Rule 615 - Beyond the Walls of the Courtroom Proper: Efficacious Truth-Seeking Device or Toothless Tiger

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I. INTRODUCTION

The practice of separating witnesses is perhaps the most ancient truth-seeking device extant in the Anglo-American system of jurisprudence. Witness sequestration "already had in English practice an independent and continuous existence, even in the time of those earlier modes of trial which preceded the jury and were part of our inheritance of the common Germanic law." The earliest known record of sequestration in an English court dates back to the beginning of the fourteenth century, but the story of Susana, which is recorded in the Apocrypha, demonstrates that ancient peoples recognized the utility of the practice thousands of years prior to their Anglo-Saxon counterparts. Susana's tribal elders accused her of adultery, and at her trial two witnesses testified that they saw her lying beneath a certain tree with a man who was not her husband. The elders believed the witnesses' uncontroverted testimony and condemned Susana to death. Daniel, however, intervened on behalf of Susana and asked the elder to remove one of the witnesses so that he could question each separately. The first man testified that he observed Susana engage in an adulterous act beneath a mastic tree, and he was then led away and the second witness was brought in. The second man testified that he witnessed the same adulterous act, but claimed that it transpired in the shade of an evergreen oak rather than a mastic tree. The discrepancy in the witnesses' accounts of the alleged incident shook the elders' confidence in the veracity of their testimony and consequently they spared Susana's life.

1 See 6 J. Wigmore, Evidence § 1837, 348 (3d ed. 1940) (discussing origins of witness sequestration).
4 See Daniel 13: 36-64 (King James).
5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
The practice of separating witnesses exists substantially the same today as it did in Daniel’s time. This ancient practice finds contemporary expression in Federal Rule of Evidence 615. The aim of the longstanding practice of sequestration which Rule 615 embodies is twofold: it endeavors to thwart efforts by later witnesses to tailor their testimony to that of earlier witnesses; and to aid the fact finder in detecting false testimony that has already been given.

Currently, several Circuit Courts of Appeals disagree as to the scope of a sequestration order issued pursuant to Rule 615. According to one strand of authority, Rule 615 requires only that witnesses be physically excluded from the courtroom and does not proscribe communication between witnesses outside the courtroom proper. A number of courts, however, have interpreted the rule more broadly. These courts have interpreted the rule as implicitly barring conduct outside the courtroom that

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11 The rule states:

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. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which 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 the party’s cause, or (4) a person authorized by statute to be present.

FED. R. EVID. 615.


13 Compare United States v. Sepulveda, 15 F.3d 1161, 1176 (1st Cir. 1993) (holding Rule 615 does not apply to communications outside the courtroom), and United States v. Smith, 578 F.2d 1227, 1235 (8th Cir. 1978) (concluding bare Rule 615 sequestration order only requires exclusion from courtroom proper), with United States v. McMahon, 104 F.3d 638, 643 (4th Cir. 1997) (rejecting argument that absent specific instructions Rule 615 does not proscribe communications outside courtroom), and Miller v. Universal Studios, Inc., 650 F.2d 1365, 1373 (5th Cir. 1981) (holding expert witness who read transcribed trial testimony violated Rule 615).

14 See, e.g., United States v. Sepulveda, 15 F.3d 1161, 1176 (1st Cir. 1993) (holding bare sequestration order does not extend beyond the courtroom proper); United States v. Smith, 578 F.2d 1227, 1235 (8th Cir. 1978) (holding sequestered witnesses may communicate outside courtroom absent specific contrary instructions); United States v. Feola, 651 F. Supp. 1068, 1130 (S.D.N.Y. 1987), aff'd without opinion, 875 F.2d 857 (2d Cir. 1989) (ruling sequestered witnesses are free to discuss their testimony outside courtroom).

15 See e.g., United States v. McMahon, 104 F.3d 638, 643 (4th Cir. 1997); Clarksville-Montgomery School Sys. v. United States Gypsum Co., 925 F.2d 993, 1002-03 (6th Cir. 1991); Miller v. Universal Studios, Inc., 650 F.2d 1365, 1373 (5th Cir. 1981).
circumvents the spirit and purpose of the rule.\textsuperscript{16} Thus far the Supreme Court has declined to resolve the thorny issue of whether Rule 615 applies to conduct outside the courtroom proper that may act to frustrate the purpose of the rule.\textsuperscript{17}

This Note asserts that courts should interpret Rule 615 broadly in accordance with the latter view, as opposed to narrowly in accordance with the former. Part II of this Note examines the text of Rule 615 and the mechanics of its invocation.\textsuperscript{18} Part III addresses the circuit split on the scope of Rule 615 and outlines examples of conduct outside the courtroom that courts have found violative of sequestration orders.\textsuperscript{19} Part IV briefly explores the possibility of amending Rule 615.\textsuperscript{20} Finally, Part V argues in favor of a Supreme Court interpretation Rule 615 that would comport with the aforementioned broad interpretation.\textsuperscript{21} The Court should resolve the uncertainty as to whether Rule 615 applies beyond the walls of the courtroom in order to insure that rule is uniformly applied in a manner that is true to its spirit and purpose.

