The "Rule"

by John A. Day

In Tennessee courtrooms from Mountain City to Memphis, it is simply known as the "Rule." What is it? It is a law that provides for the sequestration of witnesses and limits communication about the testimony of witnesses during trial.

The Rule existed at common law but is now set forth in Rule 615 of the Tennessee Rules of Evidence. It provides as follows:

> 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 for a party that is not a natural person, or (3) a person whose presence is 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.

HOW THE RULE WORKS

The Rule is invoked by simply making a request of the trial judge, preferably on the record. Counsel need say nothing more than, "Your Honor, I ask the Court to invoke the Rule" and most judges will know exactly what is being asked. Alternatively, counsel can say, "Your Honor, I ask that the Court order that Rule 615 is applicable for the balance of these proceedings." If made after jury selection, the court should grant the request and announce to the courtroom that the Rule is in effect and ask all witnesses to leave the courtroom. It is good practice for trial judges to remind each witness of the Rule during any break in testimony, and at the conclusion of the witness's testimony.[1]

When moving for application of the Rule, it is not recommended that counsel simply ask that trial judge exclude witnesses from the courtroom. As the language of the Rule indicates, the Rule is much broader than that, and it is important that the court order and expect that all aspects of the Rule be enforced.

At the outset, one can readily see that the Rule is a mechanism by which witnesses are excluded from learning the testimony of other witnesses or viewing exhibits created during the trial.[2] The purpose of this rule is to prevent witnesses from learning the testimony of other witnesses and changing their testimony.[3] Thus, while the trial judge may permit a witness to be present in the courtroom during jury selection, a judge must exclude witnesses from the courtroom during opening statements if a party requests the application of Rule 615.

Why can a trial judge permit a witness to be in the courtroom during jury selection? The Advisory Commission Comments to TENN. R. EVID. 615 indicate that the judge may waive application of the Rule during jury selection "because of a need to ask prospective jurors whether they know the witnesses."

The Rule does not require the exclusion of natural persons who are parties to the litigation. If a party to the case is not a natural person, counsel can designate a representative. It is reasonable to assume that, absent unusual circumstances, the person counsel designates as a representative for a corporation or other entity must remain the representative throughout the trial, at least for purposes of application of the Rule. It would be inappropriate for a non-human party to the litigation to use multiple corporate representatives during the trial for the purpose of avoiding the sequestration rule.[4]

The Rule does not apply to expert witnesses. The 2004 Advisory Commission Comment to Rule 615 provides that "[e]xpert witnesses generally should be considered 'essential persons' and therefore should not be sequestered. The courts have followed the thoughts of the Advisory Commission. In *State v. Bane,*[5] the Court stated: '[W]e believe that the dangers Rule 615 is intended to prevent generally do not arise with regard to expert witnesses in any proceeding.'"[6] Thus, a party may properly have one or more expert witnesses sit in the courtroom during trial, or discuss the in-court testimony of other witness with the expert witness.

The Rule does not prohibit a witness from reviewing depositions of other witnesses before testifying.[7] The Advisory Commission Comments also state that

> Rule 615 is intended to apply only to sequestration of witnesses at trial. A lawyer who wishes to exclude nonparties from oral depositions must resort to [TENN. R. CIV. P. 26.03(5)], allowing on motion a protective order that discovery be conducted with no one present except persons designated by the court.[8]

As mentioned above, the Rule does much more than require the exclusion of non-expert witnesses from the courtroom. It also prohibits one witness from discussing his or her testimony with another witness, from seeing exhibits created in the courtroom and, importantly, prohibits counsel from discussing with one witness the testimony of another witness. The Advisory Commission's 1997 Comment to Rule 615 also states that "[a] lawyer may mention subject matter to a witness not yet called, even though the subject matter has been raised by evidence. Care must be taken, however, to avoid implying to the potential witness what an earlier witness said from the stand."

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The Rule is also applicable to rebuttal witnesses, although it provides that it "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."[9]

How does a lawyer help prevent a client or the lawyer's witnesses from violating the Rule? The lawyer should caution the client or representative of the effect of the Rule before trial. For example, it is quite natural for family members of a personal injury plaintiff who are going to be testifying as damages witnesses to talk to the plaintiff about the trial. Those conversations can occur, but they cannot concern the substance of the testimony of the plaintiff or any other witness. Pretrial education on this subject, plus a gentle reminder to the client and the witnesses about the Rule during trial, will avoid an unintentional violation of the Rule by the client or the client's witnesses.

A lawyer can avoid violating the Rule by remembering he or she cannot discuss the in-court testimony of any witness with another witness except an expert witness. So, for example, a lawyer cannot say to Jones "Smith just made a mistake and testified the light was 'green.' It is thus more important than ever for you to be consistent with your previous statement and continue to say that the light was 'red.'" It is appropriate to say "I will be asking you about the color of the light at the time of the wreck. Is there any doubt in your mind that your previous statements that the light was red were correct?" The latter discussion drives home the point with Jones but does not discuss the testimony of Smith.

