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Following the Rules: Exclusion of Witnesses, Sequestration, and “No-Consultation” Orders

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Abstract

In this Article, Professor Underwood discusses the varying application of Rule 615 of the Federal Rules of Evidence, which provides for the exclusion of witnesses. He explains that varying application of Rule 615 and state evidence rules following Rule 615's language creates misunderstandings at trial. Thus, it is important to know not only the federal and local rules but also the “way things are done” in a particular court.

“Separate these two far from one another that I may examine them.”¹

“Gentlemen, that may be law in Philadelphia, but it [is] not law in Coosa-whatchie.”²

Introduction

We are supposed to follow the rules. Model Rule of Professional Conduct 3.4(c) says so: “A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists”³ And Federal Rule of Evidence 615 provides that,

[a]t 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.

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¹ *Daniel* 13:51 (New American Bible) (the story of “Susanna and the Elders”); see Richard H. Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC. 113, 115 (1997).

² JAMES PETIGRU CARSON, *LIFE, LETTERS AND SPEECHES OF JAMES LOUIS PETIGRU: THE UNION MAN OF SOUTH CAROLINA* 56 (1920), available at <http://books.google.com/books> (search “Life, Letters and Speeches of James Louis Petigru”; then follow “Life, letters and speeches of James Louis Petigru: the Union man of South Carolina” hyperlink).

³ MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2011).

But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or (d) a person authorized by statute to be present.⁴

But following the rules is easier said than done. There are the rules (both ethical and evidentiary), and then there are "the way things are done." If you have not taken the time to find out how things are done, you may get into trouble. I always make it a point to tell my students to find out the local customs when venturing out into new territories (state or federal)⁵ and ask questions when in doubt. Find out whether you are supposed to stand or sit, and where. Read the local rules. If possible, find out if the judge has any idiosyncrasies.⁶ Do the judges and lawyers in this new world into which you are venturing have their own lingo? If you can help it, do not sound too foreign.⁷ This Article addresses

⁴ FED. R. EVID. 615 (emphasis added). This Article does not address the application of Rule 615 and problems of witness coaching and consultation in discovery and pretrial proceedings. For guidance, see generally Jean M. Cary, *Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions*, 19 GEO. J. LEGAL ETHICS 367 (2006) (addressing the relationship between "no-consultation" orders and client depositions); Michael D. Moberly, *Can't we All Just Play by "The Rule"?* *Sequestering Witnesses During Pretrial Discovery*, 33 AM. J. TRIAL. ADVOC. 447 (2010) (addressing the relationship between pretrial discovery and sequestering witnesses); Joseph R. Wilbert, *Muzzling Rambo Attorneys: Preventing Abusive Witness Coaching by Banning Attorney-Initiated Consultations with Deponents*, 21 GEO. J. LEGAL ETHICS 1129 (2008) (addressing "the ethical implications of attempts to muzzle witness-coaching Rambo attorneys").

⁵ See *United States v. Magana*, 127 F.3d 1, 5-6 (1st Cir. 1997) (A new prosecutor was not familiar with the "longstanding custom" in the District Court relating to the application of Rule 615.).

⁶ I remember one federal judge who not only locked the direct examiner to the podium but also insisted that the opposing counsel get up and make it to the podium to make objections. Needless to say, this can cause unnecessary injuries, and it also cuts down on objections. The same judge thought it offensive for counsel to use the usual foundation questions to set the witness up for impeachment with a prior inconsistent statement in a deposition. The judge had been a corporate lawyer, and secured his appointment in the usual manner—senatorial campaign manager, or something like that.

⁷ For example, we do not say *voir dire* with a French accent, and we certainly do not roll our "Rs." See Jeff Akins et al., *Jury Selection and Voir Dire Examination in Civil District Courts of Bexar County*, SAN ANTONIO B. ASS'N, <http://www.sabar.org/displaycommon.cfm?an=1&subarticlenbr=55> (last visited Apr. 3, 2012).