II. RULE 615 OF THE FEDERAL RULES OF EVIDENCE

A. The Purpose of the Rule

Rule 615 empowers a trial judge to exclude witnesses the courtroom in order to prevent them from hearing the testimony of other witnesses.\textsuperscript{22} An exclusion order issued pursuant to the rule is termed a sequestration order, and an excluded witness is referred to as "sequestered."\textsuperscript{23} Trial courts issue sequestration orders to promote two closely related objectives: preventing fabrication and detecting fabrication that has already occurred.\textsuperscript{24} The rule promotes its prophylactic aim by preventing witnesses from tailoring their testimony to conform to testimony they have heard presented by other witnesses.\textsuperscript{25} Moreover, if witnesses are sequestered pursuant to

\textsuperscript{16} See id.
\textsuperscript{17} Sepulveda, 15 F.3d 1161 (1st Cir. 1993), cert. denied, 512 U.S. 1223 (1994).
\textsuperscript{18} See infra notes 22-38 and accompanying text.
\textsuperscript{19} See infra notes 39-113 and accompanying text.
\textsuperscript{20} See infra notes 114-123 and accompanying text.
\textsuperscript{21} See infra notes 124-163 and accompanying text.
\textsuperscript{22} See supra note 11; see also infra notes 23-28 and accompanying text (discussing sequestration as a matter of right).
\textsuperscript{23} See United States v. Greschner, 802 F.2d 373, 375-76 (10th Cir. 1986).
\textsuperscript{24} See Geders v. United States, 425 U.S. 80, 87 (1976) (articulating two-fold goal of Rule 615); see also United States v. Warren, 578 F.2d 1058, 1076 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980).
\textsuperscript{25} See Geders, 425 U.S. at 87 (explaining exclusion prevents witnesses from tailoring testimony to match already presented testimony); see also United States v. Shurn, 849 F.2d 1090, 1094 (8th Cir. 1988); United States v. Perry, 815 F.2d 1100, 1105-06 (7th Cir. 1987);
the rule and yet elicit uncannily similar testimony, the factfinder may infer that the similarity is the result of coaching, collusion, or memorization.26

B. How the Rule Deviates from its Common Law Predecessor

Subject to the four enumerated exceptions, Rule 615 gives a party the right to request the exclusion of witnesses from the courtroom.27 In relevant part the rule reads, “at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses.”28 Prior to the enactment of Rule 615, the decision to grant a party’s request to exclude a witness from a federal courtroom lay solely within the discretion of the trial judge.29 Congress’ inclusion of the mandatory language “shall” in the first sentence of the rule, however, stripped trial judges of the discretion they had under the common law and provided for the exclusion of witnesses as a matter of right.30 The trial court, however, retains the discretion to exclude witnesses on its own motion that it enjoyed before the adoption of the rule.31 But, a party who fails to make a timely request for the exclusion of a witness cannot later complain about the trial judge’s failure to issue a sequestration order.32

C. When the Rule Applies

Although courts generally agree that the rule is only available in proceedings involving the testimony of multiple witnesses, there is widespread disagreement as to precisely which stages of a trial the rule ap-

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26 See Perry 815 F.2d at 1105-06 (stating excluding witnesses helps uncover testimony that is not candid).
27 See supra note 11 (reciting text of Rule 615).
28 FED. R. EVID. 615.
29 See Taylor v. United States, 388 F.2d 786, 788 (9th Cir. 1967) (holding court’s discretionary power includes ability to sequester witnesses). See generally JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1839, at 467-68 (Chadbourn rev. ed. 1976) (explaining common law did not provide for sequestration of witnesses as matter of right).
30 United States v. Johnston, 578 F.2d 1352, 1355 (10th Cir. 1978) (explaining how enactment of Rule 615 changed the common law); see, e.g., United States v. Farnham, 791 F.2d 331, 334-35 (4th Cir. 1986) (holding witness exclusion pursuant to timely Rule 615 request is mandatory); Holman v. Dale Electronic, Inc., 752 F.2d 311, 313 (8th Cir. 1985); United States v. Warren, 578 F.2d 1058, 1076 (5th Cir. 1978) (en banc); Sanford v. CBS, Inc., 594 F. Supp. 713, 716-717 (N.D. Ill. 1984).
31 See United States v. Abbott, 30 F.3d 71, 73 (7th Cir. 1994) (trial court issued sequestration order without request from defendant).
32 See id. (holding defendant waived right to complain about court’s failure to issue sequestration order by neglecting to request one).
For example, there is authority that Rule 615 does not permit a party to request the exclusion of a witness before opposing counsel’s opening argument, but there is authority to the contrary as well. Those against allowing courts to apply the rule to opening statements argue that, by its own terms, Rule 615 relates solely to times when testimony is being given by other witnesses.

Similarly, some courts have held that the rule authorizes the exclusion of witnesses during closing arguments, while others disagree. Since attorneys frequently restate witnesses’ testimony during their closing arguments, in the event of a second trial, witnesses present during the closing arguments of the first trial might learn of the testimony of other witnesses and be tempted to reshape their own testimony accordingly. The counter argument is that the text of the rule states that it only applies during witnesses’ testimony and as of the time of closing arguments all witnesses have concluded their testimony.

III. THE SCOPE OF RULE 615 EXCLUSION

Common law sequestration orders not only required witnesses to be physically excluded from the courtroom while other witnesses were testifying, but also forbade witnesses from discussing their testimony with one another outside the four walls of the courtroom. Currently, a split exists


35 See Brown, 547 F.2d at 38 (explaining why Rule 615 not applicable to opening statements).


37 See Juarez, 573 F.2d at 281 (explaining failure to exclude witnesses from closing arguments might jeopardize fairness of second trial); see also Zuniga-Rosales, 1993 U.S. App. LEXIS 27606, at *14-15.

