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The Modernization of FRE 615

I. Introduction

In any federal trial, counsel must consider whether to invoke Federal Rule of Evidence 615 ("FRE 615," "Rule 615," or "the Rule") to prevent witnesses from hearing other witnesses' testimony before they are called. In a modern televised, streamed, and heavily publicized trial of a well-known party ("Celebrity Trial"), counsel may believe that this is impossible or impractical as mass media is often inundated with coverage of Celebrity Trials. For these reasons, FRE 615 existed for many years as an outdated measure to effectively sequester witnesses, especially in Celebrity Trials. However, as of December 1, 2023, the Rule was amended to better provide for remedies to such modern issues.

This paper discusses the now concluded campaign to modernize FRE 615. To do so, this paper will proceed in five parts: 1) a brief historical recap of witness sequestration, 2) the specific issues regarding witness sequestration highlighted by Celebrity Trials, 3) Circuit splits regarding and state counterparts to the Rule, 4) a timeline of the recent proposals to amend the Rule, and 5) a look at the newly amended Rule 615.

II. Brief History of Rule 615

The Rule regarding witnesses,[1] or Federal Rule of Evidence 615, is one of the most fundamental rules of trial. Its history can be sourced from biblical tales such as Daniel's separating accusers to ensure the accuracy of their allegations.[2] The Rule's purpose is simple: prevent witnesses from learning of the testimony of other witnesses to prevent corroboration and reveal dishonesty.[3] The execution of the Rule has, historically, remained as simple: remove witnesses from the courtroom while other witnesses are testifying.[4] However, as recently as the 20th century, courts have faced new issues regarding the execution of the Rule which its original drafters could not have comprehended.

Between the official codification of the Federal Rules of Evidence in 1975 and 2023, FRE 615 has been amended just five times. The notes of the Advisory Committee on Rules reflect the changes to the Rule as follows: 1987, "No substantive change;" 1988, "No substantive change;" Public Law "intert[ed] 'a' before 'party which is not a natural person,'" 1998, changes relating to criminal victim's rights to attend trials; 2011 stylistic changes with "no intent to

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[1] 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.' ").
[2] *See Clark v. Cont'l Tank Co.,* 1987 OK 93, 744 P.2d 949, 951 n.2 (citing THE BOOK OF SUSANNA, APOCRYPHA OF THE OLD TESTAMENT (Revised Standard Version)).
[3] *See Geders v. United States*, 425 U.S. 80, 87 (1976) (citing 6 J. WIGMORE, EVIDENCE § 1837, p. 348 (3d ed., 1940)).
[4] *See United States v. Rhynes*, 218 F.3d 310, 316 (4th Cir. 2000) ("Th[e] Rule's plain language relates only to 'witnesses,' and it serves only to exclude witnesses from the courtroom.").

change any result in any ruling on evidence admissibility."[5] For nearly 50 years, despite the rise of at home televisions, creation of 24-hour news cycles, dawn of the internet, and proliferation of video streaming services and social media, the Rule remained essentially untouched. This left the federal judiciary and trial attorneys practicing in federal court with the burden of adapting to the new realities of this age of instant information at a witness' fingertips.

From as early as the 1960's, predating even the formal adoption of the Federal Rules of Evidence, the Supreme Court maintained the position that witness "insulat[ion]" is appropriate where prospective witnesses are interviewed by newspapers and radio stations.[6] More recently, following the Supreme Court's holding that televising trials is not constitutionally barred,[7] the Circuit Courts have faced the bulk of determining the scope of witness sequestration in light of the technological developments that have grown within and alongside America's trial courts.[8] Unfortunately, the judiciary—and, as described above, Congress—failed to reach a consensus as to best practices.[9]

III. Issues Necessitating Witness Sequestration

Witness sequestration existed as a truth-seeking tool for millennia. Yet, the technology available to modern witnesses vastly exceeded the scope of the Rule's protection. It is one thing for a witness to hear from word of mouth what was said at a trial; it is quite another thing for a witness to observe testimony in real time followed by immediate reactions from both mass and social media. While the former allows a witness to generally tailor their response to match or contradict the rumors known to them, the latter permits the tailoring of future testimony to levels of scrutiny historically unthinkable. What's more, witnesses in a months-long Celebrity Trial would be hard pressed to avoid accessing their Instagram, YouTube, or News apps, which all promote and highlight dozens to hundreds of hours of reactions to developments in Celebrity Trials, including new witness testimony.[10] Merely instructing witnesses not to consider or be swayed by such content is inadequate to address the issue.