Federal Rule of Evidence 615. In my neck of the woods, if you want a separation of witnesses, you say, “Your Honor, I move for the Rule.”⁸ A puzzled look on your opponent’s face tells the jury he is from out of state—possibly “one of those people from Ohio.”

What is the little problem with language when we are dealing with Rule 615? The Rule says *exclusion* of witnesses.⁹ It does not say *sequestration* of witnesses.¹⁰ As we shall see, many lawyers and judges seem to think these terms mean different things.¹¹ Other lawyers and judges, and even treatise writers, use the terms interchangeably.¹² This can lead to some unfortunate, and ugly, misunderstandings at trial. And, misunderstandings can lead to distrust, which can hurt clients, and hurt lawyers’ reputations.

Barristers’ Bad Hair Days

During the high profile terrorism trial of Zacarias Moussaoui, a lawyer working for the Transportation Security Administration, who had been assisting government trial counsel in arranging for the testimony of a number of aviation security officials, provided trial transcripts of earlier witness testimony, along with advice, to seven witnesses.¹³ This was apparently in violation of the trial judge’s order that not only excluded witnesses from the courtroom but also prevented them from reviewing

⁸ The “Rule” apparently comes from “The Rule on Witnesses,” terminology that is also used in Virginia, the source of many of our Kentucky expressions and practices. Witness Guide, OFFICE OF THE COMMONWEALTH’S ATT’Y: LEE COUNTY, VA, http://www.leecountyprosecutor.com/index.php?action=witness_guide (last visited Apr. 3, 2012).

⁹ FED. R. EVID. 615.

¹⁰ *See id.*

¹¹ For an excellent student piece, see Sarah Chapman Carter, Comment, *Exclusion of Justice: The Need for a Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615*, 30 U. DAYTON L. REV. 63, 72-90 (2004).

¹² *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6.108 (3d ed. 2010) (“In courtroom parlance, excluding or sequestering witnesses is known as invoking ‘the rule on witnesses.’”).

¹³ Stephen Labaton & Matthew L. Wald, *Lawyer Thrust into Spotlight After Misstep in Terror Case*, N.Y. TIMES, Mar. 15, 2006, http://www.nytimes.com/2006/03/15/national/15lawyer.html?_r=1&pagewanted=print (At that time, Carla J. Martin was a fifty-one-year-old lawyer with experience in civil litigation defense.).

transcripts of earlier testimony.¹⁴ The order specifically stated “that ‘witnesses may not attend or otherwise follow trial proceedings (e.g., may not read transcripts) before being called to testify.’”¹⁵ The trial judge, Leonie M. Brinkema, penalized the government by barring the testimony of the witnesses.¹⁶ Legal pundits pilloried the unfortunate lawyer for the blatant misconduct,¹⁷ while opining on how they could have achieved her goals without crossing the line, or at least not getting caught.¹⁸ However, her lawyer described her as being unfairly treated by fellow prosecutors and “vilified” by the press.¹⁹ Time passed, and probably few people noted that, after an investigation, the lawyer was not prosecuted.²⁰ It seems that neither she nor her witnesses had been advised by the prosecution of the judge’s order, which went beyond the literal language of Federal Rule 615.²¹

Was this an unusual happening—an unfortunate misunderstanding unlikely to come up in our practice? Guess again. The reader is probably

¹⁴ See Labaton & Wald, *supra* note 13.

¹⁵ Adam Liptak, *Crossing a Fine Line on Witness Coaching*, N.Y. TIMES, Mar. 16, 2006, <http://www.nytimes.com/2006/03/16/national/16assess.html>; see also Felicia Carter, Current Development, *Court Order Violations, Witness Coaching, and Obstructing Access to Witnesses: An Examination of the Unethical Attorney Conduct that Nearly Derailed the Moussaoui Trial*, 20 GEO. J. LEGAL ETHICS 463, 465 n.17 (2007).

¹⁶ See Liptak, *supra* note 15.

