# Can't We All Just Play By "The Rule"?: Sequestering Witnesses During Pretrial Discovery

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## I. Introduction

Arizona courts have excluded witnesses from the courtroom during the testimony of other witnesses since the territorial era,[1] and the practice of separating or "sequestering" witnesses (now often simply referred to as invoking "the rule")[2] can be traced to a much earlier time.[3] The practice prevents witnesses from conforming their own testimony to the testimony of other witnesses,[4] and it has become a critical

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[1] *See* State v. Sowards, 406 P.2d 202, 204 (Ariz. 1965) (discussing Territory v. Dooley, 78 P. 138 (Ariz. 1889)).

[2] Courts discussing the practice may refer to the "[e]xclusion, separation, [or] sequestration of witnesses, or 'putting witnesses under the rule,' as the procedure is variously termed." Coonan v. Baltimore & O. R. Co., 25 F. Supp. 834, 835 (E.D. Pa. 1938). However, the terms used to describe the practice are not precisely synonymous. *See, e.g.*, Oregon v. Burdge, 664 P.2d 1076, 1081 n.6 (Or. 1983) ("'Sequestration' generally applies to a rule requiring no contact of any nature with other witnesses while 'exclusion' generally means merely excluded from the courtroom.").

[3] *See* State v. Thomas, 275 P.2d 408, 415 (Ariz. 1954) ("[F]rom time immemorial this salutary practice, which was devised for the discovery of the truth and the detection and exposure of falsehood, has prevailed.'"), *overruled on other grounds in* State v. Pina, 383 P.2d 167 (Ariz. 1963).

[4] *See* ARIZ. R. CRIM. P. 9.3 cmt. (1989 amendment) ("The policy underlying the mandatory sequestration rule . . . is that, by preventing a witness from hearing the testimony of another witness, the risk of fabrication, collusion, inaccuracy and shaping of testimony is minimized."); *cf.* State v. Presley, 514 P.2d 1234, 1236 (Ariz. 1973) (noting that a witness "could consciously or unconsciously tailor his own story to conform to" the testimony of other witnesses).

component of the modern judicial process.[5]

The truth-seeking objectives served by sequestering witnesses apply with equal force in pretrial depositions and other discovery proceedings,[6] where the need for truthful testimony is no less critical than it is at trial.[7] Nevertheless, no Arizona appellate court has addressed the propriety of sequestering witnesses during discovery.[8] Indeed, there is relatively little authority concerning this issue in any jurisdiction,[9] and in the

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[5] *See* Frideres v. Schiltz, 150 F.R.D. 153, 158 (S.D. Iowa 1993) (observing that the "technique of sequestering witnesses is now codified in Federal Rule of Evidence 615 and well recognized in the case law"); Jury v. Virginia, 395 S.E.2d 213, 216 (Va. Ct. App. 1990) ("Orders excluding witnesses during the taking of testimony play an important part in our system of justice and should be enforced.").

[6] *See* Athridge v. Aetna Cas. & Sur. Co., No. CIV.A. 96-2708HHG JMF, 1997 WL 732430, at *1 (D.D.C. Sept. 23, 1997) ("The common law has favored the sequestration of witnesses so that they cannot either directly or subtly influence each other's testimony. This principle has been applied in the deposition context to exclude witnesses for this reason . . . ."); Donaghue v. Nurses Registry, Inc., 485 A.2d 945, 946 (Conn. 1984) ("To allow [witnesses] to be present at each other's deposition might provide them the opportunity to compare and alter statements to ensure their consistency thereby frustrating the [parties'] efforts to discover the facts.").

[7] *See* Mason v. T.K. Stanley, Inc., 229 F.R.D. 533, 535 (S.D. Miss. 2005) ("The Court certainly has a deep and abiding interest in and commitment to insuring that witnesses testify truthfully, whether at trial or in deposition."); *cf.* Samaritan Found. v. Goodfarb, 862 P.2d 870, 875 (Ariz. 1993) (discussing the "obligation to respond truthfully to discovery requests").

[8] The Arizona Supreme Court has observed that the "bulk of case law in this area involves situations in which the press or members of the general public have sought access to pretrial proceedings." Lewis R. Pyle Mem'l Hosp. v. Superior Ct., 717 P.2d 872, 875 (Ariz. 1986). However, the witness sequestration rule "is not . . . applicable to spectators and it is not designed to exclude nonwitnesses." Lackey v. State, 271 S.E.2d 478, 482 (Ga. 1980); *see also* Tharp v. Maryland, 742 A.2d 6, 17 (Md. Ct. Spec. App. 1999) (stating that the rule "does not authorize the court to exclude non-witnesses"), *aff'd*, 763 A.2d 151 (Md. 2000).

[9] *See* Hamon Contractors, Inc. v. District Ct., 877 P.2d 884, 887 (Colo. 1994) (noting that "federal and state case law in this area is somewhat sparse"); Charles J. Kall et al., *Sequestration -- A Few Observations and a Modest Proposal*, 8 COLO. LAW. 1970, 1970 (Oct. 1979) ("The question of whether sequestration is applicable to the taking of an oral

states in which the issue has arisen, the results have not been uniform.[10]

This article attempts to illuminate the issue.[11] It begins with a brief discussion of the witness sequestration rule's origin and evolution.[12] The article then explores the judicial disagreement over the rule's applicability in discovery proceedings.[13] Next, the article discusses a federal rule amendment that now precludes the sequestering of witnesses in federal depositions absent a showing of good cause,[14] as well as the analogical impact of this amendment in state court discovery proceedings.[15]

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deposition . . . . is one that has not often been addressed.").

[10] *Compare* Pettit v. Dolese Bros. Co., 943 P.2d 161, 165 ¶ 12 (Okla. Civ. App. 1997) ("[T]he rule of sequestration does not apply in discovery depositions . . . .") *with* Stortz *ex rel.* Stortz v. Seier, 835 S.W.2d 540, 542 (Mo. Ct. App. 1992) ("The . . . rule applies to the taking of depositions.") (quoting Williams v. Elec. Control Sys., Inc., 68 F.R.D. 703, 703 (E.D. Tenn. 1975)). *See generally* Richard L. Gabriel, *Rule 615: Exclusion of Witnesses*, 24 COLO. LAW. 1299, 1299 (June 1995) ("The federal and state courts have not been consistent in determining whether [the rule is] applicable to pretrial depositions.").

[11] Although the article focuses on the rule's application in Arizona, the analysis should be useful in other states as well. *See, e.g.*, Hernandez v. Indiana, 716 N.E.2d 948, 954 (Ind. 1999) (Boehm, J., dissenting) ("[T]he Indiana [witness sequestration] rule is nearly identical to that in some other jurisdictions, including the federal courts. Accordingly, cases from these other jurisdictions . . . provide useful guidance in construing the . . . Indiana [rule].") (footnote omitted).

[12] For an extended judicial discussion of the rule's historical development, see Grab *ex rel.* Grab v. Dillon, 103 S.W.3d 228, 233-36 (Mo. Ct. App. 2003).

[13] *See* Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451, 454 (M.D. Ga. 1987) ("The case law is conflicting on the question of whether [the rule] applies to oral depositions."); *Hamon Contractors*, 877 P.2d at 888 (noting the lack of "agreement among federal courts as to whether [the rule] . . . applies to pre-trial depositions").

[14] The rule's objectives may be more clearly applicable in depositions than in other discovery proceedings, simply because deposition testimony is the aspect of discovery most closely analogous to trial testimony. *See, e.g.*, Hanlon v. Firestone Tire & Rubber Co., 218 N.W.2d 5, 13 (Mich. 1974) (Coleman, J., dissenting in part). Nevertheless, sequestration also may be appropriate in other discovery contexts. *See, e.g.*, Lutsky v. Lutsky, 183 So.2d 782, 784-85 (Ala. 1966) (interrogatory responses); Russell v. Boyles,

The article then addresses some of the policy arguments occasionally offered in support of the restrictive federal approach to this issue,[16] and concludes that sequestering witnesses actually may be a more effective truth-seeking mechanism when employed in the discovery setting than it has proven to be at trial.[17] The article also explores the need to prevent witnesses from circumventing the rule by, for example, discussing the case outside the confines of the deposition room.[18] The article ultimately concludes that witnesses should be subject to sequestration during discovery to the same extent as they are at trial.[19]

## II. The History and Evolution of the Witness Sequestration Rule

The practice of separating witnesses to prevent collusive testimony can be traced to biblical times, when an example of its application was recorded in the *Book of Daniel*.[20] From this hallowed beginning,[21] the practice found its way into the largely

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29 S.W.2d 891, 892 (Tex. Civ. App. 1930) (depositions and interrogatories).

[15] *See generally* Thomas O. Main, *Reconsidering Procedural Conformity Statutes*, 35 W. ST. U. L. REV. 75, 78 (2007) (asserting that "any procedure that survives the federal rulemaking gauntlet . . . should enjoy some rebuttable presumption of suitability for incorporation into state procedure").

[16] *See infra* notes 108-205 and accompanying text.

[17] *See infra* notes 206-19 and accompanying text.

[18] *See infra* notes 220–64 and accompanying text.

[19] *See generally* Huber Baking Co. v. Frank C. Sparks Co., 76 A.2d 124, 125 (Del. Super. Ct. 1950) (asserting that "a Court should have the power to make the same [sequestration] order relative to the deposition hearing as it would at the trial" in order "to lessen the risk of fabricating testimony or shading it in the light of other testimony"), *supplemented on reargument*, 81 A.2d 132 (Del. Super. Ct. 1951).

[20] *See* Skidmore v. Nw. Eng'g Co., 90 F.R.D. 75, 76 n.2 (S.D. Fla. 1981) ("Separation of witnesses dates from biblical times. See Daniel's judgment in Susanna's case.") (citing *Apocrypha* 36-64, *reprinted in* 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT

unwritten Germanic law prevailing in England before the advent of the common law.[22] The witness sequestration rule was subsequently integrated into the English common law even before the emergence of jury trials,[23] and the courts in Arizona and most other states embraced the practice when the common law was adopted as the prevailing legal system in this country.[24]

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COMMON LAW § 1837 (Chadbourn rev. ed. 1976)); Braswell v. Wainwright, 330 F. Supp. 281, 283 n.1 (S.D. Fla. 1971) ("The historical origin of 'The Rule' may not be clearly known. But Daniel's effective use of the practice in the trial of Susanna suggests the genesis of this practice.") (citing *Daniel* 13:51-59 (New American)).

[21] The biblical event has been recounted in countless judicial decisions. *See, e.g.*, Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996); Frideres v. Schiltz, 150 F.R.D. 153, 158 (S.D. Iowa 1993); Lopez v. House of Coffee, Inc., 753 A.2d 755, 755 (N.J. Super. Ct. Ch. Div. 1998). In one such instance, it was summarized in the following manner:

> The story of Susanna is familiar. Her accusers testified in the presence of each other to her guilt. She was about to be condemned when Daniel interposed, saying: "Put these two aside, one far from the other, and I will examine them." His examination disclosed such discrepancies in their testimony as resulted in the release of Susanna and the condemnation of her accusers.

Bishop v. State, 194 S.W. 389, 389 (Tex. Crim. App. 1917).

[22] *See* United States v. Brewer, 947 F.2d 404, 409 (9th Cir. 1991); Kansas v. Heath, 957 P.2d 449, 471 (Kan. 1998). *See generally* State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 6 (Ariz. 1961) ("In the dark days of the middle ages, when civilization was overrun by barbarians, the Germanic law was purely local. There was no written body of decisions or laws to establish precedent or uniformity . . . .").

[23] *See Brewer*, 947 F.2d at 409 ("[T]his procedure was followed 'in the time of those earlier modes of trial which preceded the jury . . . .'") (quoting 6 WIGMORE, *supra* note 20 § 1837, at 456); Grab *ex rel.* Grab v. Dillon, 103 S.W.3d 228, 234 (Mo. Ct. App. 2003) ("As trial by jury gained popularity as a mode of trial in England after the 1400s and reliance by jurors on the testimony of witnesses became paramount, it was quite natural that the practice of excluding witnesses under certain conditions would be continually applied in English courts.").

[24] *See* State v. Christensen, 508 P.2d 366, 369 (Ariz. App. 1973) ("The exclusionary

An Arizona court first discussed the sequestering of witnesses in a reported decision well over a century ago.[25] In *Territory of Arizona v. Dooley*,[26] the Arizona Territorial Supreme Court held that the exclusion of witnesses from the courtroom during the testimony of other witnesses was a matter committed to the trial court's discretion.[27] The courts of most other states shared this view,[28] which prevailed in Arizona until 1977, when the state's courts, following the federal example,[29] codified the practice in a formal evidentiary rule.[30]

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'rule' followed by Arizona trial courts is of common law origin . . . ."). *See generally* Drilex Sys., Inc. v. Flores, 1 S.W.3d 112, 116 (Tex. 1999) ("English courts incorporated sequestration long ago, and the practice came to the United States as part of our inheritance of the common law.").

[25] One state court noted that "[m]ost of the reported opinions involve appeals from trial court decisions to sequester witnesses in criminal cases." Morton Bldgs., Inc. v. Rezultz, Inc., 603 A.2d 946, 949 (N.J. 1992); *see also* Aetna Cas. & Sur. Co. v. Braud, 327 So.2d 183, 186 (La. Ct. App. 1976) ("The law on sequestration is found mostly in the criminal law . . . ."). However, "[t]he rule of sequestration articulated in criminal cases applies equally in a civil case." *In re* Gen. Election of Nov. 5, 1991, 605 A.2d 1164, 1186 (N.J. Super. Ct. Law Div. 1992).

[26] 78 P. 138 (Ariz. 1889).

[27] *See id*. at 138.

[28] *See* Hampton v. Virginia, 58 S.E.2d 288, 297 (Va. 1950) ("A majority of the states . . . adopted the English custom . . . that exclusion, separation and sequestration of witnesses is a matter not of right, but within the sound judicial discretion of the trial court.").

[29] *See* Lapenna v. Upjohn Co., 665 F. Supp. 412, 414 (E.D. Pa. 1987) ("Rule 615 [of the Federal Rules of Evidence] is a codification of the long established practice of sequestering witnesses to discourage or expose fabrication, inaccuracy, and collusion.").

[30] *See* ARIZ. R. CRIM. P. 9.3 cmt. (1989 amendment) ("Prior to the adoption of the Arizona Rules of Evidence in 1977, the rule in Arizona was that sequestration of witnesses lay within the sound discretion of the trial court.").

