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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)
) Arizona Supreme Court No. R-23-____
)
ARIZONA RULE OF)
EVIDENCE 615)
) PETITION TO AMEND ARIZONA
) RULE OF EVIDENCE 615
)
)
_____)

**PETITION TO AMEND RULE 615 OF THE ARIZONA RULES OF
EVIDENCE**

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence, by and through its Co-Chairs, the Honorable Sara Agne and the

Honorable Maria Elena Cruz, petitions the Court to amend Arizona Rule of Evidence 615, as reflected in the attachment hereto, effective January 1, 2024.

I. INTRODUCTION AND BACKGROUND

In 2012, by administrative order, the Arizona Supreme Court established the Advisory Committee on Rules of Evidence with the following purpose:

The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012.

At its regular meeting on September 9, 2022, the Advisory Committee unanimously recommended that Arizona Rule of Evidence 615 be amended consistent with the proposed amendments to Federal Rule of Evidence 615, which are expected to become effective December 1, 2023. By a split but majority vote, the Committee voted to recommend that the Arizona Supreme Court also adopt the comment to the rule change noted below and in the attachment.

II. SUMMARY OF THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 615

Arizona Rule of Evidence 615, like Federal Rule of Evidence 615, provides for court orders excluding witnesses so “they cannot hear other witnesses’

testimony.” The proposed amendments are intended to conform Arizona Rule of Evidence 615 to the proposed Federal Rule of Evidence 615, while still maintaining Arizona’s unique provision regarding crime victims.

In proposing an amendment to Federal Rule of Evidence 615, the federal Advisory Committee on Rules of Evidence sought to address a circuit split and clarify if a Rule 615 order operates solely to physically exclude witnesses from the courtroom, or if it also prevents witnesses from learning what happens inside the courtroom while they are excluded. The proposed addition of subsection (b) explicitly permits judges, in their discretion, to enter orders to prevent witnesses from learning what happens inside the courtroom even while they are outside of the courtroom. The federal Advisory Committee observed that this change would clarify that additional restrictions are not implicit in a standard Rule 615 order and would apply to both virtual and in-person trials.

The federal Advisory Committee also considered the scope of the rule with regard to exclusion for entity representatives. It observed that some courts allow entities to have multiple representatives in the courtroom without first making a showing of necessity. In the interest of fairness to non-entity parties, the proposed amendment clarifies that an entity-party can designate, as of right, one officer or employee exempt from exclusion. This does not impair the ability of an entity-party,

as with any party, to seek an exemption from exclusion upon a showing that additional representatives are essential.

Although it is not specifically stated in Arizona's current Rule 615, Arizona case law recognizes that the purpose and spirit of Rule 615 is to prohibit access to trial testimony, whether it be by a witness hearing testimony in court or by a witness being provided the substance of in court testimony by lawyers or other witnesses. *See, e.g., Spring v. Bradford*, 243 Ariz. 167, 171 ¶16 (2017). The addition of subsection (b) to Arizona's Rule 615 will codify the Court's authority to enter such orders.

The interpretive problems related to Rule 615 plaguing the federal courts do not appear to be as widespread and consistent in our state courts. However, Arizona appellate courts have addressed some interpretive issues. Arizona courts have addressed issues regarding the number of witnesses a party may exempt upon a showing of necessity, *see, e.g., State v. Williams*, 183 Ariz. 368, 380 (1995), and have also addressed whether a party violates Rule 615 by providing testimony to witness outside the courtroom, *see Spring*, 243 Ariz. at 171 ¶16. The Arizona Supreme Court has also made it clear that a party seeking to exempt its witnesses from the Rule, whether those witnesses be fact or expert witnesses, must make the required showing of necessity under the Rule before it treats the witnesses as exempt. *See Spring*, 43 Ariz. at 174-75 ¶¶ 33-34.