38 See Alvarez, 755 F.2d at 860-61 (declaring rule does not apply to closing arguments because all testimony has already concluded).

39 See Taube, supra note 10 at 198 (documenting historical sequestration practices of several states); see also United States v. Sepulveda, 15 F.3d 1161, 1175-76 (1st Cir. 1993)
among the circuits as to the scope of Rule 615 sequestration orders. According to one view, Rule 615 is limited by its own terms to the exclusion of witnesses from the courtroom proper. Another strand of authority, however, interprets Rule 615 more broadly; these courts argue that rule should read as implicitly barring conduct outside the courtroom that is intended to circumvent the purpose of the rule.

A. Rule 615 Requires Only Physical Exclusion from Courtroom

Rule 615 explicitly refers only to the exclusion of witnesses from the courtroom, and a number of courts have refused to extend the rule beyond the narrow import of its text. While these courts acknowledge that a trial judge has the discretion to issue orders proscribing conduct outside the courtroom, such as reading trial transcripts and discussing witness testimony, they maintain that the rule itself does not proscribe such conduct.

In United States v. Sepulveda, a First Circuit Court of Appeals case, the appellants argued that the government’s decision to house of three of its key witnesses in the same jail cell throughout the course of the trial was a clear violation of the district court’s sequestration order. The circuit court roundly rejected the appellants’ claim that the witnesses’ cohabitation violated Rule 615. The court explained that although the rule closely tracks its common-law predecessor, “it is at once less discretionary and less stringent than its forebears.” According to the court’s interpretation, it is less discretionary than the common law in that it provides for the exclusion of witnesses as a matter of right, yet less stringent in that it does not provide for sequestration beyond the courtroom.

('explaning how Rule 615 differs from its common law predecessor). Rule 615 only requires courts to exclude witnesses from the courtroom proper, but it provides for sequestration as a matter of right. See id. Whereas the common law of sequestration forbade witnesses from communicating outside the courtroom, but afforded judges the discretion to refuse to issue a sequestration order. See id: 40 See infra notes 44-54 and accompanying text (examining case limiting bare sequestration order to courtroom proper).
41 See infra notes 71-113 and accompanying text (discussing cases extending Rule 615 to reach conduct outside of courtroom).
42 See supra note 11 and accompanying text (setting forth text of rule).
43 See infra notes 44-65 and accompanying text (documenting narrow interpretations of Rule 615).
44 15 F.3d 1161 (1st Cir. 1993).
45 See id.
46 See id. at 1176-77 (holding Rule 615 only applies to communications in the courtroom proper).
47 Id. at 1175.
48 See id. at 1175-76 (explaining how adoption of Rule 615 deviates from common law of sequestration).
demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires. The court acknowledged that in practice trial judges frequently fashion sequestration orders that forbid witnesses from discussing testimony outside the walls of the courtroom, but cautioned that inclusion of such supplemental provisions is solely a matter for the trial judge’s discretion.

The appellants cited *United States v. Greschner* in support of the proposition that Rule 615 sequestration orders apply beyond the walls of the courtroom. The court explained that at first blush *Greschner* may appear to support appellant’s argument, but upon closer inspection the *Greschner* court actually agrees with the First Circuit’s narrow interpretation of Rule 615. Because although *Greschner* did equate “circumvention” of the rule with actual violation of the rule, it nevertheless conceded that controlling such circumvention lay solely within the discretion of the district court.

Along these same lines, the earlier First Circuit case of *United States v. Arruda*, which was cited in *Sepulveda*, agreed that standard Rule 615 sequestration orders do not reach conduct outside the courtroom. In *Arruda* the trial judge issued the baseline Rule 615 sequestration order instructing all witnesses to remain outside the courtroom during trial. Two of the government’s chief witnesses met outside the courtroom to discuss testimony during trial, but the court held that this meeting did not technically violate its sequestration order. The trial judge, nevertheless, decided to treat the witnesses’ meetings as a breach of a court order be-

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49 Id. at 1176.
50 Id. “Indeed, such non-discussion orders are generally thought to be a standard concomitant of basic sequestration fare, serving to fortify the protections offered by Rule 615.” *But see* United States v. Magana, 127 F.3d 1, 5-6 (1st Cir. 1997). The trial judge granted the defendant’s oral sequestration motion “without elaborating on the terms of the order.” Id. The prosecutor subsequently conferred with a testifying witness who had not been excused from the witness stand. Id. Shortly thereafter, the trial judge informed the prosecutor that pursuant to local custom sequestration orders prohibit attorneys from conferring with testifying witnesses. Id. Although the order had been given in its barest form and the prosecutor was unfamiliar with the custom, the judge found that he violated the order nonetheless. Id. In response to the violation, the judge ordered the portion of the witness’ that was elicited after the conferral stricken. Id.
52 See id.
53 *See Sepulveda*, 15 F.3d at 1176 (denying *Greschner* stands for proposition that Rule 615 applies to conduct outside courtroom tending to frustrate purpose of rule).
54 See id. (citing *Greschner*, 802 F.2d at 375-76 and finding it inopposite).
55 715 F.2d 671 (1st Cir. 1983).
56 See id.
57 See id. at 678, 684 (granting sequestration motion in its simplest aspect).
58 See id. (agreeing with government that conduct outside courtroom does not technically violate basic Rule 615 sequestration orders).
cause their conduct had the same effect as a breach of a sequestration order. The Circuit court explained that the district court was not required to treat the witnesses' conduct as a violation of the rule, but it was certainly within its discretion to do so.

