁷⁵ This potential conflict was highlighted by the United States District Court for the Middle District of Alabama in *United States v. McGregor*.²⁷⁶ In that case, the government sought to designate two agents as immune from sequestration in a lengthy public corruption case to provide “logistical and case specific expertise.”²⁷⁷ The court observed the seemingly conflicting authority guiding its decision:

The circuit courts are divided as to which provision of Rule 615 permits multiple agents. The Fourth and Sixth Circuit Courts of Appeals have limited the government to one representative under Rule 615(b) and one “essential-presence” agent under Rule 615(c). By contrast, the Second Circuit Court of Appeals has permitted multiple representatives under Rule 615(b)... The distinction between the two subsections is not merely academic. Rule 615(b) is a mandatory exception, whereas Rule 615(c)

273. WRIGHT & GOLD, *supra* note 52, § 6245 (footnotes omitted).

274. *See, e.g.*, *United States v. McGregor*, No. 2:10cr186-MHT, 2012 WL 235519, at *1-2 (M.D. Ala. Jan. 25, 2012) (describing different positions taken by federal courts vis-à-vis Rule 615(b)).

275. *See id.*

276. *Id.*

277. *Id.* at *1.

requires the government to make a showing that the second agent is essential to the presentation of its case.²⁷⁸

A. The Single-Representative Interpretation of Rule 615(b)

The majority of federal courts that have considered the issue have interpreted Rule 615(b) to permit the designation of only a single entity representative who may remain in the courtroom notwithstanding a sequestration order. For example, in *United States v. Farnham*, the defendant was convicted of making false statements to a grand jury.²⁷⁹ On appeal, the defendant argued that the trial court erred in refusing to exclude one of two case agents designated by the prosecution as representatives pursuant to Rule 615(b).²⁸⁰ Taking a textualist approach to Rule 615, the Fourth Circuit found reversible error based upon the trial court's refusal to sequester one of the two testifying case agents: "Relying on the mandatory language of Rule 615 and the singular phrasing of the exception embodied in 615(2), we hold that the district court erred in refusing to sequester Agent Martin."²⁸¹

Venturing beyond the plain language of the designated representative exemption into the Advisory Committee Notes discussing it, the Sixth Circuit in *United States v. Pulley* followed the Fourth Circuit's lead in finding a numerical limitation on Rule 615(b).²⁸² In that drug conspiracy prosecution, the district judge concluded that Rule 615(b) afforded him discretion to allow two government agents, both of whom were on the prosecution's witness list, to remain in the courtroom throughout the trial as representatives of the government.²⁸³ The appellate court disagreed, stating:

278. *Id.* (citations omitted). The district court sidestepped the apparent conflict by allowing one government agent to be designated as a "representative" under Rule 615(b) and by finding the second agent to be "essential" to the presentation of the government's case under Rule 615(c). *Id.* at *3.

279. 791 F.2d 331, 331-32 (4th Cir. 1986).

280. *Id.* at 334. The designated representative exemption from sequestration was styled as subsection 2 of Rule 615 at the time. *Id.* at 334 n.4.

281. *Id.* at 335.

282. 922 F.2d 1283, 1286 (6th Cir. 1991).

283. *Id.* at 1284.

The Fourth Circuit’s reading of the rule is supported by the notes of the Advisory Committee, which contain this sentence: “As the equivalent of the right of *a* natural-person party to be present, a party which is not a natural person is entitled to have *a* representative present.” ... “Most of the cases,” the note continues, “have involved allowing *a* police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness.”

“A” representative, like “a” natural person, “a” police officer, and “an” officer or employee, is singular. Our court has been known to treat the plural as the functional equivalent of the singular, ... but in the instant case we can discern no reason to convert the singular into the plural.²⁸⁴

The *Pulley* court held that an entity like the government remains free to attempt to show that additional agent witnesses are “essential” to the presentation of its case under Rule 615(c).²⁸⁵ The First, Fifth, and Tenth Circuits have likewise adhered to a single designated representative interpretation of Rule 615(b).²⁸⁶

Limiting an entity party to a single designated representative appears most consistent with the text of Rule 615(b), as well as its underlying policy. Indeed, noted authorities have explained that entity parties would obtain an unfair advantage relative to natural persons should entities be entitled to designate more than one witness representative:

284. *Id.* at 1286 (citations omitted).

285. *Id.* The Sixth Circuit reaffirmed this view in *United States v. Phibbs*, 999 F.2d 1053, 1073 n.4 (6th Cir. 1993) (“Unlike Fed. R. Evid. 615(2) [restyled as 615(b)], Rule 615(3) [restyled as 615(c)] does not restrict the number of witnesses who may be deemed ‘essential’ to the presentation of [a] party’s cause.”).