In order to maintain consistency between the Arizona and Federal Rules of Evidence, according to the Advisory Committee's practice, discussion, and approval at its meetings, and to clearly state the Court's authority to make orders prohibiting the disclosure of testimony to witnesses, the Committee recommends the proposed Rule change and comment attached to this Petition.

III. SPECIFICS OF THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 615

Consistent with the proposed amendments to the federal rules, the proposed Arizona amendments clarify the title of the rule, headings, and certain subsections of the text. The new title is "Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony," and the rule has newly numbered subsections. Proposed subsection (a) is titled "Excluding Witnesses." That subsection clarifies that it applies only to excluding witnesses "from the courtroom," and the categories of people who are not authorized to be excluded are described in the renumbered subsections (a)(1)–(5).

Consistent with clarifying the scope with regard to exclusion for entity representatives, in the newly numbered subsection (a)(2), the proposed rule changes the text from "an officer or employee" to "one officer or employee," and changes the clause "a party that is not a natural person, after being designated as the party's representative" to "a party that is not a natural person if that officer or employee has been designated as the party's representative." In order to distinguish subsection

(a)(3) from the entity-representatives subsection, the proposed rule changes “a person whose presence a party shows to be essential” to “any person whose presence a party shows to be essential.”

Some Committee members expressed concern for potential confusion between Rule 615(a)(2) and 615(a)(3), as one provision allows for the exemption of “one” representative while the other indicates “any” person whose presence is shown to be essential to the presenting party’s claim or defense may be exempt.

To assist in resolving any confusion, the Committee, by a split but majority vote, recommended a proposed comment to the Rule clarifying that the trial court has discretion to allow an entity party to substitute its designated representative as the trial progresses so long as only one representative is exempt at any one time. The comment attempts to clarify that the Rule 615(a)(3) exemption is not limited to one person, and the court may exempt additional witnesses if the party requesting the exemption demonstrates their presence is essential to the party’s presentation.

Brand-new subsection (b), titled, “Additional Orders to Prevent Disclosing and Accessing Testimony” states that “An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order: (1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony.”

In recommending that Arizona adopt the proposed federal rule amendments to Arizona Rule of Evidence 615, the Arizona Advisory Committee on Rules of Evidence notes that the proposed amendments to Federal Rule of Evidence 615 have not been finally adopted *per se*, as is typical for our Committee’s petitions. The United States Supreme Court, and ultimately Congress—even if by inaction—must still approve the federal changes. Should any approval not arise as expected, the Committee will promptly notify this Court.

The Committee further notes that the proposed amendments—apart from renumbering—do not affect Arizona’s unique Rule 615 provision, which does not authorize exclusion of “a victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant.”

CONCLUSION

Petitioners respectfully request that the Petition be circulated for public comment consistent with Ariz. R. Supreme Ct. 28, and that the Court adopt the proposed rule as presented, or as modified considering comments received from the public and any replies, with an effective date of January 1, 2024.

DATED this 3rd day of January, 2023.

/s/ Sara J. Agne _____

Sara J. Agne

Co-Chair, Advisory Committee on Rules of Evidence

/s/ Maria Elena Cruz w/ permission _____

Maria Elena Cruz

Co-Chair, Advisory Committee on Rules of Evidence

ATTACHMENT¹

ARIZONA RULE OF EVIDENCE 615

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

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

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

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

~~(c)~~**(3)** ~~a~~ any person whose presence a party shows to be essential to presenting the party's claim or defense;

~~(d)~~**(4)** a person authorized by statute to be present; or

~~(e)~~**(5)** a victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

COMMENT TO 2024 AMENDMENT

The rule does not limit the court's discretion to allow an entity-party to substitute its representative during trial under appropriate circumstances. If an entity seeks to have more than one witness-representative protected from exclusion, it is free to try to show under subdivision (a)(3) that the witness is essential to presenting the party's claim or defense. Nothing in this amendment

¹ Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (a)(3).