In *United States v. Feola*, the Second Circuit narrowly demarcated the boundaries of Rule 615. In granting the defendant's motion to sequester pursuant to the rule, the court noted that the rule only requires that witnesses be excluded from the courtroom proper to prevent them from hearing the testimony of other witnesses. The court made it clear that outside the four walls of the courtroom, witnesses may "speak freely to anybody and if they do so, may be cross-examined with respect thereto insofar as may relate to bias or credibility."

In *United States v. Smith*, the Eighth Circuit held that Rule 615 does not apply outside the courtroom, unless the trial judge augments the basic Rule 615 sequestration order with instructions to that effect. In *Smith*, a police officer took notes throughout the course of the trial and later relayed the contents of these notes to government witnesses who had not yet testified. The trial court, however, decided that the officer's conduct did not violate the rule and the appellate court agreed. The circuit court explained that the trial judge has the discretion to instruct sequestered witnesses not to discuss their testimony outside the courtroom, but in this case no such additional instructions were given. Moreover, appellant's counsel failed to request an order specifically prohibiting witnesses from discussing the trial.

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59 See id. (exercising discretion to treat conduct outside the courtroom as a violation of Rule 615).
60 See id. (describing trial court's decision to treat witnesses' meetings as violative of sequestration order as "appropriate").
62 See id.
63 See Feola, 651 F. Supp. at 1130.
64 Id.
65 See 578 F.2d 1227, 1235 (8th Cir. 1978) (limiting Rule 615 sequestration orders to exclusion of witnesses from courtroom).
66 See id.
67 Id.
68 See id. (holding whether witness has violated sequestration order within trial court's discretion).
69 See id. (refusing to extend bare sequestration order beyond courtroom walls).
70 Id.
B. Rule 615 Applies to Conduct Outside the Courtroom As Well

1. Rule 615 Proscribes Reading Transcripts of Trial Testimony

In the Fourth Circuit Case of *United States v. McMahon,*71 the court rejected appellant's narrow interpretation of Rule 615.72 The witness had instructed his secretary to take notes at the trial of his son, who was being prosecuted for engaging in fraudulent business activities, and later read these notes of trial testimony prior to testifying.73 The witness admitted to having read the notes, but cited a number of cases, including *Sepulveda,* as standing for the proposition that such conduct does not violate a basic Rule 615 sequestration order.74 The court held that none of the authority cited by appellant supported his view, and affirmed his contempt conviction for violating a court order.75 The court held that the cases cited by appellant addressed the narrower issue of whether the trial judge abused his or her discretion in allowing witnesses who had arguably violated sequestration orders to testify.76

In *Miller v. Universal City Studios Inc.,*77 a copyright infringement case, the Fifth Circuit interpreted a basic Rule 615 sequestration order as implicitly barring conduct outside the courtroom intended to frustrate its purpose.78 The trial judge barred the defendant's literary expert from testifying because defense counsel provided him with a transcribed portion the plaintiff's testimony after the trial judge had issued a general sequestration order.79 On appeal, the defendant argued that Rule 615 only explicitly prohibits witnesses from hearing the testimony of other witnesses, thus reading of daily copy does not technically violate the rule.80

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72 See id.

73 See McMahon, 104 F.3d at 641-42.

74 See id. at 643. The witness argued that he was free to read daily copy because the court's bare sequestration order did not specifically instruct him not to do so. See id.

75 See McMahon 104 F.3d at 643 (rejecting authority cited by appellant in support of his contention that Rule 615 does not apply outside courtroom absent a specific instruction to that effect).

76 See id. (explaining cited cases did not address breadth of bare sequestration orders).

77 See 650 F.2d 1365, 1373 (5th Cir. 1981) (holding that providing expert witness daily copy of trial transcript violates Rule 615).

78 See id.

79 See id. at 1372-73. The court's order, which was issued before trial, did not specifically instruct the sequestered witnesses not to read trial testimony. Id.

80 See id. at 1373. Appellant also argued that expert witnesses are impliedly exempt
The appellate court, however, disagreed and affirmed the district court's ruling that defense counsel violated Rule 615.\textsuperscript{81} The court reasoned that Rule 615 implicitly bars conduct that is designed to circumvent its purpose, which is to prevent testimony-shaping.\textsuperscript{82} Moreover, the court explained that the danger of testimony-shaping is magnified where witnesses possess trial transcripts because they "can thoroughly review and study the transcript in formulating [their] own testimony.\textsuperscript{83}