286. *See* *Capeway Roofing Sys., Inc. v. Chao*, 391 F.3d 56, 59 (1st Cir. 2004) (“[T]he bare language of Rule 615 suggests that only one [designated agent] should have stayed.”); *United States v. Green*, 293 F.3d 886, 892 (5th Cir. 2002) (holding that the district court had the discretion to exempt multiple testifying law enforcement agents from sequestration if they were shown to be “essential” under Rule 615(c)); *United States v. Williams*, No. 91-7094, 1993 WL 125403, at *1 (10th Cir. Apr. 19, 1993) (finding that the government was permitted to keep only one of the two case agents at the counsel table pursuant to Rule 615(b)). Other courts also adhere to this view. *See, e.g.*, *United States v. Cooper*, 283 F. Supp. 2d 1215, 1225-26 (D. Kan. 2003) (noting that although the government was allowed only one representative at trial, it was free to seek exemption for additional witnesses it could demonstrate were “essential” to its presentation).

There are compelling reasons to restrict this exception to one representative at a time. Both Rule 615(b) and the Advisory Committee's Note describe who is subject to this exception by employing nouns stated in the singular rather than plural. Further, the policy underlying this second exception would be undermined by permitting a party that is not a natural person to appoint more than one representative at a time [T]hat policy is to avoid unfairness by giving a party that is not a natural person a right to avoid exclusion comparable to the right created by Rule 615(a) for a party that is a natural person. But permitting a party that is not a natural person to exempt multiple representatives from exclusion could be unfair since a party that is a natural person can avoid exclusion under Rule 615(a) only for himself.²⁸⁷

B. Multiple Entity Representatives

Notwithstanding the weight of authority favoring a single-representative approach to the Rule 615(b) exemption, some federal opinions suggest that an entity may designate more than one witness to represent it during trial. In *United States v. Jackson*, the prosecution sought to have three testifying case agents sit at counsel table.²⁸⁸ In response to the defendants' objection to more than one agent, the prosecution argued that it needed all three agents due to the "voluminous amount of evidence and electronic equipment to control."²⁸⁹ The defense continued to object to more than one agent in the courtroom notwithstanding the size of the case.²⁹⁰ The district court thereafter overruled the defense objections without explanation and permitted all three testifying case agents to remain in the courtroom.²⁹¹ Importantly, the trial judge did not articulate which exemptions to Rule 615 justified this arrangement.²⁹²

Following their convictions, the defendants appealed, arguing that the court ran afoul of Rule 615's exemptions by allowing three

287. WRIGHT & GOLD, *supra* note 52, § 6245 (footnote omitted).

288. 60 F.3d 128, 133 (2d Cir. 1995).

289. *Id.* at 134.

290. *Id.*

291. *Id.*

292. *Id.*

case agents to remain in the courtroom instead of only one.²⁹³ The Second Circuit considered the automatic designated representative exemption in Rule 615(b), the essential person exemption in Rule 615(c), and whether the drafters of Rule 615 “contemplated the exemption of only one person for each subprovision.”²⁹⁴ Although the court noted that the Rule 615 exemptions are drafted in the singular, it held that the court “would be reading the language too narrowly to assume that the use of the singular implies that the drafters intended to allow only one exemption per provision.”²⁹⁵ It reasoned that “[b]ecause the Rule does not expressly limit to one the number of exemptions per provision, we conclude that this discretion extends to deciding whether, in a particular case, more than one witness should be exempt under a particular subprovision.”²⁹⁶ In upholding the defendants’ convictions, the court stated: “[w]hile we would expect it to be the rare case when a district judge exempts more than one witness under a particular subprovision of Rule 615, we hold that a district court judge has discretion to do so.”²⁹⁷ The *Jackson* court set forth six factors to be considered by the district court in exercising this discretion—which it essentially invented given that the Rule 615(b) exemption is self-executing.²⁹⁸

Jackson certainly suggests that a district court has the discretion to allow more than one entity representative to remain in the courtroom under the mandatory exemption in Rule 615(b).²⁹⁹ Ultimately, however, the *Jackson* court stated that the trial judge may have abused her discretion in allowing more than one case agent under the discretionary Rule 615(c) exemption for “essential persons,” due to the ability of nontestifying personnel to assist the prosecution with exhibits and equipment.³⁰⁰ The court upheld the defendants’ convictions only on the basis that a Rule 615 error, if any, was harmless.³⁰¹ In sum, the Second Circuit employed language that hinted that a trial judge may have discretion to allow more

293. *Id.* at 130.

294. *Id.* at 134.

295. *Id.*

296. *Id.* at 135.

297. *Id.* at 134.

298. *See id.* at 135.

299. *Id.* at 134-35.

300. *Id.* at 135.