VIOLATIONS OF THE RULE

When there is an allegation that the Rule has been violated, "the generally accepted procedure in Tennessee … is for the court to hold a jury-out hearing to determine both the facts of the violation and whether a party was prejudiced by the violation."[10] One factor examined is whether other witnesses had given essentially similar testimony.[11] A trial court is granted wide discretion to determine whether there has been a violation of the Rule.[12]

What is the sanction for violating the Rule? Not surprisingly, the decision is left to the discretion of the trial judge.[13] One case suggests that the "draconian" sanction of mistrial or a ruling for or against a party on a particular issue should be used "only in egregious cases, perhaps involving intentional violations of the rule for the purpose of creating perjured testimony."[14] Other options include use of the court's contempt power, cross-examination about the misconduct, a jury instruction that a violation of the Rule could be considered by the jury in assessing the witness' testimony, or preclusion of the witness from giving testimony.[15]

A lawyer who violates the Rule is at risk for being found in contempt of court or facing disciplinary proceedings. A knowing violation of the Rule could be determined to be a violation of Rule 3.4(c) of the Rules of Professional Conduct, which mandates that 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," and Rule 8.4(d), which provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

CONCLUSION

In most cases it is appropriate to ask the Court to invoke the Rule. If the Rule is in effect, counsel should advise his or her witnesses of the meaning of it and should obey it. If a violation is observed, it should be promptly brought to the attention of the trial judge. An out-of-jury hearing should be conducted to determine whether a violation has occurred and the circumstances giving rise to the violation. This hearing should be conducted on the record. If a violation is found and a sanction imposed, it would be prudent for the judge to summarize the facts supporting the imposition of the sanction. If the judge does so, an appellate court will be very reluctant to second-guess his or her decision.

John A. Day is a trial lawyer with the Law Offices of John Day, P.C, with offices in Brentwood and Murfreesboro. This article is adapted from a chapter in his recent book, Tennessee Law of Civil Trial.

1. For example, the trial judge would say to a witness: "Ms. Jones, please do not discuss your testimony with any other person who may be a witness in this case during the course of this trial, either during a break or after you have finished testifying. Do you understand what I have just asked you to do?"
2. The rule does not apply to exclusion of nonparties from depositions. The Comment to the rule states that "[a] lawyer who wishes to exclude nonparties from oral depositions must resort to TENN. R. CIV. P. 26.03(5), allowing on motion a protective order 'that discovery be conducted with no one present except persons designated by the court.'"
3. *State v. Reid*, 164 S.W.3d 286, 342 (Tenn. 2005).
4. Of course, once a trial is underway an entity's representative may become ill or have a family emergency that would require someone else who is likely to be a witness to serve as a representative for some or all of the trial. Counsel should work together on such issues and attempt to agree on a just method of addressing this issue.
5. *State v. Bane*, 57 S.W.3d 411, 423 (Tenn. 2001).
6. *See also State v. Anderson*, No. M2008-01230-CCA-R3-CD, 2009 WL 856903 (Tenn. Crim. App. Mar. 31, 2009) (district attorney discussed testimony of a witness with toxicologist, an expert witness in the case).
7. TENN. R. EVID. 615, Advisory Commission Comment ("This rule does not prohibit a witness from reviewing depositions of other witnesses before testifying.")
8. TENN. R. EVID. 615 Advisory Commission Comment.
9. TENN. R. EVID. 615.
10. *State v. Woods*, No. W2002-01831-CCA-R3-CD, 2003 WL 22309503, at *3 (Tenn. Ct. App. October 6, 2003), citing N. COHEN, ET AL. TENNESSEE LAW OF EVIDENCE § 6.15 [11][b] (4th ed. 2000).
11. *State ex rel. Com'r of Dept. of Transp. v. Williams*, 828 S.W.2d 397, 401-02 (Tenn. Ct. App. 1991).
12. *See, e.g. State v. Moffett*, 729 S.W.2d 679, 681 (Tenn. Ct. Crim. App. 1986).
13. *State v. Black*, 75 S.W.3d 422, 424-25 (Tenn. Crim. App. 2001); Reynolds v. Reynolds, No. M2013-01912-COA-R3-CV, 2014 WL 7151596 (Tenn. Ct. App. Dec. 12, 2014) (noting that trial courts have "significant discretion" it determining what sanction should be applied for violating the sequestration rule).
14. *State v. Anthony*, 836 S.W.2d 600, 605 (Tenn. Crim. App. 1992), citing N. COHEN, D. PAINE AND S. SHEPPEARD, TENNESSEE LAW OF EVIDENCE §615.4 (2nd ed. 1990).
15. *Id.*