Similarly, in Clarksville-Montgomery School System v. United States Gypsum Co.,\textsuperscript{84} the Sixth Circuit agreed that the defense's expert witnesses, who reviewed daily trial transcripts prior to testifying, violated district court's sequestration order.\textsuperscript{85} After the expert admitted on the stand that he had read daily transcripts, the trial judge ordered the witness from the stand and admonished the jury to disregard his testimony.\textsuperscript{86} The trial judge explained to the jury that, "[d]efense counsel has violated the rule of the court, sequestering witnesses, by giving this man the testimony of another witness who has testified."\textsuperscript{87} Following the expert's violation of the sequestration rule, the district court asked plaintiff if it would like to move for a mistrial, but plaintiff's counsel declined.\textsuperscript{88} Plaintiff's counsel did eventually move for a mistrial, but the district court chose to deny the motion.\textsuperscript{89} In the end, the jury returned a verdict for the defendant, and the plaintiff appealed on the grounds that it had been prejudiced by the expert's testimony.\textsuperscript{90} The appellate court agreed that the defense's expert had violated rule, but held that the trial judge's admonition was sufficiently

from sequestration under the rule pursuant to Rule 703 and that their expert was expressly exempt from sequestration under subsection (3) of the rule because he was necessary for the management of the case, but the court rejected each of these arguments as well. \textit{Id.} \textsuperscript{81} See \textit{id.} at 1373 (holding providing expert witnesses daily copy violates Rule 615).

\textsuperscript{82} See \textit{id.}

\textsuperscript{83} \textit{id.} (arguing reading testimony potentially more harmful than hearing it in open court).

\textsuperscript{84} 925 F.2d 993, 1003 (6th Cir. 1991) (acknowledging bare sequestration order proscribes experts from reading daily copy).

\textsuperscript{85} See \textit{id.}

\textsuperscript{86} See \textit{id.} at 1002 (striking offending witness' testimony from record and admonishing jury not to consider it).

\textsuperscript{87} \textit{id.} at 1002 n.19.

\textsuperscript{88} See \textit{id.} at 1002 (declining court's invitation for a mistrial because of plaintiff's desire to resolve case as soon as possible).

\textsuperscript{89} See \textit{id.} at 1003 (denying motion on grounds that removing witness from stand, admonishing jury, and instructing jury that defendant had violated a court order were sufficient sanctions).

\textsuperscript{90} See \textit{id.} (suggesting court's admonition insufficient to overcome prejudice caused by offending expert's testimony).
combated any prejudice that may have resulted from the witness’ testimony.\textsuperscript{91}

In \textit{United States v. Jimenez},\textsuperscript{92} the Eleventh Circuit declared that Rule 615’s prohibition on reading trial transcripts encompasses recorded testimony from prior trials as well.\textsuperscript{93} In preparing for trial, a government agent consulted the testimony of a fellow agent given at an earlier mistrial.\textsuperscript{94} The government argued that the language of Rule 615 only expressly prohibits the “hearing” of trial testimony, and thus reading transcribed testimony does not violate the rule.\textsuperscript{95} Furthermore, the government urged that there is a distinction between current trial testimony and prior trial testimony, and Rule 615 does not forbid witnesses from reading the latter.\textsuperscript{96} The court, however, citing \textit{Miller}, unequivocally stated that “there is no difference between reading and hearing trial testimony for purposes of Rule 615.”\textsuperscript{97} The government’s attempt to distinguish between current and prior trial testimony did not sway the court; the court expressly rejected the argument that a Rule 615 sequestration order does not bar a witness from reading testimony from a prior trial.\textsuperscript{98}

2. Rule 615 Prohibits Witnesses From Discussing Their Testimony

In \textit{United States v. Binetti},\textsuperscript{99} the Fifth Circuit rejected the argument that Rule 615 only applies to the exclusion of witnesses from the courtroom.\textsuperscript{100} The defense attorney, the defendant, and two witnesses discussed the trial during a lunchtime recess.\textsuperscript{101} Upon learning of this meeting, the trial judge informed the jury that the witnesses had violated the sequestra-

\textsuperscript{91} See \textit{id.} (holding district court’s denial of motion for a new trial did not amount to abuse of discretion).
\textsuperscript{92} 780 F.2d 975, 980 (11th Cir. 1986) (stating government witness violated sequestration order by reading testimony from an earlier mistrial).
\textsuperscript{93} See \textit{id.}
\textsuperscript{94} See \textit{id.}
\textsuperscript{95} See \textit{id.} at n.7 (noting Rule 615 does not explicitly proscribe reading testimony).
\textsuperscript{96} See \textit{id.} at 980 (attempting to draw a distinction between current and prior trial testimony).
\textsuperscript{97} \textit{Id.; see also supra} notes 77-83 and accompanying text (discussing Miller v. Universal Studios, Inc., 650 F.2d 1365 (5th Cir. 1981)).
\textsuperscript{98} See \textit{id.} (holding Rule 615 bars witnesses from reading all forms of trial testimony).
\textsuperscript{99} 547 F.2d 265, 269 (5th Cir. 1977) (holding witnesses who discussed their testimony violated trial judge's sequestration order); \textit{see also} United States v. Womack, 654 F.2d 1034, 1040-41 (8th Cir. 1981) (assuming without deciding, that two government witnesses who discussed trial testimony violated rule). The trial judge did issue a sequestration order, but did not specifically instruct the witnesses not to discuss their testimony. \textit{Id.} at 1040. The court did not reach the issue whether the district court's failure to complement its sequestration order with non-discussion instructions constituted a violation of Rule 615. \textit{Id.}
\textsuperscript{100} See \textit{Binetti}, 547 F.2d at 269
\textsuperscript{101} See \textit{id.}
tion order and admonished them to weigh the offending witnesses’ credibility accordingly. On appeal, the defendant argued that “on its face” Rule 615 only calls for the exclusion of witnesses from the courtroom proper and that “he was not given the parameters of any expansion of that scope.” Evidently, the court was not moved by this argument because it held that the district court did not err in admonishing the jury that the defense had violated its sequestration order.