301. *Id.* at 137.

than one designated entity representative under Rule 615(b), but its resolution of the case did not hinge upon such discretion.³⁰²

The Ninth Circuit has also stated in an unpublished decision that an entity may designate more than one representative under Rule 615(b). In *United States v. Lach*, the defendant in a tax evasion prosecution appealed his conviction, arguing that the trial court erred in permitting two government agents to remain at the counsel table over his objection.³⁰³ In upholding the conviction, the court stated that “[w]e have read [Rule 615(b)], however, to permit two individuals to represent a party at counsel table.”³⁰⁴

United States v. Alvarado, out of the former Fifth Circuit,³⁰⁵ has also been cited in support of a discretionary approach to Rule 615(b) that allows more than one designated entity representative.³⁰⁶ In that drug prosecution, the defendants argued that Rule 615 permits only one government investigative agent to be excused from sequestration.³⁰⁷ The court rejected the defense interpretation of Rule 615, holding that “the decision as to how many will be excused from sequestration is just as discretionary with the trial judge as who will be excused.”³⁰⁸ The *Alvarado* court went on to conclude that adequate grounds existed to exempt two agents from sequestration “under the second and third exceptions” to Rule 615.³⁰⁹

That language can be read in two ways. On one hand, it could be read to suggest that a district court has the discretion to allow multiple witnesses to remain in the courtroom under both subsection (b) and subsection (c), meaning that a party might exempt multiple witnesses using either provision. Indeed, district courts in the Eleventh Circuit have so construed *Alvarado*.³¹⁰ On the other hand, the *Alvarado* language could be read to mean that the court needed

302. *Id.* at 134-37.

303. No. 94-50109, 1995 WL 124323, at *3 (9th Cir. Mar. 23, 1995).

304. *Id.*

305. The Fifth Circuit was divided into the Fifth and Eleventh Circuits in the Fifth Circuit Court of Appeals Reorganization Act of 1980. Pub. L. No. 96-452, 94 Stat. 1994.

306. 647 F.2d 537, 540 (5th Cir. 1981).

307. *Id.*

308. *Id.*

309. *Id.*

310. *See, e.g.*, *United States v. Spina*, 654 F. Supp. 94, 96 (S.D. Fla. 1987), *aff'd*, 881 F.2d 1086 (11th Cir. 1989) (“The Court has the discretion to permit the Government to name more than one exempted representative.” (citing *Alvarado*, 647 F.2d at 540)); *Pless v. United States*, No. 07-21111-Civ-MOORE, 2007 WL 9810934, at *9 (S.D. Fla. Oct. 23, 2007) (same).

to rely upon a combination of Rule 615(b) and (c) to exempt multiple case agents from sequestration. In other words, the court possessed the authority to exempt one case agent from sequestration under Rule 615(b) and the second under the separate “essential” exemption under Rule 615(c). The post-1981 Fifth Circuit has since interpreted *Alvarado* in exactly that manner.³¹¹

Imprecise and ambiguous language in some of the opinions favoring a discretionary approach to the designated representative exemption in Rule 615(b) make it difficult to determine whether there is a true circuit split. But clarification of the scope of Rule 615(b) and its relationship to Rule 615(c) in an amendment to Rule 615 will clear up the confusion surrounding the exemptions evident in the federal cases.³¹² Such an amendment will aid trial judges and litigants routinely faced with Rule 615 exemption issues, particularly in criminal cases where the prosecution customarily seeks to have multiple case agents remain in the courtroom. In fact, recent district court opinions raise this very issue.³¹³

Although a discretionary approach to Rule 615(b) that allows designation of multiple entity representatives represents the minority position in the federal courts, some authoritative commentators support the approach:

Given the liberality of joinder rules, it may be impossible to find one person within the structure of a large entity who has all the information needed to assist the attorney; and the court should

311. See *United States v. Green*, 293 F.3d 886, 892 (5th Cir. 2002).

312. An amendment to Federal Rule of Evidence 615 on this point might also serve as a helpful model for state courts, where precedent similarly reveals confusion about the number of designated entity representatives exempt from sequestration. Compare *Stafford v. State*, 736 N.E.2d 326, 330 (Ind. Ct. App. 2000) (adopting the single-representative interpretation), and *Wash. Cnty. Assessor v. W. Beaverton Congregation of Jehovah’s Witnesses, Inc.*, 18 Or. Tax 226, 230 (Or. T.C. 2005) (same), with *People v. Tirado*, No. O-85-202, 1986 PR Sup. LEXIS 81, at *2 (P.R. Jan. 15, 1986) (adopting the multiple-representative interpretation), *In re E.W.*, No. 05AP-1088, 2006 WL 1431404, at *5 (Ohio Ct. App. May 25, 2006) (same), and *Commonwealth v. Burgess*, No. 700 WDA 2015, 2016 Pa. Super. LEXIS 3197, at *7-10 (Pa. Super. Ct. Aug. 30, 2016) (same).