Arizona's version of the witness sequestration rule is now set forth in Rule 615 of the Arizona Rules of Evidence.[31] Rule 615 was patterned after, and is virtually identical to, a comparable rule of the same number adopted by the federal courts two years earlier.[32] Like its federal counterpart,[33] the Arizona rule differs from its common law antecedent by making the sequestration of witnesses mandatory when requested by one of the parties,[34] rather than leaving the matter to the trial court's discretion.[35]

III. Judicial Disagreement Over the Rule's Application During Discovery

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[31] The rule states in relevant part: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." ARIZ. R. EVID. 615; *see also* State v. Jones, 917 P.2d 200, 212 & n.1 (Ariz. 1996) (noting that Arizona's witness sequestration rule has been "codified at [R]ule 615")

[32] *See* Kosidlo v. Kosidlo, 607 P.2d 15, 18 (Ariz. App.) ("The source of our Rule 615 is the counterpart federal rule."), *disapproved on other grounds*, 607 P.2d 1 (Ariz. 1979). *See generally* State v. Malloy, 639 P.2d 315, 316 (Ariz. 1981) ("The Arizona Rules of Evidence are patterned on the Federal Rules of Evidence.").

[33] *See* United States v. Johnston, 578 F.2d 1352, 1355 (10th Cir. 1978) ("Rule 615 changes the law and now makes exclusion demandable by a litigant as of right, instead of being merely discretionary with the trial court, . . . with stated exceptions as to certain persons.").

[34] Parties typically request sequestration at the beginning of trial. *See, e.g.*, State v. Van Reeden, 454 P.2d 149, 150 (Ariz. 1969); State v. Martinez, 198 P.2d 115, 117 (Ariz. 1948); State v. Christensen, 508 P.2d 366, 368 (Ariz. App. 1973). However, "[t]here is no general rule that exclusion must be demanded at a particular time or the availability diminishes." State v. Edwards, 739 P.2d 1325, 1331 (Ariz. App. 1986); *see also* Wood v. Sw. Bell Tel. Co., 687 F.2d 1188, 1194 (8th Cir. 1981) ("Rule 615 does not specifically require that the exclusionary request be made at any particular stage of the trial.").

[35] *See* State v. Wilson, 914 P.2d 1346, 1351 (Ariz. App. 1996) ("At the request of a party, Rule 615 of the Arizona Rules of Evidence requires the trial court to exclude witnesses during the testimony of other witnesses . . . .").

Although the witness sequestration rule applies during both civil and criminal cases,[36] the Arizona and federal versions of Rule 615 are silent as to the sequestering of witnesses during pretrial discovery.[37] However, the state evidence rules by their terms apply only in "proceedings in courts in the State of Arizona,"[38] and the federal rules correspondingly apply in "proceedings in the courts of the United States."[39] Depositions and other pretrial discovery proceedings may not be considered court proceedings for these purposes,[40] primarily because no adjudications take place in the discovery setting.[41]

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[36] *See* ARIZ. R. CRIM. P. 9.3 cmt. (1989 amendment) ("[T]he trial court in both civil and criminal cases no longer has discretion and sequestration is a matter of right."). *See generally* Wilson v. Riley Whittle, Inc., 701 P.2d 575, 582 (Ariz. App. 1984) ("[T]he rules of evidence apply equally to civil cases as well as criminal cases.").

[37] *See, e.g.*, S. Robert Allcorn, *Overcoming Separation Anxiety: How to Convince a Court to Allow Sequestration During Depositions*, 151 N.J.L.J. 493, 493 (Feb. 2, 1998) (noting that the federal rule "does not expressly state whether it is limited to trials or whether it may also be invoked at pretrial depositions"). The South Dakota rule, by contrast, expressly provides for the sequestering of witnesses at a "trial, hearing or deposition." Johnson v. Weber, No. Civ. 05-4062, 2006 WL 704842, at *19 (D.S.D. Mar. 20, 2006) (quoting S.D. CODIFIED LAWS § 19-14-29).

[38] ARIZ. R. EVID. 101.

[39] FED. R. EVID. 101.

[40] *See, e.g.*, Morris v. Comm'r, 65 T.C. 324, 326 n.3 (1975) ("[T]he Federal Rules of Evidence govern the proceedings of this Court, not its pretrial discovery procedures.") (citing FED. R. EVID. 101); United States v. Byard, 29 M.J. 803, 809 n.21 (A.C.M.R. 1989) ("[A] deposition is not in a strict sense a 'court' proceeding."); State *ex rel.* Dean v. City Ct., 844 P.2d 1165, 1166-67 (Ariz. App. 1992) (indicating that a "court proceeding" is "'a hearing, argument or other matter scheduled by or held before a trial court, but does not include a deposition'") (quoting ARIZ. REV. STAT. ANN. § 13-4401.7).

[41] *See* State *ex rel.* Corbin v. Sorich, 609 P.2d 601, 603 (Ariz. App. 1980) ("[R]ule 615 of the Federal Rules of Evidence . . . only comes into play in adjudicatory proceedings."); *cf.* Cook v. Arkansas, 623 S.W.2d 820, 822 (Ark. 1981) ("The rule is only applicable during an evidentiary hearing presided over by the court and there is no requirement to sequester witnesses by either party during the investigation or preparation of a case.").

Nevertheless, Rule 615 appears to apply in state court depositions by virtue of Rule 30(c) of the Arizona Rules of Civil Procedure, which provides that depositions are to be conducted under the same evidentiary rules applicable during trials.[42] This provision reflects the view that the judicial truth-seeking process, which is implicated during discovery no less than it is at trial,[43] is best served when the rules of evidence are applied in all testimonial proceedings.[44]

Although no Arizona cases have addressed the issue,[45] cases construing Rule 30(c)'s federal counterpart may provide guidance in analyzing Rule 615's

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*See generally* Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867, 872 n.4 (Fla. Dist. Ct. App. 1979) ("[T]he taking of a deposition itself can hardly be categorized as a judicial proceeding for the simple reason that there is no judge present, and no rulings nor adjudications of any sort are made by any judicial authority.").

[42] *See* ARIZ. R. CIV. P. 30(c) ("Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Arizona Rules of Evidence."); *cf*. 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6243, at 56 (1997) ("Rule 615 typically is invoked at trial. But since witnesses also give testimony at depositions, Rule 615 could be construed to apply in that context as well.").

[43] *See generally* REP MCR Realty, L.L.C. v. Lynch, 363 F. Supp. 2d 984, 1011 (N.D. Ill. 2005) ("Our entire civil justice system is dependent on accurate and truthful discovery.") (quoting Quela v. Payco-Gen. Am. Credits, Inc., No. 99 C 1904, 2000 WL 956681, at *7 (N.D. Ill. May 18, 2000)).

[44] *See* Guam v. Santos, 1999 Gaum 1, 7 ¶ 20 ("Rule 615 [is] a procedural rule designed to enhance the search for the truth and [goes] directly to the fairness of the proceeding. Consequently, in order to protect the integrity and fairness of the proceedings, trial courts may employ the procedural safeguards of the Rules of Evidence.") (footnote and citation omitted). *See generally* Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 560 (N.D. Okla. 1995) ("The belief that the rules of evidence and procedure utilized by the courts during trial are the best means yet devised to ascertain the truth is central to our civil justice system.").

[45] *See supra* note 8 and accompanying text.

application in state court discovery proceedings.[46] Unfortunately, the most closely analogous federal cases, which arose under a version of Rule 30(c) virtually identical to the current Arizona rule,[47] were split on the question of whether the witness sequestration rule applies during discovery.[48] Thus, the federal cases may provide only limited assistance in interpreting the corresponding Arizona rules.[49]

*BCI Communication Systems, Inc. v. Bell Atlanticom Systems, Inc.*[50] is the federal case most often cited by courts refusing to sequester witnesses during discovery.[51]

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[46] *See generally* Ritchie v. Grand Canyon Scenic Rides, 799 P.2d 801, 803 (Ariz. 1990) ("Whenever feasible our courts have looked to the origin and interpretation of federal counterparts for guidance in construing the Arizona rules.").

[47] Prior to 1993, the Arizona rule mirrored its federal counterpart, which stated that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." BCI Commc'n Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 156 n.1 (N.D. Ala. 1986) (quoting former version of FED. R. CIV. P. 30(c)). However, the federal rule was amended in 1993 to exclude Rule 615 from the evidence rules applicable in depositions. *See* Tuszkiewicz v. Allen Bradley Co., 170 F.R.D. 15, 16 (E.D. Wis. 1996). The impact of this amendment is discussed in Sections IV and V, *infra.*

[48] *See* Solar Turbines, Inc. v. United States, 14 Cl. Ct. 551, 553 (1988) ("There is some disagreement among the courts as to whether Rule 615 only permits the exclusion of a witness while another witness is testifying at trial, or whether it also applies to exclude a potential witness from the oral deposition of another witness."); Pryor Auto. Supply, Inc. v. Estate of Edwards, 815 P.2d 202, 204 (Okla. Ct. App. 1991) ("[I]t appears that federal authority is split on the application of Rule 615 to discovery matters . . . .").

[49] *See* United States v. Johnson, 225 F. Supp. 2d 982, 997 (N.D. Iowa 2002) (observing that a "split of authority provides no particular guidance"); Minnesota v. Alpine Air Prods., Inc., 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) (observing that "federal precedents may be . . . contradictory . . . and therefore not helpful" in applying state law), *aff'd*, 500 N.W.2d 788 (Minn. 1993).

[50] 112 F.R.D. 154 (N.D. Ala. 1986).

[51] *See, e.g.*, Lee v. Denver Sheriff's Dep't, 181 F.R.D. 651, 653 (D. Colo. 1998) (citing *BCI* for the proposition that "Rule 615 does not apply to depositions"); *Pryor Auto. Supply*, 815 P.2d at 204 (relying on "the rationale of *BCI*" to hold that the witness sequestration rule "is *not* applicable to discovery matters").

In *BCI*, the defendants sought to exclude potential witnesses from the depositions of other witnesses, arguing that when read in light of Rule 30(c), Rule 615 required the sequestering of witnesses during pretrial depositions.[52] Despite acknowledging the existence of support for this argument in *Williams v. Electronic Control Systems, Inc.*,[53] the *BCI* court concluded that the weight of authority did not support the application of Rule 615 during federal depositions.[54]

The *BCI* court relied in particular on *Skidmore v. Northwest Engineering Co*.[55] in holding that a party cannot invoke Rule 615 to sequester witnesses as a matter of right during discovery.[56] The *Skidmore* court refused to exclude an expert witness from the depositions of other witnesses,[57] and the *BCI* court concluded that the automatic exclusion of non-experts is also prohibited by the language of Rule 26(c) of the Federal Rules of Civil Procedure[58] purporting to require a court order, and a finding of good cause, before persons can be prohibited from attending federal discovery proceedings.[59]

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[52] *See BCI Commc'n Sys.*, 112 F.R.D. at 155.

[53] 68 F.R.D. 703 (E.D. Tenn. 1975).

[54] *See BCI Commc'n Sys.*, 112 F.R.D. at 156-57 ("The argument . . . that defendants are entitled, *as a matter of right* . . . to invoke 'the Rule of Sequestration' or 'The Rule' in oral depositions is not supported either by the Federal Rules of Civil Procedure or by case law."). The *BCI* court asserted that the *Williams*' court's contrary conclusion was not necessary to the decision in that case, and specifically declined "to accept *Williams* as authoritative or persuasive." *Id*. at 158.

[55] 90 F.R.D. 75 (S.D. Fla. 1981).

[56] *See BCI Commc'n Sys.*, 112 F.R.D. at 159.

[57] *See Skidmore*, 90 F.R.D. at 76-77.

[58] FED. R. CIV. P. 26(c).

[59] *See BCI* Commc'n Sys., 112 F.R.D at 159 ("[T]he burden is on the party seeking to

The contrary view is represented by *Lumpkin v. Bi-Lo, Inc.*,[60] a case expressly rejecting the *BCI* court's extension of Rule 26(c)'s good cause requirement to non-expert witnesses.[61] The *Lumpkin* court acknowledged that an expert witness could be excluded from other witnesses' depositions only upon a showing of good cause.[62] However, the court asserted that this was because experts are excluded from the operation of Rule 615,[63] and not because the rule was inapplicable during discovery.[64] Until Rule 30(c) was amended in 1993 "specifically to exclude Rule 615" from the evidence rules

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exclude anyone from [a] deposition . . . of showing good cause for the exclusion; and . . . to obtain an order of the court before the exclusion can occur.") (emphasis omitted).

[60] 117 F.R.D. 451 (D. Utah 1987).

[61] *See id*. at 453 n.1 ("[T]his court disagrees with the reasoning in *BCI* which expands the good cause requirement from expert witnesses to other witnesses who do not fall within one of the exceptions to sequestration."); *cf.* Adams v. Shell Oil Co., 136 F.R.D. 615, 617 (E.D. La. 1991) ("If a deponent does not fall within one of [the] exceptions to sequestration, then Rule 615's mandatory rule of sequestration applies").

[62] *See Lumpkin*, 117 F.R.D. at 453 n.1; *cf. Adams*, 136 F.R.D. at 617 ("Sequestration of an expert witness . . . is not authorized by Rule 615(3), but such a person may be excluded from a deposition pursuant to Rule 26(c)(5) for good cause shown.") (discussing *Skidmore*).

[63] The rule specifically "does not authorize exclusion of . . . a person whose presence is shown by a party to be essential to the presentation of the party's case . . . ." FED. R. EVID. 615(3); *cf.* Lisanti v. Lubetkin (*In re* Lisanti Foods, Inc.), 329 B.R. 491, 512 (D.N.J. 2005) (relying on *Skidmore* in holding that the witness sequestration rule applies in depositions, while acknowledging that it does not authorize "the exclusion of experts needed to advise counsel"), *aff'd*, 241 Fed. Appx. 1 (3d Cir. 2007).

[64] *See Lumpkin*, 117 F.R.D. at 453 n.1. Natural parties and designated representatives of corporate parties are also exempt from the operation of the witness sequestration rule. *See* United States v. Rhynes, 218 F.3d 310, 318 n.8 (4th Cir. 2000); United States v. Mechor, 879 F.2d 945, 953 (1st Cir. 1989). Thus, like experts, they can be excluded from other witnesses' depositions only upon a showing of good cause under Rule 26(c). *See Adams*, 136 F.R.D. at 617.

applicable during depositions,[65] most courts considering the issue adopted the *Lumpkin* court's view and held that Rule 615 applied in federal depositions.[66]

IV. The 1993 Amendment of Federal Rule 30(c)

Despite considerable lower court support for sequestering witnesses in depositions,[67] the Supreme Court amended the federal version of Rule 30(c) in 1993 to exclude both Rule 103[68] and Rule 615 from the evidentiary rules applicable in depositions.[69] In doing so, the Court effectively resolved the judicial disagreement over

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[65] Tuszkiewicz v. Allen Bradley Co., 170 F.R.D. 15, 16 (E.D. Wis. 1996).

