

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 615. Excluding Witnesses from the Courtroom;**
2 **Preventing an Excluded Witness's Access**
3 **to Trial Testimony**

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

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

10 ~~(b)(2)~~ ~~an~~one officer or employee of a party that is
11 not a natural person,~~after being~~ if that
12 officer or employee has been designated as
13 the party's representative by its attorney;

14 ~~(e)(3)~~ ~~a~~any person whose presence a party shows
15 to be essential to presenting the party's
16 claim or defense; or

¹ New material is underlined; matter to be omitted is lined through.

- 17 ~~(d)~~(4) a person authorized by statute to be present.
- 18 **(b) Additional Orders to Prevent Disclosing and**
- 19 **Accessing Testimony.** An order under (a) operates
- 20 only to exclude witnesses from the courtroom. But
- 21 the court may also, by order:
- 22 **(1) prohibit disclosure of trial testimony to**
- 23 witnesses who are excluded from the
- 24 courtroom; and
- 25 **(2) prohibit excluded witnesses from accessing**
- 26 trial testimony.

Committee Note

Rule 615 has been amended for two purposes:

(1) Most importantly, the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a “Rule 615 order” extends beyond the courtroom, to prohibit excluded witnesses from obtaining access to or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent

witnesses from tailoring their testimony to the evidence presented at trial—and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony. *See United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018) (“The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript.”). On the other hand, a rule extending an often vague “Rule 615 order” outside the courtroom raised questions of fair notice, given that the text of the rule itself was limited to exclusion of witnesses from the courtroom.

An order under subdivision (a) operates only to exclude witnesses from the courtroom. This includes exclusion of witnesses from a virtual trial. Subdivision (b) emphasizes that the court may by order extend the sequestration beyond the courtroom, to prohibit those subject to the order from disclosing trial testimony to excluded witnesses, as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the rule’s policy of preventing tailoring of testimony.

The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.

Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. To the extent that an order governing counsel’s disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis.

(2) Second, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated representative per entity. This limitation, which has been followed by most courts, generally provides parity for individual and entity parties. The rule does not prohibit the court from exercising discretion to allow an entity-party to swap one representative for another as the trial progresses, so long as only one witness-representative is exempt at any one time. If an entity seeks to have more than one witness-representative protected from exclusion, it needs to show under subdivision (a)(3) that the witness is essential to presenting the party's claim or defense. Nothing in this amendment prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (a)(3).