313. See, e.g., *United States v. Barnes*, No. 18-CR-120, 2020 WL 373552, at *1 (D. Minn. Jan. 23, 2020) (“Although the rule refers to ‘agent’ in the singular, courts allow the government to designate multiple case agents when relevant.”); *United States v. Spencer*, No. 18-cr-0114, 2019 WL 2367096, at *2 (D. Minn. June 5, 2019) (noting that Rule 615(b) permits “[e]mployees designated as representatives of an entity party” to be exempt from sequestration, allowing the government to designate multiple case agents as representatives).

allow some flexibility in designation consistent with the objectives of the rule. Unnecessary exclusion of one of a number of representatives may slow down the trial by requiring continuances so an attorney can consult with persons outside the courtroom. There must be wide discretion in the trial judge to allow multiple representatives.³¹⁴

But the better rule is clearly that an entity is limited to a single designated representative under Rule 615(b).³¹⁵ First, a single designated representative is most consistent with the plain language of Rule 615(b), which exempts “an” officer or employee of a party designated as the party’s “representative.”³¹⁶ This interpretation also squares with the policy behind the entity representative exemption outlined in the Advisory Committee’s Notes to Rule 615.³¹⁷ Given that an individual party who is a natural person may use the automatic exemption in Rule 615(a) only for herself, it would place entity parties in a superior position at trial were they permitted to automatically designate multiple witness representatives. Such a construction fails to achieve the “parity” between individual and entity parties that was the goal of Rule 615(b).³¹⁸

Further, the exemptions in Rule 615(a) and (b) are designed to be automatic and self-executing. The whole idea is that an entity need not make any showing to take advantage of Rule 615(b); it need only name or “designate” its representative.³¹⁹ Given the automatic nature of the Rule 615(b) exemption, it affords no basis upon which a trial court may exercise “discretion” to allow for multiple designations.³²⁰ Moreover, if entity parties are permitted simply to “designate” multiple witness representatives, it renders the “essential” exemption almost *superfluous* in the case of an entity party—why go to the bother of demonstrating the “essential” nature of a witness if one may simply designate her as a representative?

314. 4 MARK S. BRODIN, JOSEPH M. MCLAUGHLIN, JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 615.04 (Mark S. Brodin et al. eds., 2d ed. 2021).

315. See Capra & Richter, *supra* note 254, at 1891 (“In selecting the optimal uniform standard to resolve a conflict with credible arguments on both sides, a drafter should ordinarily give greater weight to the majority rule on an issue.”).

316. FED. R. EVID. 615(b).

317. FED. R. EVID. 615 advisory committee’s note to 1972 proposed rules.

318. *Id.*; see *supra* notes 268-70 and accompanying text.

319. WRIGHT & GOLD, *supra* note 52, § 6245.

320. See *id.*

If a trial court is to exercise some discretion in allowing multiple designated representatives under Rule 615(b)—such as determining the entity party’s “need” for the additional representative in light of the complexity of the case, the expertise of the agent witness, and the ability of nontestifying personnel to assist—it uses precisely the factors that courts consider in determining whether a witness is “essential” to a party’s presentation under Rule 615(c).³²¹ Such an interpretation renders Rule 615(c) *duplicative* in the case of entity parties. To the extent that a large corporate entity or the government requires the assistance of additional testifying agents in the courtroom in a complex case, Rule 615(c) is tailor-made to accommodate such a situation. So long as the entity party can make the showing of essentiality for every witness exempted under Rule 615(c), there is no numerical limit on the number of qualifying witnesses.³²² The optimal approach to Rule 615 exemptions, therefore, appears to be the one embraced by the majority of federal circuits—an entity party may designate a single representative to remain in the courtroom under Rule 615(b), to treat it consistently with individual parties, and may utilize Rule 615(c) to exempt any additional witnesses it can demonstrate are “essential” to presenting its case.

C. Changing Horses During the Race: A Designated Representative Relay

Perhaps surprisingly, there may be an additional twist on the designated entity representative exemption. In some cases, an entity party may seek to switch out or swap designated representatives throughout different phases of a lengthy case.³²³ In such a circumstance, there are multiple designated representatives, but only one present in the courtroom at any one time.³²⁴ In an amendment addressing the designated entity representative split of authority, this niche issue could be addressed in one of two ways in an accompanying Advisory Committee Note.

321. *See id.*

322. *See* FED. R. EVID. 615(c).

323. *See, e.g.,* Breneman v. Kennecott Corp., 799 F.2d 470, 474 (9th Cir. 1986) (permitting one designated representative during pretrial depositions and a second at trial).