[66] *See, e.g.*, *Lisanti*, 329 B.R. at 512 ("Rule 615 is primarily directed at the exclusion of witnesses at trial, but also applies to depositions."); Marks v. Powell (*In re* Marks), 135 B.R. 344, 345 (Bankr. E.D. Ark. 1991) ("This Court follows the reasoning set forth [in] *Lumpkin* . . . and finds that Rule 615, Federal Rules of Evidence, applies during depositions."); *Adams*, 136 F.R.D. at 617 n.1 (citing *Lumpkin* for the proposition that "Federal Rule of Evidence 615 applies to pre-trial depositions").

[67] *See, e.g.*, Royal Travel, Inc. v. Shell Mgmt. Haw., Inc., No. 08-00314 JMS-LEK, 2009 WL 649929, at *4 (D. Haw. Mar. 12, 2009) ("Most fact witnesses are not allowed to be present at other witnesses' depositions."); *see also* Andrew W. Bogue, *Discovery: A Judge's Perspective*, 33 S.D. L. REV. 199, 201 (1987/88) ("It has long been the practice in many areas that non-parties may be excluded from the deposition."); Stephen P. Groves, *Depositions and Interrogatories Under the Federal Rules of Civil Procedure: Before and After the 1993 Amendments*, 29 TORT & INS. L.J. 483, 492 (1994) ("Under current practice, a nonparty witness generally is excluded from the deposition of another witness.").

[68] Rule 103 "governs rulings that admit or exclude evidence." United States v. Fountain, 642 F.2d 1083, 1088 (7th Cir. 1981). It has no logical application in depositions because there ordinarily "is no judge there to rule on objections or admissibility." *In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 620 (D. Nev. 1998). Thus, even before its amendment in 1993, Rule 30(c) provided that rulings on the admissibility of evidence objected to during a deposition are "reserved for trial." Gall v. St. Elizabeth Med. Ctr., 130 F.R.D. 85, 86 (S.D. Ohio. 1990) (quoting FED. R. CIV. P. 30(c)).

[69] *See In re* Terra Int'l, Inc., 134 F.3d 302, 306 (5th Cir. 1998); Campinas Found. v. Simoni, 65 Fed. R. Evid. Serv. 1103, 1107 (S.D.N.Y. 2004). *See generally* McDonough v. Keniston, 188 F.R.D. 22, 24 (D.N.H. 1998) ("Except as to Fed.R.Evid. 103 and 615 a deposition examination is to proceed as permitted at trial.") (citing FED. R. CIV. P. 30(c)).

Rule 615's applicability in depositions in favor of the minority view represented by *BCI Communications Systems.*[70] As a result, witnesses are no longer automatically excluded from federal depositions at the request of a party,[71] although federal courts retain the authority to exclude a witness from the deposition of another witness under Rule 26(c).[72]

The district courts' authority to exclude witnesses from depositions under Rule 26(c) has been analogized to the procedure for sequestering witnesses at trial under Rule 615.[73] However, in contrast to a court's relatively unfettered discretion to order sequestration at trial even when it has not been requested by either of the parties,[74] a party

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[70] *See* Wisconsin *ex rel.* Block v. Circuit Ct., 610 N.W.2d 213, 218 ¶ 18 (Wis. Ct. App. 2000) (Fine, J., dissenting) (asserting that the "1993 amendment to Rule 30(c) of the Federal Rules of Civil Procedure . . . overturned the then universal [sic] interpretation that [Rule] 615 applied to depositions"); *cf.* Steven M. Zager, *Invoking the Rule of Sequestration of Witnesses During Discovery in Civil Litigation*, 62 TEX. B.J. 662, 662 (1989) ("A minority of federal courts . . . held that the Federal Rules of Civil Procedure allow the exclusion of persons from depositions only upon a showing of good cause under Rule 26(c)(5) by the party desiring exclusion.").

[71] *See* FED. R. CIV. P. 30(c) advisory committee's note (1993 amendments) ("[T]he revision addresses a recurring problem as to whether other potential deponents can attend a deposition. . . . The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party.").

[72] *See id.* ("Exclusion . . . can be ordered under Rule 26(c)(5) when appropriate . . . ."); Jones v. Circle K Stores, Inc., 185 F.R.D. 223, 224 (M.D.N.C. 1999) ("In 1993, Rule 30(c) of the Federal Rules of Civil Procedure was amended to make clear that deposition witnesses are not subject to sequestration as a matter of course. . . . Instead, exclusion requires that the court grant a protective order pursuant to Rule 26(c)(5).").

[73] *See, e.g.*, Clark v. Levine (*In re* Levine), 101 B.R. 260, 262 (Bankr. D. Colo. 1984) ("Rule 26(c)(5) . . . and Rule 615 . . . each provide for exclusion of witnesses under certain circumstances at either depositions or at trial."); Stortz *ex rel.* Stortz v. Seier, 835 S.W.2d 540, 542 (Mo. Ct. App. 1992) (observing that "Federal Rule 26(c)(5) and its Missouri counterpart . . . provide 'that discovery be conducted with no one present except persons designated by the court,'" and these provisions are "consistent with Federal Rule of Evidence 615 which, with some exceptions, gives a litigant the right to have witnesses excluded from the courtroom").

[74] Because a court can order sequestration "of its own motion" under both the federal and

must make a showing of good cause before a potential witness can be excluded from the deposition of another witness under Rule 26(c).[75]

Courts construing Rule 26(c) have held that a party seeking to satisfy this burden cannot rely on speculative assertions of potential harm.[76] In particular, "a conclusory allegation or inchoate fear that witnesses who attend each other's depositions will tailor their testimony" does not constitute good cause for excluding witnesses from depositions.[77] A party seeking to sequester witnesses during federal depositions instead must present "distinct facts that would lead the court to conclude that the witnesses cannot be trusted to tell the truth or that their attending each other's depositions will otherwise affect their testimony."[78]

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Arizona versions of Rule 615, the sequestration of witnesses at trial continues to be committed to the court's discretion when neither party has requested it. *See* United States v. Casas, 356 F.3d 104, 126 (1st Cir. 2004); Allison v. Ovens, 421 P.2d 929, 934 (Ariz. App. 1966), *aff'd in part and vacated in part on other grounds*, 433 P.2d 968 (Ariz. 1967).

[75] *See* New York v. Microsoft Corp., 206 F.R.D. 19, 22 (D.D.C. 2002) ("[T]he party seeking to exclude others from pretrial discovery must establish that good cause exists for such exclusion.").

[76] *See Jones*, 185 F.R.D. at 224 ("Rule 26(c)'s requirement of a showing of 'good cause' to support the issuance of a protective order . . . ['contemplates a *particular and specific demonstration of fact* as distinguished from stereotyped and conclusory statements.'") (quoting *In re* Terra Int'l, Inc., 134 F.3d 302, 306 (5th Cir. 1998)); Frideres v. Schiltz, 150 F.R.D. 153, 156 (S.D. Iowa 1993) ("The party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one.").

[77] Veress v. Alumax/Alcoa Mill Prods., Inc., 88 Fair Empl. Prac. Cas. (BNA) 1689, 1690 (E.D. Pa. 2002) (citing cases); *see also* Campinas Found. v. Simoni, 65 Fed. R. Evid. Serv. 1103, 1108 (S.D.N.Y. 2004) ("An allegation of potential collusion of testimony, without more, does not satisfy the 'good cause' standard that must be met before a court would be warranted in issuing a protective order, pursuant to Fed.R.Civ.P. 26(c).").

[78] Tuszkiewicz v. Allen Bradley Co., 170 F.R.D. 15, 17 (E.D. Wis. 1996); *cf.* Helfferich

This interpretation of the rule essentially precludes the sequestering of witnesses during federal discovery proceedings.[79] Professor Henry Wigmore, perhaps this country's foremost evidence scholar and a forceful proponent of the witness sequestration rule,[80] noted more than a century ago that the nature of the evil the rule is intended to prevent -- collusive or perjured testimony[81] -- makes it virtually impossible for a party to establish the need (or, in Rule 26(c) parlance, "good cause")[82] for its application.[83] The difficulty is particularly acute in the deposition context, where the

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v. Farley, 419 A.2d 913, 914 (Conn. Super. Ct. 1980) ("The defendants have not presented adequate grounds to lead the court to the conclusion that perjury would be committed in this case if the motion for separate depositions was not granted.").

[79] *See* United States v. Jackson, 60 F.3d 128, 136 (2d Cir. 1995) ("[P]lacing the burden of persuasion on the movant virtually demands the impossible; only with 20/20 hindsight could a party demonstrate what would have been said had a witness been sequestered."); United States v. Farnham, 791 F.2d 331, 335 (4th Cir. 1986) ("[A party] would find it almost impossible to sustain the burden of proving the negative inference that [a witness's] testimony would [be] different [if] he [were] sequestered. A . . . requirement of this sort . . . would swallow a rule carefully designed to aid the truth-seeking process.").

[80] *See* United States v. Brown, 547 F.2d 36, 37 (3d Cir. 1976) (describing Wigmore as "a strong advocate of mandatory sequestration"); Dunlap v. Reading Co., 30 F.R.D. 129, 130 (E.D. Pa. 1962) (discussing "the strong stand [in favor of sequestering witnesses] taken by Wigmore, whose views on evidence have so deeply influenced American courts").

[81] *See generally Farnham*, 791 F.2d at 335 ("[T]he sequestration of witnesses effectively discourages and exposes fabrication, inaccuracy, and collusion."); Saul v. Saul, 1 Pa. D. & C. 2d 486, 487 (C.P. Phila. County 1954) (observing that sequestration "prevents successful perjury, [and] conscious or unconscious collusion").

[82] *See In re* Terra Int'l, Inc., 134 F.3d 302, 306 (5th Cir. 1998) ("Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that the burden is upon the movant to show the *necessity* of its issuance . . . .") (emphasis added; internal punctuation and citation omitted).

[83] *See* John H. Wigmore, *Sequestration of Witnesses*, 14 HARV. L. REV. 475, 485 (1901):

party conducting the examination may have little advance notice of the deponent's likely testimony.[84]

In the trial context, this problem was eliminated by the federal courts' adoption of Rule 615.[85] The rule reflects Wigmore's view that sequestration should be demandable as a matter of right,[86] and thus requires the sequestering of witnesses in all

> [N]ot even the claimant himself can know that [sequestration] will do him service; he can merely hope for its success. . . . To require him to show some probable need to the judge, and to leave to the latter the estimation of the need, is to misunderstand the whole virtue of the expedient, and to deny it in perhaps that very situation of forlorn hope and desperate extreme when it is most valuable . . . .

[84] *See* Thompson v. Comm'r, 92 T.C. 486, 496 (1989) ("When the witness has not yet testified, it is more difficult to determine if the party [seeking sequestration] will suffer actual prejudice."); Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571, 578 (Fla. Dist. Ct. App. 1985), *approved*, 504 So.2d 378 (Fla. 1987):

> Usually and for obvious reasons . . . discovery depositions are aimed at hostile witnesses . . . that refuse to cooperate with counsel or his investigator seeking information. . . . [T]he point is that counsel cannot know in advance, except by way of possible speculation and conjecture, what the witness knows and the scope of the [witness' potential] testimony. Under these circumstances counsel . . . would have no way of satisfying the . . . test [for a protective order].

[85] *See* Virgin Islands v. Edinborough, 625 F.2d 472, 474-75 (3d Cir. 1980) ("While the party desiring sequestration previously had to convince the court to grant it, under Rule 615 sequestration must be given unless the party opposing the exclusion has convinced the court to exercise its discretion to exempt a particular witness from the sequestration order . . . .").

[86] *See* United States v. Ell, 718 F.2d 291, 292 (9th Cir. 1983) ("The rule makes the exclusion of witnesses a matter of right and the decision is no longer committed to the court's discretion as it once was."); NLRB v. Stark, 525 F.2d 422, 428-29 (2d Cir. 1975) ("[T]he principle in the federal courts prior to enactment of the Federal Rules of Evidence . . . was that it was grantable in the discretion of the trial judge. . . . Now Rule 615 has adopted Wigmore's principle of mandatory exclusion . . . .").

but the most exceptional circumstances.[87] However, most federal courts now impose on parties seeking to sequester deposition witnesses a burden that is directly at odds with Rule 615's presumption in favor of sequestration,[88] and with the important truth-seeking objectives served by the latter rule.[89] State courts in Arizona and other jurisdictions should not make the same mistake.[90]

V. State Court Responses to the Federal Amendment

In response to the 1993 amendment of Federal Rule 30(c), the courts in

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[87] *See Stark*, 525 F.2d at 430 ("[T]he presumption in favor of sequestration . . . could be rebutted, if at all, only by a particularized showing of need for [witnesses] to hear each other's evidence -- a showing we find extremely hard to visualize."); *cf.* Babcock v. Alaska, 685 P.2d 721, 724 (Alaska Ct. App. 1984) ("Only in exceptional circumstances are there sufficient reasons for denying exclusion.") (quoting ALASKA R. EVID. 615 commentary).

[88] One federal district court, apparently dissatisfied with the currently prevailing federal approach, has adopted a local rule stating that, with certain specified exceptions, "[a]ny person other than the witness being deposed . . . shall, at the request of counsel for any party, or the witness, be excluded from the hearing room while the deposition of any person is being taken." D. CONN. L. CIV. R. 30(a); *cf.* United States v. Magana, 127 F.3d 1, 5 n.5 (1st Cir. 1997) ("[A] district court may find it advisable to promulgate, by local rule or otherwise, standard terms for witness sequestration orders.").

[89] *See* Skidmore v. Nw. Eng'g Co., 90 F.R.D. 75, 76 (S.D. Fla 1981) ("The burden contemplated by the procedure rule[] . . . conflicts with the burden set by the evidentiary rule[]."); *cf.* United States v. Jackson, 60 F.3d 128, 136 (2d Cir. 1995) ("[P]lacing the . . . burden on the party . . . oppos[ing] sequestration is consistent with Rule 615's express presumption in favor of sequestration."). *See generally* Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996) ("Because of its important role in reaching the truth, Rule 615 carries a presumption favoring sequestration.").

[90] *See, e.g.,* Dardashti v. Singer, 407 So.2d 1098, 1100 (Fla. Dist. Ct. App. 1982) ("[F]ailure to exclude [a witness upon request] will only be countenanced in extra ordinary circumstances. . . . [T]here is no reason why [these] strictures should not pertain equally to pre-trial depositions in a civil matter and we so apply them."); *see also* Grace v. Delaware, 314 A.2d 169, 170 n.2 (Del. 1973) ("Many states have adopted a policy favoring sequestration whenever possible. In other words, a presumption is created in favor of allowing it, which may be rebutted by showing 'good cause' or sound reasoning for refusal.").

some states amended their own versions of the rule to conform to the revised federal rule.[91] However, the Arizona Supreme Court did not amend its version of Rule 30(c) to reflect the federal amendment,[92] despite the Arizona courts' traditional desire for uniformity in the interpretation and application of state and federal procedural law.[93] Arizona's failure to follow the federal lead appears to have been intentional,[94] and suggests that Rule 615 still applies in state court depositions in Arizona.[95]

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[91] *See, e.g.,* ALA. R. CIV. P. 30(c) committee cmts. (Jan. 1, 1996 amendment):

> Because Rule 103, Ala.R.Evid., addresses trial procedures (e.g., timely objections and offers of proof) that are not necessarily applicable to pretrial discovery and because . . . Rule 615 is intended to apply only at trial and not to pretrial discovery, a provision was added [to Alabama Rule 30(c)] stating specifically that these rules are not applicable to pretrial discovery.