In another Fifth Circuit Case, United States v. Green, the court characterized the district court’s failure to instruct witnesses not to discuss the case as a violation of Rule 615. The prosecution housed approximately thirty-seven of its witnesses together at a prison facility prior to eliciting their testimony. Defense counsel suggested that these witnesses were discussing the substance of their testimony with one another in violation of the court’s sequestration order. In response to defense counsel’s concerns, the district court conducted a thorough investigation and found that the witnesses in question had not discussed their testimony. The defendants’ moved for a mistrial based on the cohabitating witnesses’ violation of the court’s sequestration order. The court denied the defendants’ motion for mistrial because they did not suffer any prejudice as a result of the witnesses’ non-trial related discussions.

Following their convictions, the defendants appealed the denial of their motion for mistrial. The Fifth Circuit acknowledged that the district court’s failure to issue non-discussion orders to the prosecution’s cohabitating witnesses was in and of itself a violation or Rule 615. The Court, however, upheld the trial judge’s ruling in spite of the violation based on the district court’s determination that the witnesses had not actually discussed the trial.

102 See id.
103 Id.
104 See id. (holding trial judge’s remedial comment to jurors within court’s discretionary power).
105 See United States v. Green, 293 F.3d 886, 892 (5th Cir. 2002) (holding trial court’s sequestration order must include instructions not to discuss testimony).
106 See id.
107 See id.
108 See id.
109 See id.
110 Id. In denying the defendants’ motion for failure to show actual harm or prejudice, the trial court relied on United States v. Blasco, 702 F.2d 1315, 1326 (5th Cir. 1983), and United States v. Bobo, 586 F.2d 355, 366 (5th Cir. 1978). Id. The defendants were ultimately convicted of conspiring to possess cocaine with the intent to distribute. Id.
111 See Green, 293 F.3d at 892.
112 See id.
113 See id. (explaining opposing party did not suffer any prejudice as a result of violation).
IV. THE PRUDENCE OF AMENDING RULE 615

One possible approach to deterring conduct that is contrary to the spirit and purpose of the Rule 615 would be for Congress to amend the rule. Tennessee has adopted a modified version of Rule 615 that expressly proscribes communications intended to circumvent the rule's purpose. The drafters of the Tennessee rule were of the opinion that the imprecise language of Federal Rule 615 left room for unscrupulous individuals to fashion methods to circumvent its purpose. The Tennessee Rule requires the trial judge to "order all persons not to disclose by any means to excluded witnesses any live trial testimony..." By virtue of the heightened specificity of its rule, Tennessee has insured that its judges will not be haunted by the same questions of interpretation that have dogged the federal judiciary. At least one other author has cited the language of Tennessee's rule with approbation, and has urged for the inclusion of similar language in his home state's sequestration rule.

Why then, ought not Congress rush to amend Rule 615 to include language similar to that found in the Tennessee rule? Because a Supreme Court ruling, guided by the principals of statutory interpretation laid out below, would obviate the need for Congress to engage in the cumbersome exercise of statutory amendment. Furthermore, a number of circuits

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114 The rule states:

At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. 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. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) a person designated by counsel shown by a party to be essential to the presentation of the party's cause. This rule does not forbid testimony of a witness called at the rebuttal stage of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness.

TENN. R. EVID. 615.

115 Compare FED R. EVID. 615, with TENN. R. EVID. 615; see also TENN. R. EVID. 615, Advisory Commission Comment. "If [a sequestration rule] is to be meaningful, witnesses should not only be instructed to refrain from discussing their courtroom testimony, but lawyers and others should be instructed not to transmit what witnesses say in court." Id.

116 TENN. R. EVID. 615.

117 See supra notes 39-41 and accompanying text (summarizing disagreement among circuits as to scope of Rule 615).

118 See Taube, supra note 10 at 200-01. Taube argued that Alabama should include the following language in its version of Rule 615: "Additionally the court shall order all persons not to disclose, by any means, to excluded witnesses, any live trial testimony." Id.

119 See infra notes 124-65 and accompanying text (suggesting proper principals of statutory construction to apply to Federal Rules of evidence).
have managed to correctly interpret the rule as reaching conduct beyond the courtroom without the aid of an express statutory language to that effect.\textsuperscript{120}

The specific terms of the Federal Rules of Evidence were not intended to contain answers to every question that may arise in their application.\textsuperscript{121} Congress implicitly acknowledged that the Rules needed to include "some play in the joints" in order to address the infinite number of factual permutations that would inevitably arise in their application.\textsuperscript{122} The dynamic nature of the law of evidence defies codification with atomic precision. Rule 102 explains that one of the paramount purposes of the rules is the "promotion of growth and development of the law of evidence to the end that the truth may be ascertained..."\textsuperscript{123}

V. INTERPRETING FEDERAL RULE OF EVIDENCE 615

The introductory material accompanying the Federal Rules of Evidence, which was prepared by the late Professor Edward W. Cleary, suggests that it is appropriate to extend a rule beyond its express provisions in order to further its purpose.\textsuperscript{124} Although Professor Cleary acknowledged that courts should accept the plain meaning of the rule's text as the primary source of its meaning, he cautioned that solely examining the language of the rule itself can lead to an erroneous interpretation.\textsuperscript{125} He explained that courts should not interpret the Rules in isolation, but rather courts should read them "in the light of such context as may be relevant."\textsuperscript{126}

\textsuperscript{120} See supra notes 71-113 and accompanying text (discussing circuits that have extended Rule 615 to reach conduct outside courtroom).