324. *See id.*

One approach would be to bless this designated representative substitution as a matter of practical convenience given the reality of lengthy proceedings in complex cases that may make it difficult for any single agent to represent an entity for the duration. On the other hand, if entities have *carte blanche* to exchange *witness* representatives freely throughout trial, this gives the entities an advantage over individual parties, who cannot treat their right to be present at trial as a relay event. A sequential approach to witness-representatives designated by entities could lead to gamesmanship and a playing field tilted in favor of already powerful entity litigants.³²⁵ So, the competing solution would be an Advisory Committee Note that forbids an automatic representative exchange under Rule 615(b), and that counsels entities to seek approval for the sequencing of witness-representatives by making the “essential” showing required by Rule 615(c). It would seem to be the rare case in which a single entity representative *who is also a testifying witness* cannot sit through the entire proceeding and another *testifying witness* is the only viable replacement. In a case where such exigencies truly exist, an entity party should be capable of making a showing that the exchange of testifying designated representatives is “essential” to the presentation of the case.³²⁶

V. MODERNIZING RULE 615

Perhaps because of its straightforward and universally accepted purpose and longstanding application, Federal Rule of Evidence 615 has been overlooked and even taken for granted. Yet, the fundamentally important sequestration principle protected by Rule 615 is threatened by the inconsistent interpretation and operation of the

325. WRIGHT & GOLD, *supra* note 52, § 6245.

326. The Advisory Committee Note to the proposed amendment to Rule 615, currently issued for public comment, opts for allowing entities to switch representatives during the course of the litigation: “Finally, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated agent per entity. This limitation, which has been followed by most courts, generally provides parity for individual and entity parties. *The rule does not prohibit the court from exercising discretion to allow an entity-party to swap one representative for another as the trial progresses, so long as only one witness-agent is exempt at any one time.* If an entity seeks to have more than one witness-agent protected from exclusion, it is free to argue under subdivision (a)(3) that the additional agent is essential to presenting the party’s claim or defense.” Preliminary Draft of Proposed Amendments, *supra* note 28, at 307 (emphasis added).

provision in the federal courts. In some circuits, like the First, a Rule 615 order operates only to remove testifying witnesses physically from the courtroom.³²⁷ In other circuits, such as the Ninth, a similar order does much more—it automatically prohibits witnesses from accessing testimony while outside the courtroom doors.³²⁸ The purpose of a single code of evidence that applies throughout the federal court system is to provide stable and uniform evidentiary protections regardless of the location of a trial.³²⁹ And resolving circuit splits is one of the most important functions of a rulemaking committee.³³⁰

Accordingly, the split of authority regarding Rule 615 is uniquely in need of a rulemaking solution. Unlike many circuit splits in which the majority of the federal courts on one side of the split employ an optimal interpretation of a provision, *neither* of the existing interpretations of Rule 615 is ideal.³³¹ In jurisdictions construing Rule 615 strictly, the standard “sequestration” order is essentially meaningless, permitting witnesses to obtain trial testimony freely beyond the courtroom without violating the court’s order.³³² In the jurisdictions that interpret the Rule expansively to give effect to its true purpose of preventing tailored testimony, witnesses subject to terse “sequestration” orders may not appreciate the unexpressed limitations on their extra-tribunal conduct.³³³ And it is Rule 615 that creates this untenable state of affairs because its text is in tension with its clear intent.³³⁴ In an age when technology and public health are only increasing the risks of tailoring, an amendment is imperative to update and clarify the bedrock sequestration rule.

There are essentially two options for an amendment that would address the interpretive shortcomings in the existing Rule 615 precedent. One would memorialize the First Circuit approach in

327. See *United States v. Sepulveda*, 15 F.3d 1161, 1176-77 (1st Cir. 1993).

328. See *United States v. Robertson*, 895 F.3d 1206, 1215-16 (9th Cir. 2018).

329. See Edward J. Imwinkelried, *The Golden Anniversary of the “Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts”: Mission Accomplished?*, 57 WAYNE L. REV. 1367, 1368-69 (2011).

330. See Capra & Richter, *supra* note 254, at 1886.

331. See *id.* at 1891.

332. See *supra* Part II.A, C.

333. See *supra* Part II.B-C.

334. See *supra* notes 157-59 and accompanying text.

rule text, alerting litigants that *all* a brief “Rule 615” order mandates is physical exclusion of witnesses from the courtroom—but specifically providing that the court may grant additional protections against out-of-court access to trial testimony at its discretion.³³⁵ The other would adopt the majority approach to Rule 615 that automatically extends protections beyond the courtroom, but would provide clear notice in rule text that a “Rule 615” order has an expanded reach.³³⁶ Both amendment alternatives should leave the question of counsels’ adherence to sequestration prohibitions open for courts to regulate as needed.³³⁷ Both should address the split of authority regarding the number of designated entity representatives allowed to remain in the courtroom under Rule 615(b).³³⁸

A. Rule 615 Mandates Physical Exclusion Only, with the Express Possibility of Additional Orders

One amendment possibility to fix what ails Rule 615 would be to express in rule text the limits of a concise “Rule 615” order, while expressly highlighting the discretionary option to provide additional protections on a case-by-case basis. This amendment would essentially enshrine the First Circuit approach to Rule 615 orders in rule text.³³⁹ Such an amended provision would provide as follows:³⁴⁰

Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness’s Access to Trial Testimony

(a) Excluding Witnesses. At a party’s request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses’ testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) (1) a party who is a natural person;

335. See *United States v. Sepulveda*, 15 F.3d 1161, 1176-77 (1st Cir. 1993).

336. See *United States v. Robertson*, 895 F.3d 1206, 1215-16 (9th Cir. 2018).

337. See *supra* Part III.

338. See *supra* Part IV.

339. See *Sepulveda*, 15 F.3d at 1176-77.

340. Additions to the existing rule language are underscored in this draft and deletions are redacted.

(b) (2) ~~an~~ one officer or employee of a party that is not a natural person, ~~after being~~ who is designated as the party’s representative by its attorney;

(c) (3) any persons whose presence a party shows to be essential to presenting the party’s claim or defense; or

(d) (4) any persons authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

A “discretionary” amendment such as this one will improve the existing state of Rule 615 affairs. First, it clarifies its limited scope in clear rule text. Litigants obtaining the typical “sequestration” or “Rule 615” order would have unambiguous guidance on the face of the Rule about the scope of the protection they enjoy, that is, that such an order operates only to physically exclude witnesses from the courtroom and no more. Some state jurisdictions have adopted exactly this approach to sequestration.³⁴¹ Second, it would alert litigants who review the rule text of their ability to seek additional protections should they desire them. Third, this amended rule would remind trial judges of their authority to control witness behavior beyond the courtroom and of their obligation to spell out any such limitations in a detailed order.³⁴² Fourth, it would leave trial judges free to limit attorney revelation of testimony to prospective witnesses—or not, consistent with constitutional and ethical mandates.³⁴³ Finally, this amendment would resolve the seeming split

341. See, e.g., OHIO R. EVID. 615(A) (“An order directing the ‘exclusion’ or ‘separation’ of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.”).

342. See *supra* Part II.C.

343. See *supra* Part III.

of authority regarding the number of testifying designated entity representatives allowed to remain in the courtroom as of right in favor of the single representative approach favored by a majority of federal courts.³⁴⁴

One concern with the proposal above is that old trial customs die hard. If trial judges adhere to custom and deliver only terse sequestration orders invoking “Rule 615,” federal witnesses will remain free to obtain trial testimony outside the courtroom doors and to tailor their testimony accordingly. But it should be presumed that rule amendments make a difference, and this one would clearly inform the courts that they must do more than issue a “Rule 615” order if they want to combat the tailoring of testimony that could occur by a witness having access to trial testimony out of court.

This amendment gives the trial judge *discretion* to extend sequestration protections beyond the courtroom, meaning that a trial judge would also possess the discretion to *deny* such protections, even upon request. While that is a concern, there is a competing consideration: the decision of whether and how to control access to trial testimony outside of court is a complex one that is case-dependent—it is a much more complicated question than simply excluding all witnesses from a courtroom. Some cases may be important and complex, others straightforward. Some cases may have witnesses who can more easily access trial testimony and have a high incentive to do so; in other cases the judge may see at the outset that out-of-court access is unlikely. Moreover, it is entirely possible that none of the parties actually *want* an order to extend outside the courtroom, as it might be considered unduly intrusive and unnecessary under the circumstances.³⁴⁵ Arguably, a rule should not require the court to enter an order controlling out-of-court access that the parties find unnecessary and do not want. There is thus much to be said for leaving the question of out-of-court access to the experience and discretion of trial judges, after getting input from the parties, to be decided on a case-by-case basis.³⁴⁶

344. See *supra* Part IV.A.

345. See Minutes from the Evid. Advisory Comm. Meeting, *supra* note 66, at 16-17.

346. The discretionary alternative is the one chosen by the Advisory Committee in the proposed amendment released for public comment. The text of the proposed amendment is set forth above. The committee note provides in part as follows:

An order under subdivision (a) operates only to exclude witnesses from the

B. Automatic Protection Beyond the Courtroom

An amendment to Rule 615 that follows the majority of federal circuits by automatically extending protections beyond the courtroom would prevent: 1) witnesses from listening to the testimony given by other witnesses; 2) prospective witnesses from collaborating with one another in advance of testimony; and 3) a witness who has left the stand from consulting with a prospective witness or otherwise obtaining trial testimony.³⁴⁷ By expressing the full scope of a Rule 615 order in the text of the Rule, the amendment would resolve the notice shortcoming in the existing precedent.³⁴⁸ Witnesses could not credibly complain that they have been caught unaware by prohibitions on accessing testimony while excluded if Rule 615 expressly delineates such prohibitions. Such an amended provision might read:

Rule 615. Excluding Witnesses; Preventing Access to Trial Testimony by Excluded Witnesses

(a) Court Orders. At a party’s request, the court must, and on its own may:

(1) order witnesses excluded so that they cannot hear other witnesses’ testimony; and

(2) prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony.