[92] *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Court*, 3 NEV. L.J. 354, 362-63 (2003) ("The rules of civil procedure in Arizona vary in their present conformity to the federal model. Some rules have been revised to track recent [federal] amendments, while others have remained unchanged. . . . Arizona Rules 30 and 33 were revised in 1996, but do not conform to the 1993 versions of their federal counterparts.").

[93] *See* Orme Sch. v. Reeves, 802 P.2d 1000, 1003 (Ariz. 1990) ("[U]niformity in interpretation of our rules and the federal rules is highly desirable."); Bayham v. Funk, 413 P.2d 279, 280 (Ariz. App. 1966) ("The coordination of the two sets of rules gives Arizona lawyers a body of case law when searching for rule interpretation and a greater facility in the trial of cases in both the federal and the State Courts.").

[94] When the Arizona Supreme Court has agreed with prior federal amendments, the corresponding Arizona rules have been amended "to keep pace with the Federal Rule changes." *Bayham*, 413 P.2d at 280.

[95] *See generally* Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615, 627 (2002):

> The Arizona Supreme Court maintained a discovery system closely modeled on the federal approach and essentially premised the Arizona Rules of Civil Procedure governing discovery on the federal analogues for a half-century. The Arizona Supreme Court . . . departed from this practice in

This conclusion is all but compelled by the Arizona Supreme Court's amendment of several other state procedural rules in 1996 to bring them "into greater conformity with their counterparts in the Federal Rules of Civil Procedure, as the latter had been amended in 1993."[96] The fact that the court did not amend Arizona's version of Rule 30(c) at that time presumably reflects the court's rejection of the revised federal rule,[97] and mirrors the unenthusiastic reception the federal amendment received in several other states.[98]

For example, shortly after the federal rule was amended, the Wyoming Supreme Court revised Wyoming's version of Rule 30(c) to exclude Rule 103, but not Rule 615, from the evidentiary rules applicable in depositions.[99] The reporter for the

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> meaningful ways during the 1990s . . . . [T]he [amended] Arizona provisions differed somewhat from the federal changes apparently because of dissatisfaction with the federal modifications . . . .

[96] Maher v. Urman, 124 P.3d 770, 774 ¶ 9 (Ariz. App. 2005) (quoting DANIEL J. MCAULIFFE, ARIZONA CIVIL RULES HANDBOOK 36 (2005 ed.)); *see also* Anthony R. Lucia, *The Creation and Evolution of Disclosure in Arizona*, 16 REV. LITIG. 255, 256 n.2 (1997) ("[M]ost of the . . . 1993 amendments to the Federal Rules were adopted by the Arizona Supreme Court, effective December 1, 1996.").

[97] *See generally* Harbel Oil Co. v. Steele, 298 P.2d 789, 792 (Ariz. 1956) ("["T]here are instances where Arizona practice differs materially from that of the federal district courts, and necessarily so.").

[98] Maine's version of Rule 30(c), for example, continues to provide that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Maine Rules of Evidence." ME. R. CIV. P. 30(c). *See generally* Main, *supra* note 15, at 78 ("States that adopted all or substantially all of the Federal Rules for their state practice have not kept pace with all of the subsequent amendments to the Federal Rules.").

[99] *See* Joel L. Selig, *The 1994 Amendments to the Wyoming Rules of Civil Procedure*, 30 LAND & WATER L. REV. 151, 168 (1995):

committee that advised the court in connection with the amendment, Professor Joel Selig,[100] explained that the resulting difference in the state and federal rules confirms that the witness sequestration rule applies in state court discovery proceedings.[101] The same may be true in other states that chose not to adopt the federal amendment,[102] including Florida,[103] Arkansas,[104] and Colorado.[105] In these states, as in Wyoming and Arizona,[106]

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> The unamended Federal/Wyoming Rule 30(c) provided that "examination of and cross-examination of (deposition) witnesses may proceed as permitted at the trial under the provisions of the Federal/Wyoming Rules of Evidence." The 1993 FRCP amendments add: "except Rules 103 and 615." The 1994 WRCP amendments add only: "except Rule 103."

[100] *See id.* at 151 n.1, 154 (noting that Professor Selig was the reporter for the committee that assisted the Wyoming Supreme Court in revising the Wyoming rules to reflect the 1993 federal amendments "to the extent considered appropriate and desirable for Wyoming civil practice").

[101] *See id.* at 169 ("The Wyoming amendment, by mentioning Evidence Rule 103 but not Evidence Rule 615, adopts the . . . philosophy, thought to be reflected in Wyoming custom and practice, of allowing any party the unfettered discretion to invoke The Rule in the same circumstances and to the same extent as at trial.").

[102] *See generally id.* at 154 ("The process of federal amendment and [state] review is a continuous federal-state interaction. Tinkering at the federal level seems never to cease and states . . . are obligated to decide to what extent they wish to adopt the federal amendments.").

[103] *See* Joseph E. Brooks, "*Invoking the Rule" at Depositions*, 23 No. 3 TRIAL ADVOC. Q. 12, 13 (2004) ("Proponents of the application of the rule of sequestration to depositions in state cases have argued that Florida's failure to similarly amend its [rule], as was done with Federal Rule 30(c), means that Florida has not made its rule of sequestration inapplicable (and [the rule] is thus, applicable) to state depositions.").

[104] See John J. Watkins, Recent Development, *1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure - Civil*, 50 ARK. L. REV. 149, 152 (1997):

> Rule 30(c) [of the Arkansas Rules of Civil Procedure] has been amended to make plain that the examination and cross-examination of a deponent are governed by the

the witness sequestration rule appears to apply in state court depositions under the express terms of Rule 30(c).[107]

VI. The Federal Approach is Premised On Erroneous Assumptions

A. Discovery Proceedings Are Not Open to the Public

1. The Federal View

There is no persuasive policy argument for limiting the witness sequestration rule's application during discovery,[108] and few courts have seriously attempted to offer one.[109] In *BCI Communication Systems, Inc. v. Bell Atlanticom*

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> Arkansas Rules of Evidence. Exception is made for Rule 103, which deals with evidentiary rulings, but not for Rule 615, which governs exclusion of witnesses. . . . In Arkansas, depositions will continue to be subject to Rule 615.

*Id.* at 152 (footnotes omitted).

[105] *See* COLO. R. CIV. P. 30(c) ("Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Colorado Rules of Evidence except CRE 103."); Gabriel, *supra* note 10, at 1299 ("The language of Amended Rule 30(c) appears to reflect a desire to have C.R.E. 615 apply in the context of pretrial depositions. This is particularly true given C.R.C.P. 30(c)'s departure from F.R.C.P. 30(c), which expressly excepts both 103 and 615 of the Federal Rules of Evidence, not just Rule 103.").

[106] *See generally* Ritchie v. Grand Canyon Scenic Rides, 799 P.2d 801, 805 (Ariz. 1990) ("[B]lind devotion to federal interpretation is not required; we need not follow the federal cases if we believe Arizona policy, practice, or case law requires a different result.").

[107] *See generally* Tuszkiewicz v. Allen Bradley Co., 170 F.R.D. 15, 16 (E.D. Wis. 1996) (noting that a "specific exclusion for Rule 615 . . . is important . . . because that is the rule that provides that the court, upon a party's request, shall exclude witnesses from a trial so that they will not hear the testimony of other witnesses").

[108] *See* Zager, *supra* note 70, at 663 (asserting that "there is no rationale that justifies [requiring] a showing of 'good cause' for [the exclusion of] all witnesses").

[109] *See, e.g.*, N. River Ins. Co. v. St. Paul Fire & Marine Ins. Co., 600 F.2d 721, 723 (8th Cir. 1979) (rejecting without "comment" a party's contention that the trial court erred "in refusing to sequester certain witnesses whose depositions were to be taken").

*Systems, Inc.*,[110] for example, the court cited only the alleged openness of the discovery process as a policy reason for refusing to apply Rule 615 in depositions.[111] In particular, the court concluded that witnesses are not subject to automatic sequestration during depositions because discovery proceedings must be open to the public unless there are compelling reasons for closing them.[112]

The court based its characterization of discovery on the language in Rule 26(c) authorizing courts, upon a showing of good cause, to "order 'that discovery be conducted with no one present except persons designated by the court.'"[113] The premise implicit in the court's analysis is that there would be no need for a rule establishing a procedure -- and a standard -- for excluding persons from discovery proceedings unless members of the public have a presumptive right to attend those proceedings in the first instance.[114]

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[110] 112 F.R.D. 154 (N.D. Ala. 1986).

[111] *See id.* at 157; *cf.* Kerschbaumer v. Bell, 112 F.R.D. 426, 426 (D.D.C. 1986) (observing that a district court's discretion to exclude persons from depositions "should be invoked sparingly, else the openness on which our legal system properly prides itself would be impaired").

[112] *See BCI Commc'n Sys.*, 112 F.R.D. at 157 (citing Am. Tel. & Tel. Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1979)); *cf.* Visor v. Sprint/United Mgmt. Co., No. CIV.A. 96-K-1730, 1997 WL 567923, at *2 (D. Colo. Aug. 18, 1997) ("Sequestration, like all forms of exclusion and secrecy, is inimical to the principles of openness and participation that lie at the heart of our system. Courts, especially in discovery, must be ever vigilant to protect these principles and to guard against their erosion by exception.").

[113] *BCI Commc'n Sys.*, 112 F.R.D. at 157 (quoting FED. R. CIV. P. 26(c)(5) (current version at FED. R. CIV. P. 26(c)(1)(E) (2007))).

[114] *Cf. In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 146 (2d Cir. 1987) ("Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order [under Rule 26(c)] since the public would not be allowed to examine the materials in any event.").

However, discovery was not open to the public at common law,[115] and a number of courts have rejected the *BCI* court's implicit conclusion that the private nature of the process was altered by the Supreme Court's adoption of Rule 26(c) and the other federal discovery rules in 1938.[116] The enactment of those rules, and analogous provisions in Arizona and numerous other states,[117] expanded the pretrial discovery available to litigants,[118] and this resulted in greater and more frequent intrusions into the

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[115] *See In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 51 (E.D. Mich. 1985); Adams v. Metallica, Inc., 758 N.E.2d 286, 291 (Ohio Ct. App. 2001).

[116] *See, e.g.*, D. CONN. L. CIV. R. 30(a) ("Depositions . . . are deemed to constitute private proceedings which the public is not entitled to attend."); Times Newspapers Ltd. v. McDonnell Douglas Corp., 387 F. Supp. 189, 197 (C.D. Cal. 1974) ("[D]epositions . . . are not a judicial trial, nor a part of a trial, but a proceeding preliminary to a trial, and neither the public nor representatives of the press have a right to be present at such taking."). For a comprehensive discussion of this issue, see Richard L. Marcus, *A Modest Proposal: Recognizing (At Last) that the Federal Rules Do Not Declare that Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331 (2006).

[117] *See In re* Grand Jury, 286 F.3d 153, 159 (3d Cir. 2002) (discussing "Federal Rule of Civil Procedure 26(c) and . . . analogous provisions in state rules"); South Carolina State Highway Dep't v. Booker, 195 S.E.2d 615, 620 (S.C. 1973) ("The South Carolina Discovery Rules, as those in most states, were patterned after the Federal Rules of Civil Procedure dealing with discovery."); Tobias, *supra* note 95, at 627 ("The Arizona Supreme Court . . . essentially premised the Arizona Rules of Civil Procedure governing discovery on the federal analogues . . . .").

[118] *See In re* Zyprexa Injunction, 474 F. Supp. 2d 385, 413-14 (E.D.N.Y. 2007):

> [T]he discovery system in Rules 26 through 37 revolutionized pretrial preparation. The prior system had limited a litigant's ability to acquire information largely to what was admissible at trial; since 1938, a litigant has been able to secure the production of information on a vastly broadened scale – essentially any information that conceivably could be of help in preparing the case.

*Id*. at 413-14 (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 447 (1991)).

private affairs of those involved in the discovery process.[119] Nevertheless, there is no persuasive evidence that the rules were intended to create a broad right of public access to discovery that did not exist at common law.[120]

On the contrary, Rule 26(c)'s provision for "protective" orders limiting the persons who may attend a deposition[121] (and prohibiting those who do attend from disclosing the substance of the deponent's testimony to those who do not)[122] reflects the drafters' recognition of the need to protect the privacy interests of those involved, in order to assure the discovery process operates as intended.[123] Understood in this context,

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[119] *See id*. at 414 ("[T]he expanded scope of discovery under the Federal Rules . . . posed a threat to privacy and confidentiality.") (quoting Miller, *supra* note 118, at 447); Tavoulareas v. Wash. Post Co., 111 F.R.D. 653, 658 (D.D.C. 1986) ("The rules permitting discovery 'often allow extensive intrusion into the affairs of both litigants and third parties.'") (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 30 (1984)).

[120] *See Zyprexa Injunction*, 474 F. Supp. 2d at 414 ("The goals underlying the expansion of the discovery process were to facilitate preparation, to avoid surprise at trial, and to promote the resolution of cases on their merits -- not to enlarge the public's access to information.") (quoting Miller, *supra* note 118, at 447); Rhinehart v. Seattle Times Co., 654 P.2d 673, 679 (Wash. 1982) ("Nowhere in the history of the rules . . . can we find any indication that the purposes included that of disseminating to the general public the information derived from discovery, or any suggestion that such dissemination would serve the ends sought to be achieved by the rule[s]."), *aff'd*, 467 U.S. 20 (1984).

[121] *See* Adams v. Shell Oil Co., 136 F.R.D. 615, 616 (E.D. La. 1991) ("Federal Rule of Civil Procedure 26(c)(5) . . . authorizes the trial court to designate the persons who may be present during a deposition . . . .").

[122] *See* Vinton v. Adam Aircraft Indus., Inc., 232 F.R.D. 650, 662 (D. Colo. 2005) ("Rule 26(c) permits the [court] to enter orders . . . prohibiting parties from disclosing deposition testimony to other potential witnesses.").