¹⁷ Ann Althouse, *I Have Never Seen Such an Egregious Violation of a Rule on Witnesses*, ALTHOUSE BLOG (Mar. 13, 2006, 11:28 AM), <http://althouse.blogspot.com/2006/03/i-have-never-seen-such-egregious.html>; Shannon M. Awsumb, *Avoiding a Career-Ending Mistake*, THE HENNEPIN LAWYER (Feb. 20, 2007), <http://hennepin.timberlakepublishing.com/article.asp?article=1099&paper=1&cat=147>; Lloyd de Vries, *Amateur Hour*, CBS NEWS (Feb. 11, 2009, 6:42 PM), http://www.cbsnews.com/2100-18567_162-1397691.html (The government “cannot even follow simple and fundamental trial rules that first-year law students are taught.”).

¹⁸ See Liptak, *supra* note 15 (“Ms. Martin could have achieved much of what she had set out to accomplish through more subtle, quite common and perfectly lawful techniques.”).

¹⁹ Jerry Markon, *Attorney Describes 9/11 Lawyer as ‘Vilified’*, WASH. POST, Mar. 17, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/15/AR2006031502656.html>.

²⁰ Michael J. Sniffen, *Feds Decline to Prosecute Government Lawyer Who Coached Moussaoui Witnesses*, ASSOCIATED PRESS, Oct. 4, 2006.

²¹ See *Carla Martin*, WIKIPEDIA, http://www.ask.com/wiki/Carla_Martin (last visited Apr. 4, 2012).

aware of the recent second-degree murder conviction of University of Virginia lacrosse player George Huguely for the beating death of fellow athlete and sometime girlfriend Yeardeley Love.²² According to ABC News, Dr. Ronald Uscinski, the defense's neurosurgeon witness, was precluded from offering important testimony because he had received three emails from a member of the defense team that passed on certain information relating to the testimony of the prosecution's medical witness who had already testified.²³ This was a rather startling application of the "Rule on Witnesses" because expert witnesses are frequently allowed to remain in court to assist counsel and hear the testimony of other witnesses.²⁴

Bringing it All Back Home

As a professor at a state university, I am frequently asked to conduct CLE presentations for the practicing bar. I am probably asked to conduct them because I charge nothing and can usually get some laughs. I doubt that the participants credit me with much in the way of expertise. Indeed, I can expect a good portion of the audience to be hostile. I am not a "real lawyer," and I do not know how it is done in "Coosawhatchie." Still, conducting CLE presentations keeps me current and somewhat in the loop.

²² Mary Pat Flaherty, Jenna Johnson & Justin Jouvenal, *George Huguely Guilty of Second-Degree Murder*, WASH. POST, Feb. 22, 2012, http://www.washingtonpost.com/local/crime/george-huguely-guilty-of-second-degree-murder/2012/02/21/gIQA1ss4TR_story.html.

²³ Christina Ng & Cleopatra Andreadis, *George Huguely Trial: Defense and Prosecution Rest Their Cases*, ABC NEWS (Feb. 18, 2012), <http://abcnews.go.com/US/george-huguely-trial-defense-prosecution-rest-cases/story?id=15744129>; see also Colin Miller, *You've Got Mail: Trial Judge Applies "Rule on Witnesses" to Circumscribe Defense Expert Testimony in Huguely Trial*, EVIDENCEPROF BLOG (Feb. 20, 2012), <http://lawprofessors.typepad.com/evidenceprof/2012/02/you-may-have-heard-about-the-current-prosecution-of-former-university-of-virginia-lacrosse-player-george-huguely-for-the-murd.html>.

²⁴ See Colin Miller, *Is There a Doctor in the Courtroom?: Alabama Court Finds No Problem with Prosecution Expert Hearing Defense Experts' Testimony*, EVIDENCEPROF BLOG (Feb. 21, 2012), <http://lawprofessors.typepad.com/evidenceprof/2012/02/yesterday-i-postedan-entryabout-an-expert-defense-witness-not-being-allowed-to-testify-concerning-certain-subjects-pursuant.html>. Of course, in that case, it was the prosecution's expert who was allowed to remain in the courtroom. My money would be on a reversal of the Virginia verdict.

