

Sequestration of Lay Witnesses and Experts

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The rule on sequestration (exclusion) of witnesses is designed to avoid fabrication and collusion and has traditional roots in the Old Testament. Special rules apply regarding expert witnesses and "support persons." The contours of such special rules are explored within the Federal Rules of Evidence, state rules of evidence, state appellate and supreme court decisions, and U.S. Supreme Court decisions.

J Am Acad Psychiatry Law 32:447–50, 2004

To avoid having a witness color his testimony by hearing the testimony of other witnesses, any party may invoke the rule on sequestration (exclusion) of lay witnesses or experts. By not allowing a witness, lay or expert, to hear other witnesses before being called, the chances of fabrication and collusion are reduced. The purpose of sequestration was described by the U.S. Supreme Court: "The aim of imposing the rule on witnesses, as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses tailoring their testimony to that of earlier witnesses, and it aids in detecting testimony that is less than candid" (Ref. 1, p 86). Acknowledging that there is always the possibility of perjured but consistent testimony being worked out in detail in advance, Professor John Wigmore, the leading authority on the laws of evidence, maintained: "But when all allowances are made it remains true that the expedient of sequestration 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" (Ref. 2, p 86).

As a truth-seeking device, sequestration has long been practiced, going as far back as the days of Daniel and the story of Susanna. As the story goes, two elders lusted after the beautiful Susanna. When she declined their proposition they publicly accused her of having an adulterous meeting in her husband's garden with a young man who, so they said, fled when

they appeared. She was on the verge of being convicted when Daniel spoke up:

"Are you such fools, you sons of Israel? Have you condemned a daughter of Israel without examination and without learning the facts?" . . . And Daniel said to them, "Separate them far from each other, and I will examine them."

And when they were separated from each other he summoned one of them and said, . . . "Now then, if you really saw her tell me this: Under what tree did you see them being intimate with each other?" He answered, "Under a mastic tree. . . ."

Then he put him aside and commanded them to bring the other, and he said to him, . . . "Now then, tell me under what tree did you catch them being intimate with each other?" He answered, "Under an evergreen oak. . . ."

Then all the assembly shouted loudly and blessed God. . . . And they rose against the two elders, for out of their own mouths Daniel convicted them of bearing false witness. . . .

And from that day onward Daniel had a great reputation among the people.³

The story of Susanna has been cited numerous times by courts in support of the importance of sequestration of witnesses. Quoting from the treatise on evidence by Judge Jack Weinstein and Professor Margaret Berger,⁴ the Wisconsin Court of Appeals observed:

The exclusion, separation or sequestration of witnesses—a practice also referred to as putting the witness "under the rule"—is at least as old as the Bible. The Story of Susanna and the Elders was relied upon almost from the beginning of recorded trials as justifying the practice of separating witnesses to expose inconsistencies in their testimony. The rule of exclusion also aims "to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial." Such shaping may be an unconscious reaction to suggestion rather than a deliberate attempt at collusion. The rule thus has a two-fold goal: to prevent falsification and to uncover fabrication that has already taken place [Ref. 5, p 36].

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The Rule on Sequestration

Rule 615 of the Federal Rules of Evidence (FRE) provides: "At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." The rule provides three exceptions: (1) a party who is a natural person, (2) an officer or employee of a party who is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Rule 615 of the Michigan Rules of Evidence and other state rules of evidence are identical with the Federal Rule except that the word "may" is substituted for the word "shall" in the first clause of the first sentence. FRE 615 adopts the view of Wigmore that exclusion ought to be demandable as a matter of right.² In any event, when requested to do so by either side, trial judges usually exclude all prospective witnesses from the courtroom. Only in the most unusual situation does a court fail to grant sequestration. The Florida Supreme Court has said, "*Ordinarily*, when requested by either side, the trial judge will exclude all prospective witnesses from the courtroom. The failure to exclude upon request will only be countenanced in *extraordinary* circumstances" (emphasis in the original) (Ref. 6, p 731).

In the event a witness violates sequestration, the court has a variety of sanctions available. The most extreme remedy is disqualification of the witness. The witness may be held in contempt, by reason of his conduct, and his testimony is open to comment to the jury; but, be it under the permissive or mandatory rule, sanctions in the event of a violation of a sequestration order are not obligatory.

The rule on sequestration is broader than exclusion from the courtroom. It forbids a witness from discussing the case with another witness or reading the daily transcript of the testimony of another witness. The prohibition may also include experts, as noted in two cases. In one,⁷ the defendant was convicted of the murder of his wife, and he appealed. The trial court had ruled that a defense expert violated a sequestration order when he read a transcript of earlier testimony in the case, and as a consequence, the court refused to let him testify. The appellate court upheld the decision, noting that "expert witnesses are not excepted under the rule of practice or the statute and may be sequestered." In another

case,⁸ defendant's counsel provided witnesses' testimony to its expert. A sequestration order was in force. The plaintiff unsuccessfully moved to exclude the testimony of the expert. The appellate court held that the trial court did not abuse its discretion in allowing the expert to testify, as there was no showing of connivance or substantial modification of the expert's testimony.⁹

Under sections (1) and (2) of the rule, parties, including a representative of a corporate party, cannot be sequestered. However, there may be restriction in civil cases on the order of the testimony of the parties. In civil cases when a party, plaintiff, or defendant, elects to call his witnesses before testifying himself, the trial court may require either that the party testify prior to presenting the testimony of his witnesses or that he be excluded from the courtroom prior to the time he himself chooses to testify.¹⁰

In criminal cases, the rule is different. In *Brooks v. Tennessee*,¹¹ a divided U.S. Supreme Court held unconstitutional a state's rule that a defendant, if he desired to testify in his own defense, had to do so before any other defense witnesses gave testimony. The majority found that the rule imposes an unjustifiable burden on the defendant's constitutional right not to testify, since he was being forced to decide whether to testify before he could evaluate the strength of the testimony of other witnesses. The Court acknowledged that the state had an interest in ensuring that a defendant not shape his testimony to conform it to that of the defense witnesses testifying before him, but it concluded that barring defendant's later testimony, if he does not testify as the first defense witness, "is not a constitutionally permissible means of insuring his honesty."