[123] *See In re* Grand Jury, 286 F.3d 153, 159 (3d Cir. 2002) ("By shielding sensitive information from third parties and the public at large, protective orders 'offer litigants a measure of privacy' and 'aid the progression of litigation and facilitate settlements.'") (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994)); United States v. Columbia Broad. Sys., Inc., 666 F.2d 364, 368-69 (9th Cir. 1982) ("Rule 26(c), setting forth grounds for protective orders, was enacted as a safeguard for the protection of parties and witnesses in view of the broad discovery rights authorized in Rule 26(b).");

the rule provides scant support for the recognition of a public right of access to discovery that did not exist prior to the rule's adoption.[124]

In addition, Rule 5(d) of the Federal Rules of Civil Procedure[125] originally required the parties to file deposition transcripts and other discovery materials with the court in the absence of a countervailing order.[126] Once a deposition transcript was filed, members of the general public could review the transcript and ascertain the substance of the deponent's testimony.[127] This procedure prompted some courts to conclude that Rule 5(d) constitutes additional evidence of the drafters' intent to make discovery proceedings presumptively open to the public.[128]

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Piccolo v. United States Dep't of Justice, 90 F.R.D. 287, 288 (D.D.C. 1981) ("Fed.R.Civ.P. 26(c) is designed to protect the personal privacy of litigants . . . .").

[124] *See, e.g.*, Huthnance v. District of Columbia, 255 F.R.D. 285, 288 n.3 (D.D.C. 2008) ("[P]laintiff argues that there is a presumption under Rule 26(c) that 'discovery should be open.' I see no basis for such a presumption in that Rule.") (citation omitted); *In re* Thow, 392 B.R. 860, 868 (Bankr. W.D. Wash. 2007) ("Nor is the argument that the provision for protective orders in [Rule] 26 implies a right of public access persuasive.").

[125] FED. R. CIV. P. 5(d).

[126] *See* New York v. Microsoft Corp., 206 F.R.D. 19, 24 (D.D.C. 2002); Flaherty v. Seroussi, 209 F.R.D. 295, 298 (N.D.N.Y. 2001); George R. Hall, Inc., v. Superior Trucking Co., 532 F. Supp. 985, 995 (N.D. Ga. 1982).

[127] *See In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 50 (E.D. Mich. 1985). ("[I]n federal court a deposition is a public document freely open to inspection after it is filed with the clerk."); Chase v. Groff, 410 F. Supp. 602, 607 (E.D. Pa. 1976) ("The full transcript of the deposition was filed with the court and became a public record, available to all for inspection."), *aff'd*, 556 F.2d 565 (3d Cir. 1977). *But see* D. CONN. L. CIV. R. 30(b) ("If filed with the Clerk, transcripts of all pre-trial depositions . . . shall be withheld from public inspection by the Clerk, but shall be available to any party for any proper use in the case.").

[128] *See*, *e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 146 (2d Cir. 1987) ("Rule 5(d) . . . embodies the [drafters'] concern that . . . the general public be afforded access to discovery materials whenever possible."); United States *ex rel*. Stinson, Lyons, Gerlin & Bustamante v. Prudential Life Ins. Co., 736 F. Supp. 614, 619 (D.N.J. 1990)

However, many district courts adopted local rules dispensing with this filing requirement,[129] as they unquestionably had the authority to do after a 1980 amendment to Rule 5(d).[130] In addition, Rule 5(d) was amended again in 2000 to *prohibit* the filing of deposition transcripts and other discovery materials in all cases unless those materials were used in a court proceeding or the court ordered them to be filed.[131] Like Rule 26(c),[132] these rules now operate to "protect parties and non-parties from the improper disclosure of private information,"[133] further undermining any

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("[B]oth Rule 26(c) and Rule 5(d) provide that discovery is presumptively open to public scrutiny unless a valid protective order directs otherwise."), *aff'd*, 994 F.2d 1149 (3d Cir. 1991). *But cf. In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1337 (D.C. Cir. 1985) ("Requirements for the filing . . . of depositions were designed to make their contents known to the *litigants*, and even those requirements were far from absolute.").

[129] *See, e.g.*, EEOC v. Nat'l Children's Ctr., Inc., 98 F.3d 1406, 1410 (D.C. Cir.1996) ("[U]nder Local Rule 107 the parties were not required to file discovery materials with the court . . . ."); *George R. Hall, Inc.*, 532 F. Supp. at 995 ("This court no longer requires the filing of every deposition. Local Rules 181.23 and 211.1. Thus, access to a copy of a deposition filed in a clerk's office, formerly theoretical at best, is now . . . entirely fictional.").

[130] *See Consumers Power Co. Sec. Litig.*, 109 F.R.D. at 50 ("The 1980 amendments to Fed.R.Civ.P. 5(d) allow[ed] local court rules to preclude the filing in court of depositions, interrogatories, and other pretrial discovery unless needed for use in a proceeding or on order of the court."); *George R. Hall, Inc.*, 532 F. Supp. at 995 ("In 1980, . . . the rules were amended to empower the court to dispense with the mandatory filing of every deposition.").

[131] *See* Hobley v. Burge, 225 F.R.D. 221, 224 (N.D. Ill. 2004); Smithkline Beecham Corp. v. Synthon Pharms. Ltd., 210 F.R.D. 163, 167 (M.D.N.C. 2002).

[132] *See supra* notes 121-23 and accompanying text.

[133] Schroer v. United States, 250 F.R.D. 531, 535 (D. Colo. 2008); *see, e.g.*, Rossbach v. Rundle, 128 F. Supp. 2d 1348, 1354 (S.D. Fla. 2000) ("[A]ll discovery requests and information disclosed by the parties through discovery that is not filed with the Court shall henceforth be kept strictly confidential."); *cf.* Aetna Cas. & Sur. Co. v. George Hyman Constr. Co., 155 F.R.D. 113, 115 n.1 (E.D. Pa. 1994) ("The 'raw fruits' of discovery in the possession of private litigants that have not been filed with the court . . .

argument that the federal rules support the recognition of a right of public access to discovery.[134]

2. The State Court View

Both state and federal courts still occasionally struggle with the issue of whether discovery proceedings are presumptively open to the public.[135] However, the Supreme Court's affirmation of the inherently private nature of discovery in *Seattle Times Co. v. Rhinehart*[136] arguably should have resolved any legitimate debate over this issue.[137] In any event, several state courts have relied on the analysis in *Seattle Times* in

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are not impressed with [a] presumptive right of access.").

[134] *See Smithkline Beecham*, 210 F.R.D. at 167 ("Rule 5(d) now prohibits the filing of depositions, interrogatories, requests for documents, and requests for admission until they are used in a court proceeding. This negates the previous concept that discovery material somehow carried with it a right to public access.") (citing SEC v. TheStreet.com, 273 F.3d 222, 233 n.11 (2d Cir. 2001)); Schiller v. City of N.Y., No. 04 Civ. 7922 KMK JCF, 2007 WL 136149, at *19 n.12 (S.D.N.Y. Jan. 19, 2007):

> [T]o the extent prior cases relied on Rule 5(d) to find a presumption of public access to discovery materials, those cases are no longer good law, because Rule 5(d) no longer permits the filing of discovery materials with the court unless they are used in the proceeding or the court orders that they be filed.

[135] *See* Westchester Radiological Ass'n v. Blue Cross/Blue Shield of Greater N.Y., Inc., 138 F.R.D. 33, 35 (S.D.N.Y. 1991) ("There is a dichotomy between judicial decisions that view discovery as a largely private activity, and those that view it as a public activity."); Munzenmaier v. City of Cedar Rapids, 449 N.W.2d 369, 371 (Iowa 1989) ("Authorities elsewhere are divided on the question whether a deposition is public or private.").

[136] 467 U.S. 20 (1984).

[137] *See* Roberson v. Bair, 242 F.R.D. 130, 133 (D.D.C. 2007) (concluding that the "supposed presumption in favor of public access to discovery . . . did not survive . . . *Seattle Times*"); Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659, 1671 (1995) ("Following the *Seattle Times* decision, courts have generally

concluding that discovery proceedings are not open to the public as a matter of state law.[138]

In *Lewis R. Pyle Memorial Hospital v. Superior Court*,[139] for example, the Arizona Supreme Court relied on the analysis in *Seattle Times* and a concurring opinion in an earlier Supreme Court case, *Gannett Co. v. DePasquale*,[140] in holding that pretrial depositions are not public proceedings.[141] Unlike the court in *BCI Communication Systems, Inc. v. Bell Atlanticom Systems, Inc.*,[142] the Arizona court found no support in Rule 26(c)[143] for the conclusion that depositions are presumptively open to the press or other members of the public.[144]

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denied requests by the press or members of the public to attend depositions."); *cf.* Marcus, *supra* note 116, at 332 ("For more than twenty years, debate has continued about this topic, despite a 1984 Supreme Court decision . . . that would seem to have decided the question.") (footnote omitted).

[138] *See, e.g.,* Herald Ass'n v. Judicial Conduct Bd., 544 A.2d 596, 600-01 (Vt. 1988) ("As *Seattle Times* makes clear, discovery events have not traditionally been viewed as 'public components' of a trial or a traditionally public source of information."); Stenger v. Lehigh Valley Hosp. Ctr., 554 A.2d 954, 959 (Pa. Super. Ct. 1989) ("[D]iscovery practices in Pennsylvania fit into the generalizations drawn by the Supreme Court in *Seattle Times*. . . . Depositions are usually scheduled in private quarters, at times and places most convenient for those involved. Interrogatories are also privately answered.").

[139] 717 P.2d 872 (Ariz. 1986).

[140] 443 U.S. 368 (1979).

[141] *See Pyle Hosp.,* 717 P.2d at 876. Among other things, the *Pyle Hospital* court quoted with approval Chief Justice Burger's observation in *Gannett* that "it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants." *Id*. at 875 (quoting *Gannett Co*., 443 U.S. at 396 (Burger, C.J., concurring)).

[142] 112 F.R.D. 154 (N.D. Ala. 1986).

[143] The Arizona rule "allowed a court to order that discovery be conducted with no one present except those persons designated by the court." *Pyle Hosp*., 717 P.2d at 877 (discussing ARIZ. R. CIV. P. 26(c)(5) (current version at ARIZ. R. CIV. P. 26(c)(1)(5)

The *Pyle Hospital* court instead relied on a Florida state court decision, *Palm Beach Newspapers, Inc. v. Burk,*[145] in holding that the right of public access to civil trials does not extend to pretrial discovery proceedings.[146] The *Pyle* court relied in particular on a concurring opinion in *Palm Beach Newspapers* asserting that the drafters of the state discovery rules could not have envisioned that a rule authorizing trial courts to issue protective orders would be interpreted to establish a broad right of public access to discovery.[147] Significantly, both the concurring judge and the author of the majority opinion in *Palm Beach* noted their disagreement with the reasoning of the federal cases reaching a contrary conclusion.[148]

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(2004))).

[144] *See id.* at 875. The court stated that it did "not read the rule to mean that since an order may be obtained to exclude persons then *ipso facto* everyone, the public and press, is entitled to attend absent an order to the contrary." *Id.* at 876; *cf.* Kimberlin v. Quinlan, 145 F.R.D. 1, 2 n.2 (D.D.C. 1992) ("[A] motion [for protective order] is not needed to exclude a person who is not a party to the litigation from attending a pretrial deposition.").

[145] 471 So.2d 571 (Fla. Dist. Ct. App. 1985), *approved*, 504 So.2d 378 (Fla. 1987).

[146] *See Pyle Hosp.*, 717 P.2d at 876 ("There is no doubt that there exists a common law right of access to civil trials. However, no such blanket rule exists for pretrial depositions.") (citations omitted); *cf.* Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986) ("[D]iscovery is fundamentally different from those proceedings for which a public right of access has been recognized.").

[147] *See Palm Beach Newspapers*, 471 So.2d at 580 (Letts, J., concurring) (discussing FLA. R. CIV. P. 1-280(c)(5)).

[148] *See id.* at 579 n.4 (asserting that the federal courts have offered no "compelling reason" for the view that "depositions are open to the public"); *id.* at 580 (Letts, J., concurring) ("I cannot accept . . . the Federal cases . . . .").

B. Witnesses Can Be Sequestered During Public Proceedings

The court in *BCI Communication Systems* also ignored the analogical implications of the witness sequestration rule's applicability during trials,[149] which are considerably more open to the public than discovery proceedings.[150] The Arizona Constitution, for example, contains an "open courts" provision requiring that all trials be conducted in public,[151] and this requirement is repeated in various court rules[152] and judicial decisions.[153] Despite its constitutional underpinnings, the requirement is not

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[149] *See* State v. Mathias, 423 A.2d 484, 486 (R.I. 1980) ("We have recognized the inherent authority of a trial [court] to sequester witnesses during the taking of testimony at a trial."); Harris v. Texas, 122 S.W.3d 871, 882 (Tex. Ct. App. 2004) ("The rule provides for the sequestration of witnesses from the courtroom during trial."); Smith v. S. Baptist Hosp. of Fla., Inc., 564 So.2d 1115, 1118 (Fla. Dist. Ct. App. 1990) (observing that the "rule of sequestration . . . is applicable at trial").

[150] *See* Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 944 (7th Cir. 1999) ("[P]retrial discovery, unlike the trial itself, is usually conducted in private."); H.B. Fuller Co. v. Doe, 60 Cal. Rptr. 3d 501, 510 (Ct. App. 2007) ("[F]ederal cases have not recognized the same presumptive right of access to discovery materials that they have found in courtroom proceedings."); NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct., 56 Cal. Rptr. 2d 645, 652 (Ct. App. 1996) ("In contrast to pretrial discovery procedures, civil trials have historically been open to the public."), *aff'd*, 980 P.2d 337 (Cal. 1999).

[151] *See* ARIZ. CONST. art II, § 11 ("Justice in all cases shall be administered openly, and without unnecessary delay."); State v. Ramirez, 871 P.2d 237, 248 (Ariz. 1994) ("The 'open courts' provision essentially commands public judicial proceedings."). For a discussion of the public access rights created by this type of provision, see Jack B. Harrison, Comment, *How Open is Open?: The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307 (1992).

[152] *See. e.g.,* ARIZ. R. CRIM. P. 9.3(b) ("All proceedings shall be open to the public, including representatives of the news media, unless the court finds, upon application of the defendant, that an open proceeding presents a clear and present danger to the defendant's right to a fair trial by an impartial jury."); ARIZ. R. SUP. CT. 91(d) ("All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom.").

[153] *See e.g.*, Ridenour v. Schwartz, 875 P.2d 1306, 1308 (Ariz. 1994) ("[T]he public has a constitutional and common law right of access to observe court proceedings."); State v. Bush, 714 P.2d 818, 823 (Ariz. 1986) ("Whatever its roots, the right . . . to an open and

absolute.[154] In particular, it does not prevent a trial court from sequestering witnesses,[155] who are simply not accorded the same right of access to judicial proceedings as are members of the public at large.[156]

The alleged openness of the discovery process, which clearly is not of constitutional magnitude,[157] likewise provides no basis for refusing to sequester witnesses

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public trial was recognized in the colonies as part of the common law of England and has been with us ever since.").

[154] *See* State v. White, 398 P.2d 903, 904 (Ariz. 1965):

> The community is deeply interested in the right to observe the administration of justice and . . . the presence of its members at a public trial is as basic as that of a defendant. This in no way, however, deprives the trial court [of the right], in its sound discretion, to make reasonable exclusion orders . . . .