Not long ago, I was on a trial ethics panel, which included a state judge, a federal judge, and several practitioners. At the time, I was updating one of my books, and I made the mistake of bringing up Rule 615 and the fallout from the Moussaoui trial. I was actually interested in finding out how the denizens of the local bar interpreted the Rule and its application. I do not mind exposing my own ignorance. Admittedly, I was not surprised by the fact that the federal judge and the local lawyers, who mostly practice in the state courts, held very different views on the subject, despite the fact that the text of the federal and state rules are virtually identical.²⁵ The federal judge took an expansive view of the rule and his powers of enforcement. The practicing lawyers, on the other hand, did not. I was also not surprised by the rather condescending attitude of the “older” lawyers, who practice mostly in the state courts. They knew what the Rule meant and were offended by my suggestion that there may be varying interpretations of it and possible pitfalls associated with it. Another issue that came up during our discussion of Rule 615 was the limitations on judges’ power to prevent or limit counsel’s discussion of testimony with the client or witnesses at breaks during the trial. Some participants seemed shocked that *any* limits might be imposed and that I might suggest the possibility that such things happen.

Oh, well. It was not my first such experience. When I was Chairman of the State’s Model Rules Committee proposing the adoption of the ABA Rules, I was accused of importing new rules that were contrary to accepted traditions of advocacy, such as Rule 3.3(a)(2), which requires a lawyer to “disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel,”²⁶ and Rule 3.4(e), which states that a lawyer should not inject “personal opinion” or belief.²⁷ My proposed, “new” rules were identical to the then-current code provisions, but that fact did not seem to matter to the offended lawyers. During a break, a member of the Kentucky Supreme Court (he is no longer with us) actually accused me of “fraud” for suggesting that the then-current version of the state’s Code of Professional Conduct was

²⁵ Compare FED. R. EVID. 615, with KY. R. EVID. 615.

²⁶ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2) (2011).

²⁷ *Id.* R. 3.4(e) (2011).

actually consistent with the “new” and dreaded Rule 3.3(a)(3), which provides that a lawyer must take “reasonable remedial measures” when the lawyer knows the client has committed perjury.²⁸

More Confusion

I was gratified to later find that these same issues have also vexed at least some “real lawyers” and judges.²⁹ In a 2007 Symposium at Georgetown University, Judge George W. Miller raised the same questions:

[I]t is another example of an issue arising in connection with the study of legal ethics that also has very practical consequences in the trial of lawsuits. I have reference to what I would describe as “non-consultation” orders. That is to say, in a trial, the court at the outset enters an order to the effect that once a witness is seated there shall be no consultation between the witness and counsel with regard to the substance of the witness’s testimony. . . . I wanted to take just a minute to read you one of my favorite transcript excerpts dealing with a rule of the type I just described, which I announced I was going to impose in a particular trial.

. . . .
[At this point the Judge described a pretrial conference with opposing counsel.]

The Court, “I think it was at least my intention to state that once the witness takes the stand, that it would not be proper to discuss the substance of his testimony during breaks or over the evening for that matter.”

Plaintiff’s Counsel responded, “The Court would preclude consultations regarding the ‘substance of [the witness’s] testimony,’ but that doesn’t flow from 615”

The Court, “Yes, you’re correct. That does not flow from 615. That’s another issue altogether.”

²⁸ See Richard H. Underwood, *What I Think that I Have Learned About Legal Ethics*, 39 IDAHO L. REV. 245, 266-67 (2003) (discussing the author’s experiences with the Kentucky Model Rules Committee).