\textsuperscript{122} Id. Judge Bailey Aldrich of the First Circuit Court of Appeals wrote Professor Cleary to inquire why the then Proposed Federal Rules of evidence did not expressly recognize the need for there being "some play in the joints" with respect to the interpretation and application of the rules. Id. Professor Cleary explained that Rule 102, which is captioned "Purpose and Construction," acknowledges, albeit obliquely, that the text of the rules may not contain the answers to every issue that arises in their application. Id. Professor Cleary believed that any express encouragement of judicial creativity incorporated into the rules was certain to arouse opposition. Id. See also Fed. R. Evid. 102. The rule states, "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Id.

\textsuperscript{123} Fed. R. Evid. 102 (entitled "Purpose and Construction").

\textsuperscript{124} See Fed. R. Evid., Introduction at iv.

\textsuperscript{125} See id. at iii-iv (citing instance where legislative history overrode the "apparently plain and unmistakable meaning of the words" of Rule 609(a)).

\textsuperscript{126} See id.
The so-called plain meaning rule is among the most fundamental cannons of statutory construction. The rule mandates that "[if] language is plain and unambiguous, it must be given effect." In a similar vein, another oft cited canon states that "[a] statute cannot go beyond its text." In light of these canons, one can make a colorable argument that the language of Rule 615 plainly requires only the physical exclusion of witnesses from the courtroom proper, and that courts should not extend the statute beyond the plain import of its text to reach conduct outside the courtroom. One could also marshal the aphorism of construction _expression unius est exclusion alterius_ in support the preceding narrow interpretation of the rule.

Although Professor Cleary acknowledged the utility of the "plain meaning rule," he advised that a statute cannot reliably be interpreted on the basis of its text alone. He explained that if what is meant by the plain meaning rule "is that meaning is to be ascertained by reading the statute with aid only of a dictionary and such aphorisms of construction as _noscitur a sociis_ and _ejusdem generis_ as may be suitable, then it must be discarded as unrealistic." If the Rules themselves acknowledge that "the answers to all questions that may arise under the Rules may not be found in specific terms in the Rules," then any interpretory approach that relies exclusively on the text of the Rules is necessarily deficient. The Federal Rules of Evidence must be interpreted with an eye to relevant contexts such as legislative history and legislative purpose.

Often the most pertinent context will be legislative history, "which on occasion may even override an apparently plain and unmistakable meaning of the words of the rule." For example, the language of Rule
609(a)(2) plainly states that convictions for crimes involving "dishonesty" shall be admitted for impeachment purposes, yet the Court of Appeals for the District of Columbia Circuit held that a conviction for attempted burglary does not involve dishonesty.\textsuperscript{137} The Court based its holding on the Conference Committee Report which clearly indicates that robbery is not among the offenses contemplated as involving dishonesty for Rule 609 purposes.\textsuperscript{138} Therefore, this seemingly quixotic interpretation makes perfect sense in light of the rule's legislative backdrop.\textsuperscript{139}

Not all components of a statute's legislative history, however, are of equal import.\textsuperscript{140} Professor Cleary ranks the relative importance of the various components of legislative history based on their authoritativeness and availability.\textsuperscript{141} Authoritativeness is a measure of the nexus between a given legislative material and the enacted statute that follows.\textsuperscript{142} Availability is significant in that it helps demarcate and narrow the boundaries of the inquiry.\textsuperscript{143} Expressed more colorfully, "[i]n the public interest, how far should the profession and its menial diggers be expected, or even permitted to excavate and sift for minute shards of legislative history."\textsuperscript{144} Based on the criterion of availability and authoritativeness, Professor Cleary ranks the Rules prescribed by the Supreme Court as the most important component of legislative history with the Advisory Committee's Notes a close second.\textsuperscript{145}

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\textsuperscript{137} See FED. R. EVID. 609; United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976) (holding burglary does not involve dishonesty as the term is used in Rule 609).
\textsuperscript{138} The report states:

By the phrase 'dishonesty or false statement,' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

\textsuperscript{139} See Smith, 551 F.2d at 362 (citing Conference Committee Report); see also H.R. CONG. REP. NO. 93-1597, at 9 (1974).
\textsuperscript{140} See infra notes 143-147 and accompanying text (discussing relative importance of various components of legislative history).
\textsuperscript{141} See Cleary, supra note 121 at 912 (setting forth principal considerations for use of legislative history in statutory interpretation).
\textsuperscript{142} See id. According to Cleary, "[a]uthoritativeness concerns the extent to which given materials reflect the thinking that actually went into the legislation." Id.
\textsuperscript{143} See id. Cleary believed that the less accessible the legislative material, the less weight one ought to ascribe to it. Id.
\textsuperscript{144} Id.
\textsuperscript{145} See id. Cleary divided legislative materials into five so-called components, and he ranked these components based upon the criteria of authoritativeness and availability. Id. Listed in descending order of importance, the components are: the Rules prescribed by the Supreme Court, the Advisory Committee's Notes, Congressional materials, remote materi-
The legislative history of Rule 615 offers scant guidance as to whether it was intended to proscribe conduct outside the courtroom. The Advisory Committee Note does, however, shed some light on the purpose of the rule. According to the Advisory Committee, the purpose of Rule 615 is to discourage and expose fabrication, inaccuracy, and collusion.