[155] *See* United States v. McVeigh, 106 F.3d 325, 335 (10th Cir. 1997) ("The witnesses do not assert, nor could they, that an order precluding (only) intended witnesses from attending a . . . proceeding generally open to the public and the press violates the *public's* right of access."); West Virginia v. Richey, 298 S.E.2d 879, 889 n.12 (W. Va. 1982) (holding that a constitutional requirement that trials be conducted in public "does not preclude . . . the sequestration of witnesses"); Michigan v. Insley, 194 N.W.2d 20, 22 (Mich. Ct. App. 1972) ("Although a public trial is guaranteed by our Constitution, . . . witnesses may be excluded."). *See generally* Hawaii v. Culkin, 35 P.3d 233, 259 (Haw. 2001) ("[T]he right to a public trial is not implicated by the exclusion of a potential witness pursuant to the witness exclusionary rule.").

[156] *See* Tharp v. Maryland, 763 A.2d 151, 160 (Md. 2000) ("In effect, those sequestered . . . are no longer considered members of the general public for purposes of exclusion from the courtroom . . . ."); LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 154 (1987) ("The impact of the rule is that . . . a witness loses his right as a member of the general public to be present throughout the . . . trial.").

[157] *See, e.g.*, Tavoulareas v. Wash. Post Co., 724 F.2d 1010, 1017 ("[T]he presumptive openness of discovery materials not used at trial derives only from the Federal Rules of Civil Procedure. No right of access to such materials lies either in the common law or the Constitution."), *on reh'g*, 737 F.2d 1170 (D.C. Cir. 1984); *cf.* Adams v. Metallica, Inc., 758 N.E.2d 286, 292 (Ohio Ct. App. 2001) ("[T]here appears to be no clear, unqualified right to inspect pretrial discovery materials, even when they are filed with the trial court,

during discovery proceedings.[158] In discovery proceedings, no less than at trial, the truth-seeking objectives underlying the witness sequestration rule should outweigh a witness's right -- if such a right can even be said to exist[159] -- to be present during the testimony of other witnesses.[160]

C. Sequestering Witnesses During Discovery Promotes Truthful Testimony

The court in *Kerschbaumer v. Bell*[161] offered an alternative argument for refusing to sequester witnesses during discovery.[162] The court in that case refused to prohibit the parties from attending one another's depositions in the absence of specific

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under . . . the 'open courts' provision of the Ohio Constitution . . . .").

[158] *Cf. McVeigh*, 106 F.3d at 335-36:

> A broad survey of public trial-access case law . . . confirm[s] that pertinent constitutional proscriptions are implicated only when, through orders closing proceedings, . . . a trial court has deprived the public at large direct or indirect access to the trial process. [A] witness-sequestration order . . . has no such effect . . . .

[159] The Arizona Court of Appeals has stated that there "is no fundamental right to have all defense witnesses hear each other's testimony and testify consistently." State v. Edwards, 739 P.2d 1325, 1331 (Ariz. App. 1986); *see also* Lee v. Thornton, 93 S.E. 788, 788 (N.C. 1917) ("There is no inherent right that witnesses may hear each other testify and when the court thinks the interest of justice requires that by separation they should be prevented from doing so lest there be collusion among them, the order must be obeyed . . . .").

[160] *See, e.g.*, Athridge v. Aetna Cas. & Sur. Co., No. CIV.A. 96-2708HHG JMF, 1997 WL 732430, at *1 (D.D.C. Sept. 23, 1997) ("The societal interest that is advanced by the sequestration rule outweighs the reasons tendered for [a witness's] presence at the deposition [of another witness]."); *cf.* Calhoun v. Mastec Inc., No. 03-CV-03865(SR), 2004 WL 1570302, at *3 (W.D.N.Y June 1, 2004) ("Non-parties . . . have no particular interest in the deposition testimony of other [witnesses] . . . .").

[161] 112 F.R.D. 426 (D.D.C. 1986).

[162] *See id.* at 427.

evidence that their attendance might cause them to testify untruthfully.[163] Alluding to the familiar psychological principle of association,[164] the court reasoned that hearing other witnesses testify may stimulate a party's recollection of events, thus enabling the party to give more accurate testimony.[165] The court relied on an earlier case, *Dunlap v. Reading Co.*,[166] in which another federal court reached essentially the same conclusion.[167]

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[163] *See id.* (refusing to sequester the parties because there was no evidence they "falsified testimony or would be likely to do so").

[164] *See* Baker v. Maryland, 371 A.2d 699, 703 (Md. Ct. Spec. App. 1977) ("[T]he latent memory of an experience may be revived by an image seen, or a statement read or heard. It is a part of the group of phenomena which the classical psychologists have called the law of association.") (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 14 (1954)); *cf.* Curtis v. Bradley, 31 A. 591, 594 (Conn. 1894) (discussing "the right of a witness to the use of such aids as, under the subtle laws of association, serve to refresh his memory").

[165] *See Kerschbaumer*, 112 F.R.D. at 427 ("[The Court] cannot discern why the cause of truth would be advanced by denying opposing parties the opportunity to react to the recollections of their opponents and, perhaps, thereby be able to offer a fresher and more complete account of their own."); *cf.* Randall v. Tracy Collins Trust Co., 305 P.2d 480, 483 (Utah 1956) ("[The witness's] more specific recollection was made after the witness had heard the testimony of [other witnesses].").

[166] 30 F.R.D. 129 (E.D. Pa. 1962).

[167] *See id.* at 131:

> Given the inevitable faultiness of recollection of participants and observers of any event, much of a witness' recollection will be stimulated on hearing the narrative of others who were observers or participants in the same event. To this extent the cause of truth will be advanced by affording him the opportunity to react to this stimulation and so offer a more accurate and comprehensive recital of his own.

*Id*. at 131 (footnote omitted).

The reasoning in these cases mirrors the rationale underlying Rule 612 of the Arizona Rules of Evidence[168] and its federal counterpart.[169] Under certain circumstances, those rules permit trial witnesses -- and deponents[170] -- to review writings or other materials in order to refresh their recollections.[171] The rules are premised on the assumption that the truth-finding process is best served by permitting witnesses to revive their memories through the use of external stimuli,[172] even though their ensuing testimony might be unduly influenced by the material they review.[173]

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[168] ARIZ. R. EVID. 612.

[169] FED. R. EVID. 612.

[170] *See, e.g.*, Constand v. Cosby, 232 F.R.D. 494, 501 (E.D. Pa. 2006) ("[I]f a deponent's recollection is exhausted, he may use [a] document to refresh his recollection and continue the deposition testimony in his own words based on that refreshed recollection, if any.") (citing FED. R. EVID. 612); *see also* Sporck v. Peil, 759 F.2d 312, 317 (3d Cir. 1985) (observing that Rule 612 "is applicable to depositions and deposition testimony by operation of Federal Rule of Civil Procedure 30(c)"); Samaritan Health Servs., Inc. v. Superior Ct., 690 P.2d 154, 156 (Ariz. App. 1984) ("Rule 30(c), Arizona Rules of Civil Procedure, makes Rule 612 applicable to depositions.").

[171] *See* United States v. Bertoli, 854 F. Supp. 975, 1023 n.82 (D.N.J.) ("In accordance with Fed.R.Evid. 612, a party may seek to refresh the recollection of a witness if the witness testifies that his recollection is exhausted and he cannot recall the matter forming the subject of his inquiry."), *aff'd in part and vacated and remanded in part*, 40 F.3d 1384 (3d Cir. 1994); State v. Salazar, 166 P.3d 107, 109 n.2 (Ariz. App. 2007) ("We note that a witness may be shown a writing or other evidence, including listening to a recording to attempt to refresh the witness's recollection.") (citing ARIZ. R. EVID. 612).

[172] *See* Samaritan Found. v. Superior Ct., 844 P.2d 593, 598 (Ariz. App. 1992) ("[T]he truth-finding process might profit from witnesses with refreshed recollection of critical moments of the case."), *aff'd in part and vacated in part sub nom.* Samaritan Found. v. Goodfarb, 862 P.2d 870 (Ariz. 1993); State v. Carter, 399 P.2d 191, 195 (Ariz. App. 1965) ("A witness who has the means of aiding his memory by a recourse to memoranda or papers may . . . give more exact testimony than he otherwise could as to times, numbers, quantities and the like.").

[173] *See* Jos. Schlitz Brewing Co. v. Muller & Phipps (Haw.), Ltd., 85 F.R.D. 118, 120 (W.D. Mo. 1988) ("It seems likely that truthful and accurate testimony by a prospective witness will be assisted by reviewing files, and . . . the useful discipline of such

As suggested by the analysis in *Kerschbaumer* and *Dunlap*, hearing other witnesses testify also may refresh a witness's recollection,[174] and in theory enable the witness to present more accurate and reliable testimony.[175] This possibility prompted the *Dunlap* court to question the efficacy of the witness sequestration rule even at trial,[176] because sequestering witnesses obviously operates to prevent them from hearing each

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examination probably outweighs the danger of fabrication and mistake caused by reliance on [such] writings."). For a scholarly criticism of the premise underlying Rule 612, see Thomas M. Tomlinson, Note, *Pattern-Based Memory and the Writing Used to Refresh*, 73 TEX. L. REV. 1461 (1995).

[174] *See, e.g.*, Am. Steel Works v. Hurley Constr. Co., 46 F.R.D. 465, 468 (D. Minn. 1969) (discussing a party's ability to "listen[] to the opponent's testimony so as to refresh his recollection"); Puccio v. Diamond Hill Ski Area, Inc., 385 A.2d 650, 655 n.8 (R.I. 1978) (describing a witness who "had an opportunity to refresh his memory by listening to the testimony of other witnesses"); *cf.* Roberson v. United States, 249 F.2d 737, 742 (5th Cir. 1957) ("Prior testimony may, in the discretion of the trial court, be used for the purpose of refreshing the recollection of witnesses.").

[175] *See* United States v. Ianniello, 740 F. Supp. 171, 189-90 (S.D.N.Y. 1990) (observing that the "testimony of other witnesses . . . may stimulate or test the recollection of the witness, and assure that the testimony to be given [by the witness] is well-considered and truthful"), *rev'd on other grounds sub nom.* United States v. Salerno, 937 F.2d 797, *modified on reh'g*, 952 F.2d 623, *amended*, 952 F.2d 624 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992).

[176] *See* Dunlap v. Reading Co., 30 F.R.D. 129, 131 (E.D. Pa. 1962) ("We have answered the question which is the most likely means of ascertaining the truth by following the general practice of permitting prospective witnesses to be present in the courtroom while one of their member testifies."); *cf.* United States v. Postma, 242 F.2d 488, 494 (2d Cir. 1957) ("Not infrequently justice may be better served, we think, by allowing witnesses to remain in the court room . . . .").

other testify,[177] and to that extent also necessarily prevents them from having their memories "refreshed . . . by what has gone before."[178]

However, this reasoning is ultimately unpersuasive.[179] The benefits of sequestering witnesses may be difficult to establish in a given situation.[180] Nevertheless, Professor Wigmore viewed sequestration as "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."[181] He maintained

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[177] *See* Sanders v. Lane, 861 F.2d 1033, 1035 (7th Cir. 1988) (discussing "the longstanding practice of sequestering witnesses to prevent them from hearing the testimony of earlier witnesses"); Jeung v. McKrow, 264 F. Supp. 2d 557, 573 (E.D. Mich. 2003) (noting that courts "sequester witnesses to prevent them from hearing the testimony of other witnesses").

[178] *In re* Smith's Will, 60 N.W.2d 866, 869 (Iowa 1953); *see also* State v. Lackey, 271 S.E.2d 478, 482 (Ga. 1980) ("By sequestration, . . . the recollections of the witnesses are not unduly refreshed by other witnesses . . . ."); Louisville & Nashville R.R. Co. v. York, 30 So. 676, 678 (Ala. 1901) ("The purpose to be served in putting witnesses under the rule is that they may not be able to . . . have their memories refreshed, sometimes unduly, by hearing the testimony of other witnesses . . . .").

[179] *See generally* United States v. Hobbs, 31 F.3d 918, 921 (9th Cir. 1994) (observing that sequestration "serves both to reduce the danger that a witness's testimony will be influenced by hearing the testimony of other witnesses, and to increase the likelihood that the witness's testimony will be based on her own recollections"); United States v. Bramlet, 820 F.2d 851, 855 (7th Cir. 1987) ("The rationale for excluding adverse witnesses is premised on the concern that once having heard the testimony of others, a witness may inappropriately tailor his or her own testimony to the prior evidence. This concern is justified . . . where 'fact' or 'occurrence' witnesses are called to testify.") (citations omitted).

[180] *See* United States v. Ell, 718 F.2d 291, 293 (9th Cir. 1983) ("It may be impossible to tell how a witness' testimony would have differed had [a] motion to exclude been granted."); West Virginia v. Omechinski, 468 S.E.2d 173, 180 (W. Va. 1996) ("It might very well be impossible to tell how a witness's testimony would have differed had there been compliance with Rule 615."); Babcock v. Alaska, 685 P.2d 721, 724 (Alaska Ct. App. 1984) ("Although it is often difficult to assess the likelihood that sequestration will elicit inconsistent testimony that could not be elicited from witnesses who heard each other testify, the possibility exists in virtually every case.") (quoting ALASKA R. EVID. 615 commentary).

[181] *Dunlap*, 30 F.R.D. at 130 (quoting 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT

that the mere possibility of preventing perjured or collusive testimony outweighs any conceivable benefit to be derived from permitting witnesses to hear others testify.[182]

Wigmore's views have been embraced by numerous state and federal courts,[183] and despite occasional misgivings,[184] there is no discernable movement to abolish the practice in this country.[185] On the contrary, most jurisdictions now expressly

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COMMON LAW § 1838, at 354 (3d ed. 1940)); *see also* New Jersey v. Williams, 148 A.2d 22, 32 (N.J. 1959) (noting that Wigmore placed the right to sequester witnesses "just below that of cross-examination as a device to expose falsity").

[182] *See* Wigmore, *supra* note 83, at 484-85 ("No rule . . . should ever be laid down which will by possibility deprive an opponent of the chance of exposing perjury."); *cf. Babcock*, 685 P.2d at 724 ("[T]here is rarely a good reason to deny a sequestration request; the procedure is simple and the possible benefit to be derived by a party is enormous . . . .") (quoting ALASKA R. EVID. 615 commentary).

[183] *See, e.g.*, Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996); State Farm Fire & Cas. Co. v. Tan, 691 F. Supp. 1271, 1273 (S.D. Cal 1988); Motley v. Tarmac Am., Inc., 516 S.E.2d 7, 9 (Va. 1999); Lopez v. House of Coffee, Inc., 753 A.2d 755, 756 (N.J. Super. Ct. Ch. Div. 1998); *see also* Hanson v. United States, 271 F.2d 791, 793 (9th Cir. 1959) ("We are in accord with the expressions of the great teacher as to the value, in the administration of justice, of the sequestration of witnesses during a jury trial.").