²⁹ Symposium, *Twenty Years of Legal Ethics: Past, Present, and Future*, 20 GEO. J. LEGAL ETHICS 321, 332-34 (2007) (quoting Hon. George W. Miller); see also 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6246 (1997); Carter, *supra* note 11, at 72-90. See generally Kurtis A. Kemper, *Exclusion of Witnesses Under Rule 615 of Federal Rules of Evidence*, 181 A.L.R. Fed. 549 (2002) (discussing the issues concerning Federal Rule of Evidence 615 in the federal courts).

Government counsel, “That was my understanding, your Honor, and I’ll restate it if I could, just to make sure that I’m clear on it as well. That is, *under 615 the witnesses are sequestered and neither counsel nor the party’s representative can tell that witness and neither can the testimony, the substance of testimony, be communicated either by sitting in the courtroom or by communicating transcripts or by any other means, under 615*. As to a seated witness and communications between counsel and the seated witness, it’s my understanding that is something outside the scope of 615, but that the ground rules for our trial are *once the witness is seated, even if trial ends for a break, for lunch, at the end of the day, that counsel may have no substantive conversations, no conversations about the substance of the testimony, the cross-examination that may be likely or about the case at all, while the witness is seated and that is a second aspect of the communications or limits on communications during the course of trial.*”

The Court, “I think that does state what I had intended to convey at the pretrial conference.”

Plaintiff’s counsel, “Your Honor, I think that is problematic. I think it’s problematic in that to the extent that counsel is precluded from talking to his witness not about testimony that has transpired but about future testimony, future cross examination, that could be a denial of counsel and a violation of due process.”³⁰

Notice that there are two things under discussion here. First, government counsel and the court, and maybe plaintiff’s counsel, seem to be assuming that an order separating the witnesses under Rule 615 prevents counsel or other persons from conveying to a prospective witness the substance of the testimony that has already been given by other witnesses in the case.³¹ That is not a universally recognized interpretation of Rule 615, even in the federal courts, and is a potential source of misunderstanding.³² Second, government counsel and the court are saying that once a witness is on the stand, counsel may not confer with the witness about the substance of the witness’s testimony, the likely cross-examination, or the

³⁰ Symposium, *supra* note 29, at 332-33 (alteration in original) (emphasis added) (quoting Hon. George W. Miller).

³¹ *See id.* at 333.

³² There is a massive A.L.R. annotation of the subject that collects the conflicting precedents. *See* Kemper, *supra* note 29, § 2[a] (noting the different interpretations of Federal Rule of Evidence among the federal courts of appeal); *see also* WRIGHT & GOLD, *supra* note 29, § 6246 (“Exactly what is required by way of compliance is largely determined by the precise wording of the order. However, the courts disagree as to whether an order that on its face merely excludes witnesses from the courtroom impliedly also precludes the witnesses from discussing the case outside court.”).

like.³³ I gather that this is what the judge is referring to as a “non-consultation” order.³⁴ (Should it not be a no-consultation order? I prefer that term.) The judge and the government counsel appear to be on the same wave-length insofar as their local custom is concerned.³⁵ The plaintiff’s counsel is perplexed.³⁶ Again, this quarantine of a witness, not to mention quarantine of a lawyer’s client, is apparently not universally accepted by lawyers.³⁷ Both propositions would have shocked—indeed, did shock—the lawyers on my CLE panel.

In some states, this is not the rule at all. For example, one Florida judge recently opined that the Rule only prohibits “1) witnesses remaining in the courtroom to hear the testimony of other witnesses; and 2) witnesses discussing their testimony among themselves prior to testifying.”³⁸ Florida courts do not prohibit lawyers from communicating with witnesses during their testimony.³⁹ On the other hand, the same judge notes the the Florida equivalent of Federal Rule of Evidence 611,⁴⁰ and states that the trial judge has discretionary authority to prohibit lawyer-witness consultations so long as the witness is not the criminal defendant.⁴¹ That is to say that, although Federal Rule of Evidence 611 does not specifically prohibit lawyers from communicating with witnesses during their testimony, it may be a source of authority to support a specific “non-consultation” order preventing the practice.⁴² Put

³³ Symposium, *supra* note 29, at 333 (quoting Hon. George W. Miller).