A few years later, the U.S. Supreme Court, again in a divided opinion, ruled that prosecutors may try to undermine a defendant's credibility by warning the jury that the defendant might have tailored his testimony to match that of witnesses who took the stand first. Justice Scalia said, "It is natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him" (Ref. 12, p 67). He added, "Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony" might sometimes be "essential to the central function of the trial, which is to discover the truth" (Ref. 12, p 73).

In a criminal case, the victim is not considered to be a party to the case. Hence, the complaining witness may be excluded from the courtroom until he or she is called as a witness. However, in the past decade or so, various states have adopted a constitutional provision that specifies numerous rights of victims of crime, including the following . . . “The right to attend trial and all other court proceedings the accused has the right to attend.”¹³ The import of the provision is that the victim, like the defendant, has an absolute right to be present at all court hearings. The term “crime victims” extends beyond the individual who was allegedly victimized by the accused. The persons who qualify as victims include siblings, spouses, and children of the complainant. For example, a spouse of a homicide victim is deemed a victim under the provision, as is a parent of a child victim who is younger than 18 years.

Exception for a Witness Essential to the Presentation

The rule in section (3) contains an exception to sequestration for a person whose presence is shown by a party to be essential to the presentation of his or her cause. Under this exception, for example, law enforcement officers have been allowed to remain in the courtroom, as they are the individuals who tend to be the most knowledgeable about the case and thus are of great assistance to prosecutors.¹⁴ Expert witnesses, though, are the most frequently cited category of witness who may qualify under the exception.¹⁵ The Oklahoma Court of Appeals set out the rationale for excusing an expert from sequestration:

The expert witness exception to the rule is based on sound logic. He is not in court to say what happened or did not happen. . . . He may only give his opinion based upon “what if” this or that particular set of facts is true. The traditional way to elicit his opinion testimony was by asking him a hypothetical question, which question by law must be based on facts in evidence. . . . Hypothetical questions were sometimes considered cumbersome or subject to abuse, and an alternative to the use of them was in letting the witness hear an uncontradicted portion of the testimony on which to base his opinion, or part of it. . . . The purpose of the rule in preventing collusion was not thereby defeated, since the expert witness must perforce base his opinion on facts that are in the record and before the trier of facts—how is one prejudiced if the expert hears them from the witness stand instead of from friendly counsel? [Ref. 16, p 952].

The Texas Supreme Court has said, “Although an expert witness may *typically* be found exempt under the essential presence exception, experts are not *au-*

tomatically exempt. Instead, [the relevant Texas rules of evidence] vest in trials broad discretion to determine whether a witness is essential” (emphasis in the original) (Ref. 17, p 118). It may appear unseemly, however, if not an outright role conflict, for an expert to sit at counsel’s table if he also functions as an expert witness, but under Rule 615(3) it may be allowed in some circumstances.

Allowing experts to avoid sequestration can have significant effects on a trial. For example, in the spectacular case of Alger Hiss in the early 1950s, Harvard psychiatrist Carl Binger was allowed to testify about the credibility of Whittaker Chambers, the principal government witness, on the basis of observation of Chambers during the trial as well as on his writings. With that as a basis, he was allowed to testify that Chambers was a “psychopath with a tendency toward making false accusations.”¹⁸ Similarly, the Michigan Supreme Court has held that a trial court’s refusal to sequester the prosecutor’s expert witness, a psychiatrist, was not an abuse of discretion, apparently because the witness was essential to the prosecutor’s rejoinder to the insanity defense.¹⁹

Experts may avoid sequestration for other reasons as well. Prior to trial and also at trial, a psychiatrist may be of assistance to an attorney in alleviating the anxiety of a witness (plaintiff, defendant, or nonparty witness).²⁰ Counseling or medication may help alleviate a witness’ anxiety. Indeed, by medication, an accused in a criminal case may be rendered competent to stand trial. Time and again, as a result of stress, witnesses have collapsed while testifying at trial or even at a deposition. The televangelist Jim Bakker, accused of siphoning millions of dollars from his ministry, rolled into a fetal position during the course of the trial and began to weep. If an expert’s presence can help to prevent this kind of breakdown, it can be said to be essential. Moreover, various states have enacted legislation allowing a child witness to have the presence of a “support person.” In some cases, child witnesses have sat on their mother’s lap while testifying. Michigan law, for example, provides that a witness younger than 15 years of age who testifies as an alleged victim of sexual, physical, or psychological abuse, may have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony.²¹

Gary Gilmore, who was charged in Utah with killing several people, desperately wanted his girlfriend at the trial. The state listed her as a witness, appar-

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ently to have her excluded. Norman Mailer, in his book *The Executioner's Song*,²² described how badly Gilmore needed her support. The court allowed her presence, although he might have been given a tranquilizer instead. Be that as it may, he was sentenced to death and executed.

However, not all "supporters" are welcome in court. Not long ago, in a sexual harassment case, the claimant brought her snarling German police dog. The judge ordered the dog out of the courtroom.²³

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