[184] *See, e.g.*, Charles v. United States, 215 F.2d 825, 828 (9th Cir. 1954) (discussing "a declaration by the District Court that it had abandoned and would not follow the practice of putting witnesses under the rule"); Pennsylvania v. Howard, 312 A.2d 54, 56 (Pa. Super. Ct. 1973) ("Witness sequestration is normally impractical or inadvisable, except in unusual circumstances.") (footnote omitted). *See generally* United States v. Allen, 542 F.2d 630, 633 n.1 (4th Cir. 1976) ("While the sequestering of witnesses is of ancient origin the practice has never been universal, which suggests that the danger of influencing witnesses feared so much by some is not at all feared by others.").

[185] *See Charles*, 215 F.2d at 827 ("The practice of putting witnesses under the rule is a time-honored one and should not be abandoned.") (footnote omitted); *cf.* United States v. Rhynes, 218 F.3d 310, 334 (4th Cir. 2000) (Niemeyer, J., dissenting) ("The mechanism . . . represents the wisdom of the ages. . . . Professor Wigmore, characterizing the pedigree and importance of the sequestration rule, states, 'There is perhaps no testimonial expedient which, with as long a history, has persisted in this manner without essential change.'") (quoting 6 WIGMORE, *supra* note 20 § 1837, at 457).

provide for sequestration by rule or statute,[186] and many, including Arizona,[187] follow Wigmore's lead in making it mandatory.[188] This widespread codification of the practice reaffirms its continued acceptance as an effective truth-seeking mechanism.[189]

In short, because the risk of tainted or collusive testimony outweighs the potential benefit of having a witness's memory refreshed by the testimony of other witnesses,[190] the judicial quest for truth is best served by sequestering witnesses at

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[186] *See* Drilex Sys., Inc. v. Flores, 1 S.W.3d 112, 116 (Tex. 1999); Gee v. Oklahoma, 538 P.2d 1102, 1108 (Okla. Crim. App. 1975).

[187] *See supra* notes 31-35 and accompanying text.

[188] *See, e.g.*, NLRB v. Stark, 525 F.2d 422, 429 (2d Cir. 1975) ("[Federal] Rule 615 has adopted Wigmore's principle of mandatory exclusion . . . ."); North Dakota v. Hill, 590 N.W.2d 187, 188 (N.D. 1999) ("The [North Dakota] rule is derived from Rule 615 of the Federal Rules of Evidence and its application for sequestration, upon request by a party, is mandatory."); J.R. v. Florida, 923 So.2d 1269, 1271 n.2 (Fla. Dist. Ct. App. 2006) ("Section 90.616 [of the Florida Statutes] adopts the view of Federal Rule 615 that sequestration is demandable as a matter of right.") (quoting CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 616.1, at 595 (2004)); Nickerson v. Maryland, 325 A.2d 149, 154 n.6 (Md. Ct. Spec. App. 1974) ("The Arkansas rule on exclusion of witnesses, like Maryland's, is mandatory . . . .").

[189] *See, e.g.*, United States v. Johnston, 578 F.2d 1352, 1355 (10th Cir. 1978) ("The importance of the rule was emphasized anew by its reaffirmation in Rule 615 of the Federal Rules of Evidence."); West Virginia v. Omechinski, 468 S.E.2d 173, 176 (W. Va. 1996) ("The importance of the rule was emphasized anew by its reaffirmation and codification into the West Virginia Rules of Evidence."); *cf.* Kansas v. Soriano-Garcia, 174 P.3d 458, 2008 WL 142104, at *6 (Kan. Ct. App. Jan. 11, 2008) (observing that the "mandatory nature of this practice in federal courts is an acknowledgement that sequestration is indeed the better practice").

[190] *See, e.g.,* Anderson Co. v. Sears Roebuck & Co., 165 F. Supp. 611, 622 (N.D. Ill. 1958) (discussing "the erroneous testimony of well intentioned disinterested witnesses whose minds were stimulated to memory of something that never existed by . . . untrue statements of [other] witnesses"); Connecticut v. McCown, 793 A.2d 281, 287 (Conn. App. Ct. 2002) ("By having the opportunity to listen to Dinello's testimony, McCown had the ability to tailor her testimony to . . . Dinello's, thereby inhibiting the truth seeking and fact-finding functions that a sequestration order seeks to ensure.").

trial.[191] This conclusion is no less compelling in the deposition context,[192] where sequestering witnesses would enable the examining party to explore their independent recollections without those recollections having been influenced by the deposition testimony of other witnesses.[193] Indeed, the *Dunlap* court itself ultimately acknowledged as much.[194]

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[191] *See* Franklin v. Texas, 733 S.W.2d 537, 540 (Tex. Ct. App. 1985) ("[T]he truth is more likely to be reached by presenting . . . each witness' unalloyed, independent version of an occurrence uncolored by previous testimony . . . ."); *cf.* Lopez v. House of Coffee, Inc., 753 A.2d 755, 757 (N.J. Super. Ct. Ch. Div. 1998) ("Undoubtedly, the sequestration of witnesses tends to better produce the truth."). *See generally* Oregon v. Bishop, 492 P.2d 509, 512 (Or. Ct. App. 1972) (observing that "the danger that the witnesses' memories might be confused by other testimony" is one of the "reasons for the rule of sequestration").

[192] *See* Beacon v. R.M. Jones Apartment Rentals, 79 F.R.D. 141, 142 (N.D. Ohio 1978) (noting that "the equivalent of an order of separation of witnesses, made routinely in trials, will permit the greatest opportunity for evaluation of the testimony secured" during depositions); *cf.* Cox v. Ford Motor Credit Co. (*In re* One Moore Ford, Inc.), 146 B.R. 800, 806 (Bankr. E.D. Ark. 1992) ("[P]ermitting . . . nonparty witnesses to attend [a] deposition would be contrary to the purpose of the rule.").

[193] *See* Queen City Brewing Co. v. Duncan, 42 F.R.D. 32, 33 (D. Md. 1966); *cf.* Bittinger v. Owens-Corning Fiberglass Corp., Civ. A. No. 85-6108, 1986 WL 14195, at *1 (E.D. Pa. Dec. 12, 1986) ("[I]f witnesses can listen to each other's deposition testimony, they will be able to coordinate their testimony and thereby increase their appearance of credibility."). *See generally* Kris J. Kostolansky, *Sequestration of Deponents in Civil Litigation*, 15 COLO. LAW. 1028, 1028 (June 1986) (asserting that "the separate and distinct recollections of each witness" can be ascertained "only if each witness is sequestered from the depositions of the others").

[194] *See* Dunlap v. Reading Co., 30 F.R.D. 129, 131 (E.D. Pa. 1962):

> [S]equestration will deny to the dishonest witness the advantage of observing the experience of other witnesses as they give their testimony on direct examination and are confronted with contradictions or evasions under cross-examination. At the least, it will make available the raw reactions and the individual recollection of each witness unaided by the stimulation of the evidence of any other witness.

D. Fear of the Slippery Slope

The court in *Kerschbaumer v. Bell*[195] also based its decision to permit the parties to attend one another's depositions on its concern that a contrary ruling would force the courts down a perilous slippery slope.[196] In particular, the court concluded that excluding parties from other witnesses' depositions based solely on an "inchoate fear that perjury would otherwise result" would require the sequestering of witnesses in any case in which "credibility looms large"[197] – that is, in virtually every case in which depositions are taken.[198]

Many state courts, including those in Arizona, are unlikely to find this reasoning persuasive.[199] In *Montgomery Elevator Co. v. Superior Court*,[200] for example,

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[195] 112 F.R.D. 426 (D.D.C. 1986).

[196] *See id.* at 427 ("While the Court ordinarily disdains actions based on fear of a mythical 'slippery slope,' it sees no principled way to grant plaintiffs' [sequestration] motion and preserve the openness and procedural fairness so important to our system.").

[197] *Id.*; *cf.* Tuszkiewicz v. Allen Bradley Co., 170 F.R.D. 15, 17 (E.D. Wis. 1996) (asserting that the sequestering of witnesses without a specific showing of harm "would surely mandate the same result in all cases in which there was more than one fact witness on an issue and where the movant alleges that prejudice could result").

[198] *See* Conrad v. Bd. of Johnson County Kan. Comm'rs, No. CIV. A. 00-2277-DJW, 2001 WL 1155298, at **1-2 (D. Kan. Sept. 17, 2001) (concluding that sequestering witnesses during discovery without a specific showing of harm would require sequestration in "virtually every case" because almost all depositions are "fact intensive"). *See generally* Kopack v. NLRB, 668 F.2d 946, 953 (7th Cir. 1982) ("Arguably, credibility is at issue in virtually every case, or at least in any case involving testimonial evidence.").

[199] *See, e.g.*, Lowy Dev. Corp. v. Superior Ct., 235 Cal. Rptr. 401, 403 (Ct. App. 1987) ("[T]he presence at each deposition of closely allied prospective deponents could foster collusive testimony and . . . obviate any possibility of getting an objective deposition from each one of those persons.") (internal quotation marks omitted); *see also* Dardashti v. Singer, 407 So.2d 1098, 1099 (Fla. Dist. Ct. App. 1982) ("One would suppose that when a party seeks the deposition of the other side's non-party witnesses, and is fearful that they will tailor their answers in support of each other, he simply 'invokes the rule'

the Arizona Supreme Court indicated that witnesses can be sequestered during depositions solely in order to preserve their independent recollections.[201] Significantly, the Arizona court relied on two cases the *Kerschbaumer* court specifically declined to follow,[202] *Beacon v. R.M. Jones Apartment Rentals*[203] and *Milsen Co. v. Southland Co.*,[204] in which other federal courts obviously were not dissuaded from sequestering witnesses during discovery by the prospect of proceeding down the proverbial slippery slope.[205]

VII. Sequestration May Be Particularly Beneficial During Discovery

The examining party's ability to impeach witnesses with their own prior inconsistent deposition testimony may deter them from shaping their trial testimony to

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whereupon all but the particular witness to be deposed are excused as a matter of course.") (footnote omitted).

[200] 661 P.2d 1133 (Ariz. 1983).

[201] *See id.* at 1135; *cf.* Russell v. Boyles, 29 S.W.2d 891, 892 (Tex. Civ. App. 1930) ("The law clearly contemplates, in case of depositions as in personal testimony before the court, that a party to a suit shall have the separate and individual testimony of each witness . . . ."). *See generally* State v. Edwards, 739 P.2d 1325, 1330 (Ariz. App. 1986) (noting that one of the purposes of sequestration is to "preserve individual testimony").

[202] *See Kerschbaumer*, 112 F.R.D. at 426-27.

[203] 79 F.R.D. 141 (N.D. Ohio 1978).

[204] 16 Fed. R. Serv. 2d 110 (N.D. Ill. 1972).

[205] *See generally* Allcorn, *supra* note 37, at 497:

> One of the primary functions of discovery is to permit a party to ascertain the credibility of the factual allegations supporting his or her opponent's claims or defenses. . . . Because this is one of discovery's primary goals, it is inexplicable that courts could be unsympathetic to the goal of truth-testing as a singular reason for ordering the separation of witnesses. If indeed a "slippery slope" of sequestration looms, why are we loathe to propel ourselves down that path? The only thing we have to fear is discovery of the truth.

conform to the testimony of other witnesses they have heard.[206] However, because most deponents have not previously been "pinned down" on the record,[207] they may be able to conform their deposition testimony to the testimony of other deponents without fear of being impeached.[208] This critical distinction between trial and deposition testimony suggests that sequestering witnesses during discovery actually may do more to promote truthful testimony than sequestering them during the trial itself.[209]

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[206] *See, e.g.*, Queen v. Wash. Metro. Area Transit Auth., 842 F.2d 476, 482 n.9 (D.C. Cir. 1988) ("[T]he fact that [the witness's] deposition had been taken before trial, thereby giving . . . counsel prior statements with which to impeach her, would seem to prevent [her] from credibly modifying at trial the important elements of her account . . . ."); United States *ex rel*. El-Amin v. George Washington Univ., 533 F. Supp. 2d 12, 49 (D.D.C. 2008) ("The Defendant's ability to cross-examine the [Plaintiffs] about their deposition testimony . . . should provide adequate safeguards to prevent the [Plaintiffs] from parroting the testimony of each other and the testimony of other witnesses.").

[207] *See generally* United States v. Houghten, 554 F.2d 1219, 1224 (1st Cir. 1977) ("The only sure way of pinning a witness down is getting a statement from him under oath prior to trial, and a deposition is the time-honored and most effective way of [doing] this."); Kelly v. New W. Fed. Sav., 56 Cal. Rptr. 2d 803, 810 (Ct. App. 1996) ("One purpose of pretrial discovery is to pin down the testimony of parties and witnesses which can be used for impeachment at the time of trial.").

[208] *See* Mills v. Dortch, 361 A.2d 606, 609-10 (N.J. Super. Ct. Law Div. 1976) (observing that there may be "no opportunity for impeachment" during a deposition "because no earlier discovery deposition will present testimony upon which [the witness] may be cross-examined"); *cf.* Snead v. Am. Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151 (E.D. Pa. 1973) ("Once [a witness's] testimony is memorialized in deposition, any variation he may make *at trial* to conform to [other evidence] can be used to impeach his credibility . . . .") (emphasis added). *See generally In re* Estate of Rennick, 692 N.E.2d 1150, 1156 (Ill. 1998) ("[A]n attorney will rarely impeach a nonparty witness in a discovery deposition.").

[209] *See* Allcorn, *supra* note 37, at 497 ("[S]equestering witnesses is effective only if it begins during discovery. Paradoxically, our system has upheld the availability of sequestration at trial -- when it may be too late -- while curtailing its use during the time when it is most useful."); Kall et al., *supra* note 9, at 1970 ("In civil litigation, the facts face their first litmus test during discovery. When the time for trial arrives, sequestration of witnesses is still a useful tool, but arguably this technique for seeking out the truth may then be . . . too late.").

The importance of sequestering witnesses during discovery becomes even clearer when one considers how frequently cases are resolved on the basis of the evidence developed during that process.[210] Most civil litigation is disposed of without the need for trial, either by settlement or the granting of a dispositive pretrial motion.[211] In either situation (and often even when a case proceeds to trial),[212] deposition testimony and evidence obtained through other discovery procedures are bound to play a crucial role in the case's resolution.[213]

The fact that depositions, in particular, have become the "factual

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[210] *See* Hall v. Clifton Precision, Div. of Litton Sys., Inc., 150 F.R.D. 525, 531 n.12 (E.D. Pa. 1993) ("The reality is that what is learned at depositions becomes the factual basis upon which most cases are disposed of -- not by trial, but by settlement."); Mokhiber v. Davis, 537 A.2d 1100, 1112 (D.C. 1988) ("The discovery process is clearly an important element of civil litigation. The manner in which it proceeds may prove decisive to the outcome of particular disputes . . . .").

