Alabama Rules of Evidence

Article VI. Witnesses

Rule 615.

Exclusion of witnesses.

At the request of a party the court may 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, (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a victim of a criminal offense or the representative of a victim who is unable to attend, when the representative has been selected by the victim, the victim's guardian, or the victim's family.

Advisory Committee's Notes

As with the pre-existing Alabama evidence law, the trial judge, on the judge's own motion or on the motion of a party, is vested with the power to exclude witnesses from the courtroom. This historic practice has been referred to both as "sequestration of witnesses" and as "putting witnesses under the rule." See, e.g., *Chatman v. State*, 380 So.2d 351 (Ala.Crim.App.1980); C. Gamble, McElroy's Alabama Evidence § 286.01 (4th ed. 1991).

Through the use of the word "may," in contrast to the word "shall," as in the corresponding federal rule, Rule 615 continues the discretionary sequestration that has long existed under Alabama practice. See *Lewis v. State*, 55 Ala.App. 140, 313 So.2d 566 (1975); Ala.R.Crim.P. 9.3(a) (providing that the court, on its own motion or at the request of any party, may exclude prospective witnesses from the courtroom; that rule is superseded by Ala.R.Evid. 615). Unless the witness falls into one of the four categories specifically described in Rule 615, sequestration is left within the sound discretion of the trial court; the court's action in sequestering a witness who is not within one of those four categories is reviewed on appeal under an "abuse of discretion" standard. See *Camp v. General Motors Corp*., 454 So.2d 958 (Ala.1984). The committee emphasizes, however, that Alabama appellate courts frequently observe that, notwithstanding the fact that sequestration is discretionary, the trial court rarely should deny a request for sequestration of witnesses. *Otinger v. State*, 53 Ala.App. 287, 299 So.2d 333 (1974).

Rule 615 provides that four classes of witnesses are exempt from sequestration or being placed "under the rule." The provisions relating to the first three classes are taken verbatim from Fed.R.Evid. 615. First, no party who is a natural person may be sequestered. This is consistent with pre-existing Alabama authority and with constitutional considerations. See, e.g., *Smith v. State*, 253 Ala. 220, 43 So.2d 821 (1950); *McDowell v. State*, 238 Ala. 101, 189 So. 183 (1939). Second, a party that is not a natural person is entitled to have a representative present. This person is to be an officer or employee of the party and is to be designated by the party's attorney. Allowing such a witness to be present is consistent with

historic Alabama practice. An example of this would be when a police officer, who has been in charge of the state's investigation, is allowed to remain in the courtroom despite the fact that the officer will be a witness. See, e.g., *Portomene v. United State*s, 221 F.2d 582 (5th Cir.1955). Third, no witness is to be placed "under the rule" if the party calling that witness can show that the presence of the witness is essential to the presentation of that party's case. The committee contemplates that this third exception would include an agent who handled the transaction being litigated, an expert who advises counsel in the management of the litigation, a guardian, or a next friend. This third exception is consistent with the prior evidence law of Alabama. See, e.g., *Nationwide Mut. Ins. Co. v. Smith*, 280 Ala. 343, 194 So.2d 505 (1967); *Ryan v. Couch*, 66 Ala. 244 (1880). Fourth, as provided under a preexisting statute, in a criminal case, the victim of the crime is exempted from the general rule of witness exclusion. See Ala. Code 1975 § 15-14-55. If the victim is unable to attend the trial, then the victim, the victim's guardian, or the victim's family can select a representative, and that representative would be exempted from the rule. See Ala. Code 1975, § 15-14-56 (grounds for permitting a victim's representative to attend are: death of the victim; disability; hardship; incapacity; physical, mental, or emotional condition; age; or other inability). See also Or.R.Evid. 615.1.

On occasion, a party's expert witness will be permitted to remain in the courtroom, either because the witness is designated as the party's representative under Rule 615(2) or because the witness's presence is essential under Rule 615(3). Whenever this occurs, it is only fair that the opposing party's expert witness likewise be exempted from sequestration. See *Camp v. General Motors Corp*., 454 So.2d 958, 960 (Ala.1984).

Rule 615 governs the exclusion of witnesses from the courtroom. It leaves to evolving case law the question whether "invoking the rule" (i.e., sequestering witnesses) precludes witnesses from speaking with each other outside the courtroom. While preexisting law has not fully answered this question, several observations may be made regarding the present status of the law. There is no question that the trial judge possesses the discretion to explicitly instruct witnesses not to talk with each other outside the courtroom. See *Gautney v. State*, 284 Ala. 82, 222 So.2d 175, 178 (1969). A violation of such an order may be dealt with appropriately. See *Birmingham Ry. & Elec. Co. v. Ellard*, 135 Ala. 433, 33 So. 276, 280 (1903). It appears equally clear that a general invocation of the rule does not preclude the lawyers from meeting with and talking to their witnesses. See *Christiansen v. Hall*, 567 So.2d 1338 (Ala.1990) (also implying that a general invocation of the rule does not preclude witnesses from talking with each other outside the courtroom). See J. Hubbard, *The Rule on Exclusion of Witnesses – Beyond the Courtroom*, 53 Ala.Law. 126, 128 (1992) (calling for clarification of the law regarding the impact outside the courtroom of invoking "the rule").

The preferred sanction for violation of an order placing witnesses under the rule is to punish any offending witness, party, or counsel for contempt. *Degg v. State*, 150 Ala. 3, 43 So. 484, 486 (1907). See 75 Am.Jur.2d Trial § 250 (1991); J. Hubbard*, The Rule on Exclusion of Witnesses – Beyond the Courtroom*, 53 Ala.Law. 126, 127 (1992). Rarely should the court exercise its power to exclude the testimony of a witness who has violated the court's sequestration order. While the witness is subject to punishment for contempt and the adverse party is free, in argument to the jury, to raise an issue as to the witness's credibility by reason of the violation, a party who is innocent of the violation ordinarily should not be deprived of the witness's testimony. See 75 Am.Jur.2d Trial § 246 (1991). However, such a sanction may be imposed when a party or the party's attorney either contributes to or has failed to act reasonably to prevent the violation. See *Ex parte Faircloth*, 471 So.2d 493, 497 (Ala.1985); J.

Hubbard, *The Rule on Exclusion of Witnesses – Beyond the Courtroom,* 53 Ala.Law. 126, 127 (1992).