³⁴ *Id.* at 332.

³⁵ *See id.* at 333.

³⁶ *See id.*

³⁷ *See id.*

³⁸ Judge Tom Barber, *Restrictions on Lawyers Communicating with Witnesses During Testimony: Law, Lore, Opinions, and the Rule*, 83 FLA. B.J. 58, 59 (2009).

³⁹ *Id.*

⁴⁰ *Id.* at 59. Compare FED. RULE OF EVID. 611, with FLA. R. EVID. 612.

⁴¹ Barber, *supra* note 38, at 60 (discussing constitutional limitations on trial judges’ common law authority).

⁴² *See Minebea Co. v. Papst*, 374 F. Supp. 2d 231, 233, 235 (D.D.C. 2005). Again, federal trial judges have authority to add other restrictions to Rule 615, including an order that witnesses may not converse with each other. *See United States v. Magana*, 127 F.3d 1, 5 (1st Cir. 1997) (citing *United States v. Arias-Santana*, 964 F.2d 1262, 1266 (1st Cir. 1992)) (In fact, the district judge in the case assumed that counsel was familiar with a “long standing” custom that was not included in the Rules or local rules.).

another way, “absent such an order from the trial court, there is nothing in Florida law prohibiting lawyers from communicating with witnesses during their testimony unless the communication constitute[s] coaching.”⁴³ Judge Barber also notes that, even though Florida law does not give a criminal defendant a right to discuss her testimony with counsel while on the witness stand, Florida law goes even further than the United States Supreme Court by allowing a criminal defendant to have access to her counsel, “once a recess is called, no matter how brief.”⁴⁴ However, that is not the law in Coosawhatchie.⁴⁵

I should also note that, while the federal trial judge in the Moussaoui case had the authority to issue an order that went further than the literal language of Rule 615,⁴⁶ exclusion of witness testimony would not necessarily have followed Fourth Circuit precedents.⁴⁷

Back in Coosawhatchie Again

Naturally, a new development in our state law reinforces the rift between federal and state practice. In a 2007 case, *Woodward v. Commonwealth*, the Kentucky Supreme Court, without any discussion of the

⁴³ Barber, *supra* note 38, at 61.

⁴⁴ *Id.*; see also *Leerdam v. State*, 891 So. 2d 1046, 1049 (Fla. Dist. Ct. App. 2004) (quoting *Amos v. State*, 618 So. 2d 157, 161 (Fla. 1993)). In *Perry v. Leeke*, the Supreme Court held that a prohibition on consultations during a fifteen-minute recess between the direct and cross-examination of criminal defendant does not violate the criminal defendant’s Sixth Amendment right to counsel. 488 U.S. 272, 280-85 (1989). For a case holding that a judicial order prohibiting consultation during a trial recess violated a criminal defendant’s Sixth Amendment right to counsel, see *Sanders v. Lane*, 861 F.2d 1033, 1034 (7th Cir. 1988) (The court, nonetheless, found the error to be harmless.). *But cf.* *United States v. Sandoval-Mendoza*, 472 F.3d 645, 650-52 (9th Cir. 2006) (finding constitutional violation, but reversed on other grounds); *Mudd v. United States*, 798 F.2d 1509, 1510-14 (D.C. Cir. 1986) (adopting a *per se* rule of reversal for violations of a criminal defendant’s constitutional right to counsel); *United States v. Romano*, 736 F.2d 1432, 1438-39 (11th Cir. 1984) (finding reversible error based on the “special facts of [the] case”).

⁴⁵ See *Beckham v. Commonwealth*, 248 S.W.3d 547, 553-54 (Ky. 2008). For a critique of “non-consultation” orders and the United States Supreme Court precedents, see Bennett L. Gershman, *Judicial Interference with Effective Assistance of Counsel*, 31 PACE L. REV. 560, 572-74 (2011).