Celebrity Trials offer the pinnacle of these differences. Compare, for example, 1995's *People v. Simpson* with 2023's *Depp v. Heard*. Where witnesses in 1995 could have seen other witnesses' testimony on cable and listened to discussion about that testimony on the nightly news or in the papers, witnesses in 2023 could watch the trial anywhere on their mobile device's

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[5] *See* FEDERAL RULES OF EVIDENCE**,** RULE 615: EXCLUDING WITNESSES FROM THE COURTROOM; PREVENTING AN EXCLUDED WITNESS'S ACCESS TO TRIAL TESTIMONY, *Notes of Advisory Committee on Rules*, 1987 Amendment, 1988 Amendment, 1998 Amendment, 2011 Amendment, Amendment by Public Law, *available at* https://uscode.house.gov/view.xhtml?path=/prelim@title28/title28a&edition=prelim.

[6] *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966) (citing *Estes v. State of Tex.*, 381 U.S. 532, 547 (1965)) ("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.").

[7] *See Chandler v. Fla.*, 449 U.S. 560, 574–75 (1981).

[8] *See supra* Part IV.A.

[9] *See id*.

[10] *See, e.g.*, Anastasia Tsioulcas, Ayesha Rascoe, *On Social Media, Johnny Depp Is Winning Public Sympathy Over Amber Heard*, NPR (May 23, 2022), *available at* https://www.npr.org/2022/05/23/1100685712/on-social-media-johnny-depp-is-winning-public-sympathy-over-amber-heard.

streaming apps and are inundated with information regarding the trial whether they choose to specifically tune in or not. In 2023, depending on a user's choice of web browser, the mere act of opening a webpage forces headlines from daily news into the user's field of view.[11] Similarly, simply opening a social media app in the post-TikTok era often subjects users to automatically playing videos,[12] the content of which a user has little to no control over. All these issues lead to the important question: how can FRE 615 be amended to anticipate these issues and those that will develop along with ever-developing media technology? As with most questions of this nature, the Circuits and states provided inspiration and guidance.

IV. Witness Sequestration Across the Country

A. Circuit Split

Rule 615's pre-2023 language technically required just that the court order witnesses "excluded" so that they could not "hear" other witnesses' testimony. Unsurprisingly, legal minds differed as to what that required in practice. Assume the following hypothetical: on a party's oral motion ahead of trial, the court invokes Rule 615 and orders all witnesses be excluded from hearing the testimony of other witnesses. Without more, the Circuits were split as to what extent that exclusion applied. In the First circuit, a witness sitting just outside of the courtroom would not have been in violation of the order if he or she asked another witness what they testified to after that witness was excused from the trial.[13] Similarly, the witness would not have been in violation of the order for looking up trial testimony through published transcripts, YouTube videos, news outlets, or even by watching a televised Celebrity Trial in real time.[14] Yet, in the Ninth and Tenth Circuits, a witness would likely have been in violation of an identical order for that same conduct.[15]

This split was not one of moralistic or constitutional disagreements. Rather, the split regarding the Rule concerned interpretation of the scope of the Rule's language. Under the First Circuit's interpretation, the Rule did what the Rule said; "exclude" witnesses from the courtroom so they cannot "hear" other witnesses' testimony.[16] Under the Ninth and Tenth Circuits' interpretations, the Rule did what the Rule meant; prevent witnesses from corroborating testimony by learning of others' testimony prior to testifying themselves, however that information was gained.[17] Looking to the states provided no clarity on this split, but offered several suggestions to address the underlying issue of how to specify the Rule's scope.