Purpose is a second crucial context which courts should consider when interpreting the Federal Rules of Evidence. Courts frequently face the dilemma of deciding the extent to which they ought to extend a rule beyond the express language of its text. Professor Cleary suggests that "[t]he answer lies in the purpose of the rule: if the additional situation presents the same problem as that which the rule was designed to deal, application of the rule is appropriate."

For example, in *United States v. Lewis*, the Second Circuit extended Rule 801(d)(1)(C) beyond the plain import of its text in order to further the purpose of the rule. The rule allows an out-of-court statement of identification, which would otherwise be hearsay, to be admitted at trial if the declarant testifies, is subject to cross-examination, and he or she made the statement "after perceiving the person." The express language of the rule clearly speaks only to instances where the declarant has made a corporeal identification, yet the court held that photographic identifications fall within 801(d)(1)(C) as well. The court reasoned that the rule's purpose, permitting "the introduction of identifications made by a witness when memory was fresher and there had been less opportunity for influence to be exerted," justified its interpretation. Moreover, the court found that the rule's legislative history clearly indicated Congress' intent that the rule cover "nonsuggestive photographic" as well as lineup identifications.

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146 See FED. R. EVID. 615, Advisory Committee Note (explaining purpose of witness sequestration).
147 See id.
148 See id.
149 See Cleary, supra note 111, at 916 (discussing importance of purpose in interpreting Federal Rules of Evidence).
150 See id.
151 565 F.2d 1248, 1251-52 (1977) (holding photographic identifications within purview of Rule 801(d)(1)(C)).
152 See id.
153 See FED. R. EVID. Rule 801 (removing certain out-of-court statements from category of hearsay).
154 See Lewis, 565 F.2d at 1151-52 (justifying extension of Rule 801(d)(1)(C) beyond its text).
155 See Lewis, 565 F.2d at 1151-52 (quoting United States v. Marchand, 564 F.2d 983, 996 (2d Cir. 1977)).
156 See Lewis, 565 F.2d at 1151-52; see also S. REP. NO. 199, at 2 (1975) (stating Rule 801(d)(1)(C) applies to photographic identifications).
Similarly, in *Kennedy v. Great Atlantic Tea Co.*, the Fifth Circuit looked beyond the plain meaning of Rule 605 in order to interpret it in a manner consistent with its purpose. On its face Rule 605 only applies to trial judges. The rule states, "The judge presiding at the trial may not testify in that trial as a witness." The *Kennedy* Court, however, extended the rule to preclude testimony by the presiding trial judge's clerk. The court held that the reasons for the rule articulated in the Advisory Committee's Note applied equally as well to the judge's clerk as the judge himself. For instance, the jury may interpret the clerk's testimony as indicative of the judge's preference for a particular party, or in the case of a bench trial, the clerk's involvement certainly has the potential to taint the judge's impartiality.

Just as the *Lewis* court extended Rule 801(d)(1)(C) to include photographic identifications and the *Kennedy* court extended Rule 605 to forbid testimony by law clerks, the Supreme Court should extend the reach of Rule 615 beyond the walls of the courtroom. The Court should hold that any person who exposes a sequestered witness to live trial testimony, in any form, violates the rule. Although Rule 615's text does not expressly proscribe such a broad range of conduct, this holding is supported by the rule's truth-seeking purpose. If the rule is to discourage and expose fabrication, inaccuracy, and collusion, it must reach conduct outside the courtroom proper.

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157 551 F.2d 593, 597 (5th Cir. 1977) (extending Rule 605 to include presiding judge's clerk).
158 See id.
159 See FED. R. EVID. 605.
160 Id.
161 See *Kennedy*, 551 F.2d at 597.
162 See id. (reasoning testimony given by trial judge's clerk presents same dangers as testimony given by trial judge); see also FED. R. EVID. 605, Advisory Committee Note (discussing rationale behind rule).
163 See FED. R. EVID. 605, Advisory Committee Note (highlighting potential problems with trial judge serving as witness). Id. The Advisory Committee Note rhetorically asks, "Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality?" Id.
164 See supra notes 148-163 and accompanying text (highlighting role of purpose in statutory interpretation).
165 See supra notes 114-118 (examining Tennessee version of Rule 615).
166 See supra notes 22-26 and accompanying text (discussing purpose of Rule 615).
167 See id.
VI. CONCLUSION

Courts should interpret Rule 615 broadly to proscribe conduct outside the courtroom intended to circumvent its purpose. While a number of courts have, in fact, interpreted the rule as implicitly barring conduct designed to circumvent its purpose, others persist in their obstinate refusal to extend the rule beyond the “plain meaning” of its text. The drafters of the Federal Rules of Evidence cautioned against slavish adherence to the plain meaning rule, and urged courts to interpret the Rules in light of the crucial context of purpose. If given the opportunity, the Supreme Court should interpret Rule 615 broadly in light of its truth-seeking purpose.

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