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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-23-0003
)
) COMMENT OF ARIZONA
Petition to Amend Arizona Rule of) ATTORNEYS FOR CRIMINAL
Evidence 615) JUSTICE (AACJ) IN SUPPORT OF
) PETITION TO AMEND ARIZONA
) RULE OF EVIDENCE 615
_____)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment on the petition to amend Arizona Rule of Evidence 615.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public

awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

For the reasons stated in this comment, AACJ does not agree with Petitioner that most of the proposed amendments to Rule 615 are necessary and proper. This Court explained the meaning of Rule 615 in *Spring v. Bradford*, 243 Ariz. 167 (2017). On the issue of the ability to access trial testimony, the proposed amendments are verbose, confusing, and incomplete. And on the issue of experts' access to trial testimony being necessary to the presentation of a claim or defense, the proposal is silent. Finally, AACJ disagrees with the practice of including comments that explain the law; instead, the text of the law should be clear. At the conclusion of this comment, AACJ offers a proposal for amendments that it believes accomplish the purposes of the proposal and are consistent with *Spring*.

I. Access to Testimony vs. Access to the Courtroom

This Court explained in *Spring* that when the defense provided one of its expert witnesses with a transcript of another witness's trial testimony in advance of his own, this "violated the purpose and spirit, if not the express terms, of Rule 615." 243 Ariz. at 171 ¶ 16. This was correct: there was nothing in the plain language of Rule 615 that prevented defense counsel's action. The purpose of excluding

witnesses is so that they may not receive the testimony of other witnesses before they give their own.

Petitioner’s proposal to resolve this problem and codify *Spring*, however, fails to recognize that there are other means by which witnesses can receive testimony. Most notably, in response to the COVID-19 pandemic, many courtrooms now provide streaming audio/video via YouTube or other Internet services. By including only two potential limitations on the improper receipt of testimony, the proposal impliedly would permit other abuses of the Rule to continue based on the canon *expressio unius est exclusion alterius*. See *State v. Maestas*, 244 Ariz. 9, 13 ¶ 15 (2018) (“In general, when the [lawmaking body] expressly prescribes a list in a [rule], ‘we assume the exclusion of items not listed.’”) (quoting *State v. Ault*, 157 Ariz. 516, 519 (1988)).

Moreover, Petitioner’s proposal not only requires trial courts to go through the cumbersome process of entering additional orders, but it allows the court discretion to deny requests. This means that witnesses can share testimony with each other outside the courtroom, whether or not attorneys are involved in coaching. Thus, while “[w]e trust in the good faith, sound judgment, and professionalism of the Arizona bar in that regard,” *Spring*, 243 Ariz. at 175 ¶ 35, the Rule applies to the conduct of witnesses as well as attorneys and thus it must be clear and unequivocal.

Rather than include a new Rule 615(b) (which in turn results in an additional layer of subsections) that does not adequately accomplish the spirit of the Rule, this Court should codify *Spring* by simpler means: by placing an additional sentence within the main section of Rule 615. This sentence can incorporate the myriad ways in which a witness may improperly access prior testimony in a manner that incorporates the *eiusdem generis* rule. See *In re Julio L.*, 197 Ariz. 1, 4 ¶ 11 (2000) (“Under the *eiusdem generis* principle, unless contrary legislative intent is apparent, when a general term follows specific terms in a statute, the general term is interpreted as of the same class or type as the specific terms.”).

II. Experts versus fact witnesses

Although Rule 615 treats experts and fact witnesses the same, in fact they are not. Fact witnesses are supposed to reveal only that information within their personal knowledge, such as what they saw and heard and laying foundation for exhibits. The purpose of the rule of exclusion is to prevent fact witnesses from modifying their testimony—intentionally or unconsciously—based on what they hear another say. Experts, on the other hand, are naturally expected to review the work of others when they offer their opinions. When a defense expert reaches a conclusion different from that of the plaintiff’s expert (and vice versa), the finder of fact expects to hear a “battle of the experts” where the conflicting experts debate, through the witness stand, and explain why the other is wrong. Prior to trial, the experts are expected to

review others' reports and opinions and factor that information in when reaching their own conclusions. It is strange that an expert should be allowed to review all of the opinions offered by the other side's expert, except for those that are offered for the first time during trial testimony.

Of course, there is little that prevents fact witnesses from sharing their observations prior to trial and thereby influencing each other's testimony. However, when the jury hears about that during cross-examination, it negatively impacts the credibility of those witnesses. The opposite is true for experts, who are expected to have reviewed the other experts' work, and it has a negative impact on their credibility if they avoid such information.

Spring recognizes this distinction, 243 Ariz. at 172 ¶ 21, while noting that the importance of allowing an expert to have access to trial testimony does not justify a blanket exemption from the rule of exclusion, *id.* at 174-75 ¶ 33. Petitioner's proposal fails to address this aspect of *Spring*. AACJ suggests this Court add a clause to existing Rule 615(c) that provides a reference to expert witnesses as an exemplar.

III. Other stylistic changes

AACJ does not disagree with Petitioner's suggestion that a corporate party should only have one officer present and that the presence of "any" person as a change to current Rule 615(c) is clearer than "a" person.

While the Petition notes that the inclusion of Arizona’s “unique Rule 615 provision” is left undisturbed, AACJ notes that this provision already exists in Arizona Rule of Criminal Procedure 9.3(a)(2)(A). There would be no problem with the duplication except for the fact that Evidence Rule 615 fails to account for the other exception in Criminal Rule 9.3(a)(2)(B): “If the court enters an exclusion order, both the defendant and the State are nevertheless entitled to the presence of one investigator at counsel table.”

AACJ believes that current Evidence Rule 615(e) (renumbered Rule 615(a)(5) under Petitioner’s proposal), instead of specifying victims in criminal cases, should instead contain a reference to Criminal Rule 9.3, which includes but is not limited to crime victims.

IV. The comment should not be included

AACJ also believes that the rule change should not be accompanied by a corresponding comment. The meaning of the rule should be clear from the text of the rule. Wherever possible, this Court should remove existing comments, and it should add new comments only in extraordinary circumstances where it is absolutely necessary. Furthermore, many practitioners (not to mention *pro se* litigants) do not have handy access to a book that publishes the comments; even this Court’s website links to rules published by Thomson-Reuters that does not include access to

comments. For this reason, AACJ hopes that the Advisory Committee on Rules of Evidence will look for opportunities to delete comments in the future.

V. AACJ's proposal

AACJ proposes Petitioner consider these changes when submitting its Reply, and for this Court to adopt these amendments to Rule 615:

Rule 615. Excluding Witnesses

At a party's request, the court must order witnesses excluded from the courtroom and prohibit them from receiving trial testimony through any means, 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) a party who is a natural person;
- (b) ~~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) a any person whose presence a party shows to be essential to presenting the party's claim or defense, such as expert witnesses;
- (d) a person authorized by statute to be present; or
- (e) ~~a victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant.~~ any person permitted to be present under Arizona Rule of Criminal Procedure 9.3.

AACJ believes these changes will reflect the current state of the law in Arizona.

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Conclusion

For these reasons, AACJ requests this Court amend Rule 106 consistently with the proposal in this comment.

DATED (electronically filed): May 1, 2023.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By: /s/ David J. Euchner
David J. Euchner

Comment electronically mailed to:

Hons. Sara Agne & Maria Elena Cruz
Advisory Committee on Rules of Evidence