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[11] *See, e.g.*, BING, https://www.bing.com/; YAHOO, https://www.yahoo.com/.
[12] *See* Andrew Hutchinson, *YouTube Tests Opening to Shorts Direct for Users That Regularly Engage with the Option*, SOCIAL MEDIA TODAY (Nov. 3, 2021), *available at* https://www.socialmediatoday.com/news/youtube-tests-opening-to-shorts-direct-for-users-that-regularly-engage-with/609433/.
[13] *See, e.g.*, *United States v. Sepulveda*, 15 F.3d 1161, 1176–77 (1st Cir. 1993).
[14] *See id.*
[15] *See, e.g.*, *United States v. Greschner*, 802 F.2d 373, 375 (10th Cir. 1986); *United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018).
[16] *See Sepulveda*, 15 F.3d at 1176–77.
[17] *See Greschner*, 802 F.2d at 375; *Robertson*, 895 F.3d at 1215.

B. State Counterparts to Rule 615

Most states' rules of evidence largely mirror the Federal Rules of Evidence.[18] However, as is the case with Rule 615, individual rules can differ from jurisdiction to jurisdiction. Virginia, the venue for the recent *Depp v. Heard* Celebrity Trial, splits its witness sequestration rule to address criminal[19] and civil[20] trials, but both rules generally follow Rule 615's pre-2023 language. South Carolina's rule replaces just the term "shall order" to "may order," thereby leaving the discretion of sequestering entirely with the judge presiding over the case.[21] California's witness sequestration rule shares that change and further differs from the former Rule 615 in that it textually follows the First Circuit's interpretation that the Rule provides just for exclusion "from the courtroom."[22]

More specifically tailored is Ohio's rule, which goes so far as to include that an order invoking the rule, without more, does *not* extend past the doors of the courtroom.[23] New York takes an interesting approach in that the Rule has been modified to allow judges presiding over a criminal trial to instruct a non-defendant witness to not share his or her testimony with anyone until the conclusion of the trial.[24] Notably, while this provision was added in May of 2023,[25] it fails to address the issue of future witnesses learning of other witnesses' testimony ahead of their own.

The state which most directly advanced the *expansion* of the Rule's scope is Pennsylvania.[26] There, the Rule was amended by changing just three terms: "must" to "may," "exclude" to "sequester," and "hear" to "learn of."[27] Pennsylvania's changes address the issues discussed in this paper more clearly than any other state's. The technical issues with reading "exclude" to mean physically remove and "hear" to mean the act of hearing are completely

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[18] *See* Sam Stonefield, *Rule 801(d)'s Oxymoronic "Not Hearsay" Classification: The Untold Backstory and A Suggested Amendment*, 5 Fed. Cts. L. Rev. 1, 53, 53 n.202 (2011) ("[A]s of August 2010, forty-four states have adopted some version of the Federal Rules.").

[19] CODE OF VIRGINIA § 19.2-265.1, Exclusion of witnesses ("In the trial of every criminal case, the court . . . may upon its own motion and shall upon the motion of either [party], require the exclusion of every witness to be called . . . [not including an individual defendant, entity defendant's corporate representative, and victims to the crime].")

[20] CODE OF VIRGINIA § 8.01-375, Exclusion of witnesses in civil cases ("The court trying any civil case may upon its own motion, and shall upon the motion of any party, require the exclusion of every witness.").

[21] S.C. R. EVID. 615 ("[T]he court **may** order witnesses excluded so that they cannot hear the testimony of other witnesses . . . .") (emphasis added).

[22] CAL. EVID. CODE § 777(a) ("[T]he court **may exclude from the courtroom** any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.") (emphasis added).

[23] OHIO EVID. R. 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**.") (emphasis added).

[24] Guide to NY Evid., Rule 6.03 (Exclusion of Witnesses & Ban on Discussing Testimony, https://www.nycourts.gov/JUDGES/evidence/6-WITNESSES/6.03_Exclusion_of_Witness.pdf), at 1 ("(3) In a criminal proceeding, a court is not required, but may in its discretion, direct a witness, other than a defendant, not to discuss the witness's testimony with another person or persons during a recess or until the trial is completed . . . .").

[25] *See id.* at 6 n.1.