⁴⁶ See FED. R. EVID. 615.

⁴⁷ See, e.g., *United States v. Rhynes*, 218 F.3d 310, 325 (4th Cir. 2000); see also *United States v. Washington*, 653 F.3d 1251, 1268-69 (10th Cir. 2011).

conflicting authorities on the subject, read Kentucky Rule of Evidence 615 literally.⁴⁸ The court opined that the Rule requires only separation of witnesses and not sequestration: “The rule makes separation in the courtroom mandatory, but makes no mention of witnesses interacting outside the courtroom. Obviously, the spirit of the Rule is not observed when witnesses coordinate their testimony against a party. Unfortunately, there is no practical means to ensure that this does not happen.”⁴⁹ If there appears to have been witness collusion outside the presence of the court, “[t]he best course is to allow the testimony subject to proper impeachment on cross examination.”⁵⁰ There was no discussion of orders requiring more than that authorized by the literal language of Kentucky Rule of Evidence 615 (perhaps under the authority of state Rule 611).⁵¹

Summing Up

It is not my intention to lecture anyone on how Rules 611 and 615 must be interpreted or applied, nor do I have a personal stake in the power of judges to issue “non-consultation orders.” Indeed, I am not generally in favor of overly confining rules.⁵² I only wish to suggest that you

⁴⁸ 219 S.W.3d 723 (Ky. 2007), *overruled on other grounds*, Commonwealth v. Prater, 324 S.W.3d 393 (Ky. 2010).

⁴⁹ *Woodward*, 219 S.W.3d at 728.

⁵⁰ *Id.* at 728-29. *Cf.* State v. Silver, 3 Dev. 332, 14 N.C. 332 (1832). This case held that the trial judge has discretion to allow witnesses to be reexamined at the request of the jurors despite the fact that they have conversed together after their initial testimony. This did not work out well for Frances (Frankie) Silver, whose appeal on this fine point fell on deaf ears. She was hanged for the murder of her husband. He had been dismembered, the body parts scattered and some burned in the fireplace. It was probably a case of self-defense by an abused wife, and her family members probably aided in her activities. But poor Frankie could not testify because in those days the defendant was not deemed a competent witness. Apparently witnesses against her told a more seamless story when recalled. Daniel was not there to help either. “Frankie Silver” is a popular murder ballad, and her story is told in several recent works of fiction and non-fiction. *See, e.g.*, SHARYN MCCRUMB, THE BALLAD OF FRANKIE SILVER (1999) (fiction); PERRY DEANE YOUNG, THE UNTOLD STORY OF FRANKIE SILVER (2012) (non-fiction).

⁵¹ *See id.* For a recent state case recognizing the discretionary power of the trial judge, see State v. Copeland, 798 N.W.2d 250, 252-53 (Wis. Ct. App. 2011).

⁵² Some folks stretch this to the limit, and beyond. *See* John Steele, *When Is Informing a Witness of Facts Improper Witness Preparation?*, LEGAL ETHICS FORUM

should not make any assumptions about what the “real” rules are. Furthermore, if you want separation, or something more than separation, *ask for it.*⁵³ *Assume nothing.* When in doubt about the local “understanding,” ask questions.

(July 14, 2011, 2:01 PM), <http://www.legalethicsforum.com/blog/2011/07/when-is-informing-a-witness-of-facts-improper-witness-preparation.html> (noting that, in the context of the “Fast and Furious” investigation, some members of Congress were arguing that the DOJ was engaged in improper witness preparation by creating a “database of documents and witness statements” that their witnesses could access).

⁵³ *Marshall v. United States*, 15 A.3d 699, 706 (D.C. 2011) (“The federal courts have consistently interpreted Rule 615 of the Federal Rules of Evidence to require a party to request the sequestration of witnesses ‘in order to claim any protection’ from the rule . . .”).