(b) Effect of Order. An order entered pursuant to this Rule operates to exclude witnesses from the courtroom and to prohibit

courtroom. This includes exclusion of witnesses from a virtual trial. Subdivision (b) emphasizes that the court may by order extend the sequestration beyond the courtroom, to prohibit parties subject to the order from disclosing trial testimony to excluded witnesses, as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the rule’s policy of preventing tailoring of testimony. The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.

Preliminary Draft of Proposed Amendments, *supra* note 28, at 306.

347. WIGMORE, *supra* note 1, § 1840.

348. *See supra* Part II.C.

excluded witnesses from learning about, obtaining, or being provided with trial testimony. The court may set forth specific requirements and limitations according to the circumstances of the case. Or the court may do so on its own. But this rule does not authorize excluding:

(c) Exceptions from Exclusion. This Rule does not authorize excluding the following persons from the courtroom:

—(a) (1) a party who is a natural person;

—(b) (2) ~~an~~ one officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney;

—(c) (3) ~~any person~~ persons whose presence a party shows to be essential to presenting the party’s claim or defense; or

(~~d~~) (4) ~~any person~~ persons authorized by statute to be present.

The obvious benefit of extending “automatic” protection against out-of-court access is that parties will not have to expend litigation resources seeking protections beyond the courtroom. Should trial judges continue their longstanding tradition of entering succinct “Rule 615” or simple “sequestration” orders, this amended provision automatically affords the full complement of necessary protections beyond the courtroom door, consistent with the practice of the majority of federal courts under the existing rule.³⁴⁹ This amendment has the advantage of efficiency by extending the protection out of court without requiring the parties to request, and the trial judge to enter, a specific and detailed order in every case.³⁵⁰

But what if a prospective witness should accidentally click on a website that posted trial testimony? Or what if the prosecution, through an innocent error, placed two trial witnesses in the same cell during the trial, and they talked about trial testimony?³⁵¹ These instances would be in violation of a Rule 615 order under the automatic rule. This could be a problem, but it does not mean that

349. See *supra* Part II.B.

350. See *supra* note 346 and accompanying text.

351. See *United States v. Sepulveda*, 15 F.3d 1161, 1175 (1st Cir. 1993).

anyone will be sanctioned, or that any witness will necessarily be excluded. Trial courts have substantial discretion to determine the proper sanction, if any, for violation of a sequestration order under either amendment alternative.³⁵²

It should be noted, though, that calling this an “automatic” rule is a misnomer. As stated above, every case is different, and so the trial court may still need to issue an additional order to, for example, lay out specific limitations on access or use of the internet. In the typical case, a trial judge may find it necessary only to admonish all sequestered witnesses generally against accessing testimony given during their exclusion. But additional safeguards may be necessary in some factual scenarios. If, for example, the prosecution in a criminal case planned to have an agent who was present during trial transport multiple witnesses to and from court, a trial judge may wish to fashion measures that avoid multiple witnesses being transported together or that caution the agent against sharing trial progress during daily transport. A trial court experimenting with virtual access to trial proceedings could admonish witnesses against accessing proceedings remotely until the time designated for their testimony.

One concern with an “automatic” rule is that it lacks flexibility. It requires extension outside the courtroom even if that may not be necessary in a particular case, and even if the parties do not want or need the regulation. Essentially the “automatic” rule has the advantage of efficiency, while the “discretionary” rule has the advantage of flexibility.³⁵³

352. *See, e.g.*, *United States v. Washington*, 653 F.3d 1251, 1268-70 (10th Cir. 2011) (holding that it was harmless error to exclude testimony of a witness due to violation of a sequestration order when there was no evidence of culpable behavior by defense counsel and no prejudice was apparent from the violation); *United States v. Hobbs*, 31 F.3d 918, 921-23 (9th Cir. 1994) (holding that it was plain error to exclude the testimony of a defense witness who violated a sequestration order when there was no showing that the defense knew about the violation).