[26] Pa.R.E. 615 ("At a party's request the court **may** order witnesses **sequestered** so that they cannot **learn of** other witnesses' testimony. Or the court may do so on its own.").

[27] *Compare id. with* FED. R. EVID. 615 ("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.") (emphasis added).

bypassed. Sequestering is already something litigants, judges, and the public are intimately familiar with through its effect on juries; the term better represents what witnesses are *expected* to do when they are excluded from the trial than does "excluded." Finally, changing "hear" to "learn of" future-proofs the rule by expanding the sequestering restriction to all information sources and puts the onus on witnesses who have yet to testify instead of witnesses who have been excused from trial.

Simply put, Pennsylvania's amendments modernized the Rule without overly complicating it with excessive language or abandoning its fundamental purpose—protecting the parties' and the judiciary's interest in securing honest testimony from all witnesses. This is likely why Pennsylvania's amendments served, in large part, as inspiration for the Advisory Committee on Evidence Rules' now complete journey to modernize Rule 615 itself.

V. The Campaign to Modernize the Rule

In 2019, the Advisory Committee on Evidence Rules (the "Committee") considered the issue of whether FRE 615 had fallen out of touch with the modernization of American society.[28] Specifically, the Committee considered whether it should recommend the adoption of a change similar to Pennsylvania's "to deal with the issue of witnesses learning about testimony outside the courtroom" through sources such as "news, social media, or daily transcripts."[29] Over the next four years, the Committee considered this and nearly all possible amendments relating to this issue.[30]

In spring of 2019, Daniel J. Capra—Reporter to the Committee and professor at Fordham University School of Law—posed two potential amendments to the Rule for the Committee's consideration.[31] First, Professor Capra posed a modest revision; changing just "hear" to "learn of."[32] Second, the professor offered a more extensive revision which would make the same change but also add that the order may, at the court's discretion, also "prevent[] excluded witnesses from obtaining or being provided trial testimony."[33]

At the fall 2019 session, the Committee considered the latter draft.[34] The Committee addressed a panel of judges,[35] one of whom suggested that there may be situations where parties may agree that their respective experts should be excluded from sequestration. Thus, the

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[28] ADVISORY COMMITTEE ON EVIDENCE, AGENDA BOOK, at 22–23 (May 3, 2019), *available at* https://www.uscourts.gov/sites/default/files/2019-05-evidence-agenda-book.pdf.
[29] *Id.* at 23.
[30] For example, during the spring 2019 session the Committee's determination was limited to just declining to change "must" to "may" and leaving further determinations for another day. *See id.* at 44–45.
[31] *Id.* at 287–90.
[32] *Id.* at 288.
[33] *Id.* at 289.
[34] ADVISORY COMMITTEE ON EVIDENCE, AGENDA BOOK, at 85–89 (Oct. 25, 2019), *available at* https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_final_draft_agenda_book.pdf.
[35] Predictably, the judges in attendance relayed inconsistent application of the Rule, often simply invoking it without further discussion. *Id.* at 87.

Committee considered whether a limiting phrase such as "unless the parties agree otherwise" should be added to any amendment.[36] The Committee also considered potential alterations such as including that the amendment "should not be interpreted to prevent witnesses from talking to trial counsel" with a trial transcript while prepping for their own testimony.[37] Further, a DOJ representative expressed concerns that the amendment removed too much of the judge's discretion in tailoring a sequestering order.[38] The session concluded with the Committee deciding to engage in further research on the topic and consider adding a discretionary provision.[39]

Jumping ahead two years to the spring 2021 session, the Committee circled in on a final proposal.[40] There, the Chair pushed back on the idea of the previously considered amendments and instead suggested that the Committee propose a change in line with Ohio's Rule which specifies that the Rule "affirmatively *does not* extend any protection beyond the courtroom."[41] However, the Committee also sought to specify that the sequestering order *may* specifically provide that the order extends outside of the courtroom if the parties and judge so choose.[42] This session ended with the Chair's requesting that the Reporter prepare a new amendment consistent with those suggestions.