353. As stated above, the Advisory Committee on Evidence Rules chose the discretionary provision over the mandatory provision in regulating out-of-court access. *See* Preliminary Draft of Proposed Amendments, *supra* note 28, at 304. Excerpts from the Minutes of the Fall, 2020 Advisory Committee meeting elucidate the Committee’s thinking: “One Committee member suggested that counsel do not always invoke Rule 615 and may not want sequestration protection at all or at least none beyond the courtroom. For that reason, the Committee member expressed a preference for the purely discretionary amendment proposal.... The Chair also noted that parties may not want sequestration orders to extend beyond the courtroom

Because both of these amendment alternatives would operate only upon “excluded *witnesses*,” prohibiting them from learning about, obtaining, or being provided with trial testimony, they would not expressly control *attorney* conduct as does the Maryland version of Rule 615.³⁵⁴ The Advisory Committee Notes to either of these alternatives should highlight the complex constitutional and ethical issues surrounding limitations on attorney communication with prospective witnesses.³⁵⁵ The note could caution courts to be mindful of these concerns in fashioning appropriate orders governing extra-tribunal conduct. Last, but not least, both of these options would also resolve the split of authority regarding designated entity representatives in favor of a single testifying representative.³⁵⁶

Significantly, sequestration is one of the topics where states have deviated from their typical practice of adopting the Federal Rules of Evidence verbatim. Several states have enacted sequestration provisions that differ from Rule 615 in specifying the full complement of protections they mandate.³⁵⁷ While distinct in some ways, several state variations expand upon the textual “exclusion” protection outlined in Rule 615 and specify additional necessary protections outside the courtroom proper. For example, Maryland’s version of Rule 615 specifically addresses “[n]ondisclosure,” providing that “[t]he court may, and upon request of a party shall, order the witness and any other persons present in the courtroom not to disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness’s absence.”³⁵⁸ The Wisconsin counterpart to Rule 615 authorizes a trial judge to “direct that all excluded and non-excluded witnesses be kept separate until called” and to “prevent them from communicating with one another until they have been examined or

and that the Rule should not require something the parties do not want.” Minutes from the Evid. Advisory Comm. Meeting, *supra* note 66, at 16-17. Several other members, including the DOJ representative, agreed with this position. *See id.* at 17.

354. *See* MD. R. EVID. 5-615(d)(1) (“A party or an attorney may not disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness’s absence.” (emphasis added)).

355. *See supra* Part III.A.

356. *See supra* Part IV.

357. *See, e.g.*, MD. R. EVID. 5-615(d)(2); N.H. R. EVID. 615(b).

358. MD. R. EVID. 5-615(d)(2).

the hearing is ended.”³⁵⁹ Louisiana’s Rule 615 requires that the judge order witnesses to “refrain from discussing the facts of the case with anyone other than counsel in the case.”³⁶⁰ And New Hampshire’s equivalent to Rule 615 provides that a sequestration order “prohibits a sequestered witness ... from discussing the testimony he or she has given in the proceeding with any other witness who is subject to sequestration and who has not yet testified.”³⁶¹ Similarly, Tennessee’s Rule 615 directs that the “court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness.”³⁶² Although the Federal Rules of Evidence are intended as a model for state practice, the Rules would benefit from making improvements to Rule 615 akin to those made successfully in the state courts.

CONCLUSION

Preventing prospective witnesses from being exposed to trial testimony is so fundamental to the trial process that it is traditionally referred to as “THE” Rule of Evidence. Its importance to the accuracy of the truth-seeking process has been uniformly accepted and uncontroversial since Biblical times. Yet, this bedrock protection against inaccurate trial testimony is imperiled by conflicting interpretations of Federal Rule of Evidence 615. Circuits that narrowly construe the Rule in accordance with its plain language provide no protection against testimonial tailoring outside the courtroom in the vast majority of cases tried under a succinct “sequestration” or “Rule 615” order. Circuits that construe such terse orders broadly to prohibit witness collaboration and communication beyond the trial setting raise concerns about inadequate notice of proscribed witness behavior.

As demonstrated above, only an amendment to Rule 615 can offer a workable solution and restore the protection against tailoring to its intended place of distinction in the trial process. The unavoidable conflict between the text of Rule 615, which references physical

359. WIS. STAT. § 906.15(3) (2021).

360. LA. CODE EVID. ANN. art. 615(A) (2021).

361. N.H. R. EVID. 615(b), (b)(2).

362. TENN. R. EVID. 615.

presence in the courtroom alone, and its clear purpose, to prevent testimonial tailoring, however accomplished, puts federal courts interpreting and applying the Rule in an impossible position. An amendment that provides for expansion of sequestration protection outside the courtroom and provides clear notice to all litigants of the reach of Rule 615 would provide the optimal solution to the conflict and confusion plaguing the existing rule. By targeting “witness” behavior specifically, such an amendment could cleverly elide the difficult constitutional and ethical issues surrounding counsel’s preparation of witnesses that are beyond the purview of the Federal Rules of Evidence, leaving them to be sorted appropriately by trial judges on a case-by-case basis. Finally, amending Rule 615 offers an opportunity to clarify that entity parties are entitled to designate only one testifying agent to remain in the courtroom notwithstanding an order of sequestration. This amendment would resolve a split of authority in favor of a level playing field between natural and institutional parties, while retaining the trial judge’s discretion to exempt additional witnesses as “essential” to a party’s presentation. With these revisions, Rule 615 would embody a complete and effective right of witness sequestration befitting “THE” Rule of Evidence.