Following the spring 2021 session, the amendment was modified to provide, in relevant part, two subsections: a) "[a]t 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," and b) "[a]n order under (a) operates **only to exclude witnesses from the courtroom**. But **the court may issue additional orders to**: (1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) **prohibit excluded witnesses from accessing trial testimony**."[43] These amendments borrowed language from Ohio, New York, and Pennsylvania while keeping with South Carolina's policy of leaving the scope of sequestration within the discretion of the judge presiding over the trial. Finally satisfied, the Committee approved the proposed amendment to be released for public comments.

By the spring 2022 session, after four years of research and bureaucracy, the Committee reached its final step to set forth a proposed amendment to Rule 615.[44] The public comments[45] and the Committee were unanimously supportive of the amendment as drafted. The several issues raised at the previous sessions were either directly addressed or satisfactorily dismissed

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[36] *Id.*
[37] *Id.*
[38] *Id.* at 87–88.
[39] *Id.* at 88.
[40] *See* ADVISORY COMMITTEE ON EVIDENCE, AGENDA BOOK (April 30, 2021), *available at* https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021.pdf.
[41] *Id.* at 31 (emphasis in original).
[42] *Id.*
[43] *Id.* at 291 (emphasis added).
[44] *See* ADVISORY COMMITTEE ON EVIDENCE, AGENDA BOOK, at 2 (May 6, 2022), *available at* https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf.
[45] *Id.* at 122.

from consideration. The Committee thus unanimously agreed to formally offer the amendment for referral to the Committee on Rules of Practice and Procedure ("Standing Committee").[46]

VI. The Newly Amended Rule 615

On June 7, 2022, the Standing Committee unanimously approved the proposed amendment to Rule 615.[47] The Standing Committee then transmitted the proposed amendment to the Supreme Court on October 19, 2022.[48] The Supreme Court adopted the rule in full and submitted it to Congress for rejection, modification, or deferral on April 24, 2023.[49] Seven months passed, and Congress took no such action; the rule was approved as submitted.

After four years of careful consideration, the Committee's amendment passed through each procedural hurdle with ease, suffering no changes along its path. Thanks to that effort, the amended Rule went into effect on December 1, 2023.[50] The amended Rule reads as follows:

> **Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony**
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> **(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:
>
> **(1)** a party who is a natural person;
>
> **(2)** one officer or employee of a party that is not a natural person if that officer or employee has been designated as the party's representative by its attorney;
>
> **(3)** any person whose presence a party shows to be essential to presenting the party's claim or defense; or
>
> **(4)** a person 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.[51]

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[46] *See* ADVISORY COMMITTEE ON EVIDENCE, AGENDA BOOK, at 57–59 (Oct. 28, 2022), *available at* https://www.uscourts.gov/sites/default/files/2022-10_evidence_rules_committee_agenda_book_final_0.pdf.
[47] COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, AGENDA BOOK, at 1035–36 (June 7, 2022), *available at* https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf
[48] HONORABLE JOHN D. BATES, SUMMARY OF PROPOSED NEW AND AMENDED FEDERAL RULES OF PROCEDURE, at 217–26 (October 19, 2022), *available at* https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf.
[49] Letters from the Honorable John G. Roberts, Chief Justice, United States Supreme Court, to the Honorable Kevin McCarthy, Speaker, House of Representatives, and the Honorable Kamala Harris, President, United States Senate (April 24, 2023), *available at* https://www.supremecourt.gov/orders/courtorders/frev23_5468.pdf.
[50] *See supra* FED. R. EVID. 615, *available at* https://uscode.house.gov/view.xhtml?path=/prelim@title28/title28a&edition=prelim.
[51] *Id*.

VII. CONCLUSION

Thanks to the Committee's diligent efforts, Federal Rule of Evidence 615 has finally been brought into the modern era by providing a specific mechanism to account for witnesses' presumed use of mass media and the internet which now dominate American culture. Trial attorneys practicing across the country will need to modify their future witness sequestration motions to account for the new language. While the First Circuit need not substantially change daily practices, counsel and courts in the vast majority of Circuits will need to ensure that witness sequestration orders are specifically tailored to include what was once assumed; that an order invoking Rule 615 extends outside of the courtroom to prevent witnesses from accessing trial testimony in its various forms.