[211] *See, e.g.*, O'Gilvie v. United States, 519 U.S. 79, 99 (1996) (Scalia, J., dissenting) ("[B]etween 92 and 99 percent of tort cases in federal court are disposed of by either settlement or some other means (such as summary judgment) prior to trial."); *see also* Cyberscan Tech., Inc. v. Sema Ltd., No. 06 Civ. 526(GEL), 2006 WL 3690651, at *11 (S.D.N.Y. Dec. 13, 2006) ("[M]odern civil litigation rarely results in a trial. The vast majority of cases are resolved by settlement, by summary judgment, or by other legal devices.").

[212] *See, e.g.*, Latiolais v. Whitley, 93 F.3d 205, 207 (5th Cir. 1996) ("The district court tried the case before a jury, entirely on deposition testimony."); Dist.-Realty Title Ins. Corp. v. Jack Spicer Real Estate, Inc., 373 A.2d 952, 953 (Md. 1977) ("No live testimony was elicited at trial – the only evidence presented consists of two depositions, one affidavit, and a number of documentary exhibits.").

[213] *See, e.g.*, GMAC Bank v. HTFC Corp., 248 F.R.D. 182, 185 ("More than 98% of all civil cases filed in the federal courts result in disposition by way of settlement or pretrial adjudication. Very often these results turn on evidence obtained during depositions.") (footnote omitted), *reconsideration denied*, 252 F.R.D. 253 (E.D. Pa. 2008); *cf.* United States *ex rel.* Weston & Brooker Co. v. Cont'l Cas. Co., 303 F.2d 91, 92 (4th Cir. 1962) ("A party to an action has the right to have the benefits of discovery procedure . . . in order to bring to light facts which may entitle him to summary judgment or induce settlement prior to trial.").

battleground" on which much of modern civil litigation is conducted[214] is further confirmation of the need for accurate and truthful deposition testimony.[215] Because sequestering witnesses serves this need,[216] the practice should extend to depositions,[217] just as other established truth-seeking procedures such as cross-examination and the oath

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[214] *Hall*, 150 F.R.D. at 531; *see also* Visor v. Sprint/United Mgmt. Co., No. CIV.A. 96-K-1730, 1997 WL 567923, at *2 n.2 (D. Colo. Aug. 18, 1997) ("To a significant extent, civil cases are now adjudicated on their facts without proceeding to a formal trial. The evidence upon which such adjudications are based is presented largely through deposition testimony.").

[215] *See, e.g.*, Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 560 (N.D. Okla. 1995) ("The vast majority of the civil cases in this county are decided by way of settlements which are reached on the basis of 'facts' developed during discovery, particularly oral depositions. If the truth finding function of discovery has been obstructed the settlement will not reflect a just result based upon the truth.") (footnote omitted); Quela v. Payco-Gen. Am. Credits, Inc., No. 99 C 1904, 2000 WL 656681, at *7 (N.D. Ill. May 18, 2000):

> Every day, litigants make settlement decisions on the basis of information obtained during the discovery process. Across the country, our fellow judges enter summary judgment in numerous cases on the basis of undisputed facts determined during the discovery process. . . . Therefore, the importance of accurate and truthful discovery to the civil justice system cannot be overstated.

[216] *See* Kansas v. Alderson, 922 P.2d 435, 449 (Kan. 1996) ("[S]equestering witnesses furthers the truth-finding process because when witnesses are separated, they cannot change their testimony to make it consistent with the testimony of previous witnesses."); Connecticut v. Robinson, 646 A.2d 118, 122 (Conn. 1994) ("The right to have witnesses sequestered . . . facilitates the truth seeking and fact-finding functions of a trial.").

[217] *See generally Damaj*, 164 F.R.D. at 560:

> Since the fact (truth) finding process in civil litigation is almost exclusively conducted in the discovery phase of litigation, it follows logically that the efficacy of the discovery process as the central truth finding mechanism would be enhanced by employing, to the extent possible, the same rules . . . during discovery as employed at trial.

requirement apply in that setting.[218] As one court explained:

> [A]ll witnesses . . . are required to tell the truth under oath whether they hear anybody else testifying or not. Unfortunately, however, some witnesses pay little heed to this requirement. Such witnesses may, and often do, shape their testimony to match that given by other witnesses within their hearing. To prevent such matching of testimony is the prime purpose of putting witnesses under the rule.[219]

## VIII. The Impact of Sequestration on Conduct Outside the Deposition

### A. Witnesses Discussing Their Testimony With One Another

The court in one federal case, *Lee v. Denver Sheriff's Department*,[220] declined to sequester witnesses during discovery because the witnesses had an opportunity to discuss the case, and presumably coordinate their testimony, before their depositions were to be conducted.[221] Although the propriety of this ruling is

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[218] *See, e.g.,* Prucha v. M & N Modern Hydraulic Press Co., 76 F.R.D. 207, 209 (W.D. Wis. 1977) ("Rule 30(c) of the Federal Rules of Civil Procedure provides that . . . cross-examination of witnesses at a deposition may proceed as permitted at trial under the provisions of the Federal Rules of Evidence, and the witnesses shall be under oath."); *cf.* Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320, 322 (D.N.J. 1944) ("The safeguards set up to combat [false and dishonesty] testimony . . . are the oath and the right of the adverse party to cross-examine the witness.").

[219] Charles v. United States, 215 F.2d 825, 827 (9th Cir. 1954) (internal quotation marks omitted); *see also* Connecticut v. Cassidy, 672 A.2d 899, 920 (Conn. 1996) (Callahan, J., dissenting) ("The shaping of testimony by a witness to fit the testimony of previous witnesses does happen. That is precisely the reason for the sequestration of witnesses."), *overruled on other grounds by* Connecticut v. Alexander, 755 A.2d 868 (Conn. 2000).

[220] 181 F.R.D. 651 (D. Colo. 1998).

[221] *See id.* at 653 (refusing to exclude defendants from each other's depositions because they "had almost four years to discuss among themselves" the events at issue in the litigation); *cf.* Veress v. Alcoa/Alumax Prods., Inc., 88 Fair Empl. Prac. Cas. (BNA) 1689, 1690 (E.D. Pa. 2002) (refusing to sequester a witness during a deposition because the witnesses had "undoubtedly already discussed their respective versions of the underlying facts").

questionable,[222] the court's reasoning raises troubling questions about the ability of witnesses to familiarize themselves with other witnesses' deposition testimony even if they are sequestered during discovery.[223]

Professor Wigmore recognized that witnesses could circumvent a sequestration order by conferring with each other prior to testifying.[224] He proposed various means of dealing with this problem,[225] including expanding the scope of the

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[222] *See* Dardashti v. Singer, 407 So.2d 1098, 1100 (Fla. Dist. Ct. 1982):

> It is not enough to suppose that the [witnesses] will have long since dove-tailed their versions of the facts so that no prejudice can result [from the failure to sequester them]. This is so because they can have little advance warning during a deposition of unexpected and oblique questions requiring instantaneous response. To permit the one to sit and absorb the answers of the other . . . obviously facilitates the . . . "coloring of a witness's testimony" . . . .

*Id*. at 1100 (quoting Spencer v. Florida, 133 So.2d 729, 731 (Fla. 1961)).

[223] *See, e.g*., Bogue, *supra* note 67, at 201 ("[I]f a prospective witness' deposition is not to be taken shortly after the deponent's, little value is to be gained by securing an exclusion order because little can be done to restrict disclosure of the substance of the deposition by the deposed or the attorney to the prospective witness."); *see also* 29 WRIGHT & GOLD, *supra* note 42 § 6242, at 54 ("In many cases, witnesses have ample opportunity to compose their stories outside a proceeding in which testimony is given.").

[224] *See* Wigmore, *supra* note 83, at 487, 488 (noting that "sequestration begins with the delivery of testimony," and that prior to this time witnesses may have an "unrestrained opportunity for consultation"); *cf.* Clark v. Cont'l Tank Co., 744 P.2d 949, 951 (Okla. 1987) (noting that Wigmore favored sequestration despite "[a]cknowledging that there is always the possibility of perjured but consistent testimony being worked out in detail in advance").

[225] Wigmore initially asserted that "any danger of improper suggestions" arising from witnesses discussing the case could "be dealt with in other ways." Wigmore, *supra* note 83, at 487. He presumably was referring to cross-examination, which he regarded as "the greatest legal engine ever invented for the discovery of truth." Dungan v. Superior Ct., 512 P.2d 52, 54 (Ariz. Ct. App. 1973) (quoting 5 WIGMORE, *supra* note 181 § 1367, at 29); *cf.* United States v. Feola, 651 F. Supp. 1068, 1130 (S.D.N.Y. 1987) (observing that witnesses "can speak freely to anybody and if they do so, may be cross-examined with

witness sequestration rule to prohibit witnesses from discussing the case with one another.[226] However, Wigmore's proposal was not incorporated into the federal version of Rule 615,[227] which "serves only to exclude witnesses from the courtroom."[228] Thus, even if the federal rule was extended to the discovery process,[229] it would not necessarily prevent witnesses from learning of one another's deposition testimony by other means.[230]

Several states have at least impliedly rejected the federal approach to this issue.[231] The Arizona Supreme Court, in particular, adopted a sequestration rule

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respect thereto insofar as may relate to bias or credibility").

[226] Wigmore ultimately "devised a sequestration rule addressing both direct and indirect circumvention of the rule and in his 1942 evidence code proposed a rule explicitly limiting communication with [other] witnesses." Gregory M. Taube, *The Rule of Sequestration in Alabama: A Proposal for Application Beyond the Courtroom*, 47 ALA. L. REV. 177, 200 (1995) (citing JOHN H. WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW 344 (3d ed. 1942)).

[227] The drafters of the 1993 amendment of Rule 30(c) of the Federal Rules of Civil Procedure were cognizant of the problem. *See* FED. R. CIV. P. 30(c) advisory committee's note (1993 amendments) ("[I]f exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in . . . earlier depositions.").

[228] United States v. Rhynes, 218 F.3d 310, 316 (4th Cir. 2000); *see also Feola*, 651 F. Supp. at 1130 ("Rule 615 only requires that witnesses be excluded 'so that they cannot hear the testimony of other witnesses[.]' . . . The witnesses . . . can speak freely to anybody . . . .") (quoting FED R. EVID. 615).

[229] *See* Lisanti v. Lubetkin (*In re* Lisanti Foods, Inc.), 329 B.R. 491, 512 (D.N.J. 2005) ("Rule 615 . . . certainly ought to, in general, apply to excluding witnesses at deposition testimony.") (quoting lower court with approval), *aff'd*, 241 Fed. Appx. 1 (3d Cir. 2007); *cf*. United States v. Brown, 547 F.2d 36, 37 (3d Cir. 1976) ("[A] party may request as of right that witness[es] be excluded prior to the time that any opportunity exists for them to hear the testimony of other witnesses.").

[230] *See, e.g.*, Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451, 453 (M.D. Ga. 1987) ("Rule 615 cannot be used to prohibit witnesses from reading depositions and communicating with other witnesses between the time a deposition is taken and the time trial is set to begin.").

[231] *See, e.g.*, Drilex Sys., Inc. v. Flores, 1 S.W.3d 112, 117 (Tex. 1999) ("Texas Rule of

applicable in state criminal cases that not only excludes witnesses from the courtroom when they are not testifying,[232] but also prohibits them from communicating with one another until all of them have testified.[233] Although there is no comparable language in Arizona's version of Rule 615,[234] the Arizona trial courts are also likely to prohibit out-of-court communications when sequestering witnesses during civil trials.[235] As the authors of Arizona's principal evidence treatise explained:

> Rule 9.3(a) of the Arizona Rules of Criminal Procedure . . . requires the Court to direct the witnesses [who have been] excluded not to communicate with each other until all have

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Civil Procedure 267(d) states that '[w]itnesses, when placed under [the rule], shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys.'") (emphasis omitted); Wisconsin v. Green, 646 N.W.2d 298, 313 (Wis. 2002) (Abrahamson, C.J., concurring) ("According to Wis. Stat. § 906.15(3), the judge or court commissioner 'may direct that all . . . witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.'").

[232] The rule provides for the exclusion of witnesses "during opening statements and the testimony of other witnesses." ARIZ. R. CRIM. P. 9.3(a). It is therefore broader than its common law and federal counterparts. *See Brown*, 547 F.2d at 37 ("Rule 615 relates exclusively to the time testimony is being given by other witnesses. Even such a strong advocate of mandatory sequestration as Professor Wigmore was of the view that the sequestration of witnesses was not appropriate during the opening statement of counsel.") (footnote omitted).

[233] *See* State v. Perkins, 686 P.2d 1248, 1263 (Ariz. 1984) (discussing ARIZ. R. CRIM. P. 9.3(a)); *cf.* Clemons v. State, 720 So.2d 961, 971 (Ala. Crim. App. 1996) ("Rule 9.3(a), Ala.R.Crim.P. states that 'the Court may exclude witnesses from the courtroom and direct them not to communicate with each other concerning any testimony until all witnesses have been released by the Court.'") (internal ellipses omitted).

[234] *See* JOSEPH M. LIVERMORE ET AL., ARIZONA LAW OF EVIDENCE § 615.1, at 388 (4th ed. rev. 2008) (noting that a trial court is "not expressly required by Rule 615" to instruct witnesses "not to communicate with each other").

[235] *See* 8 BENNETT EVAN COOPER ET AL., ARIZONA TRIAL HANDBOOK § 26:6, at 444 (2007-08 ed.) (observing that "the court *in a civil or criminal case* will exclude prospective witnesses from the courtroom," and also will direct them "to not communicate with one another until all have testified") (emphasis added).

> testified. While not expressly required by Rule 615, such an admonition nonetheless should be given by the Court in civil cases as well, and if not given, should be requested by counsel, if the purposes of sequestration are to be served.[236]

Extending the Arizona rule's prohibition on witness communications to pretrial discovery proceedings would be an equally plausible, and logical, application of the witness sequestration rule, assuming the rule applies in the discovery context.[237] Indeed, the objectives sought to be served by sequestering witnesses during discovery presumably can be achieved only if the court also prohibits them from communicating with one another about the case.[238]

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[236] LIVERMORE ET AL., *supra* note 234 § 615.1 at 388. Some states have adopted variations of Rule 615 that expressly prohibit communications among witnesses. *See, e.g.*, Fourthman v. Indiana, 658 N.E.2d 88, 91 n.2 (Ind. Ct. App. 1995) ("Indiana Evidence Rule 615 is identical to Federal Rule of Evidence 615 except that the Indiana rule also provides for the separation of witnesses so that they cannot discuss testimony with other witnesses."); Tennessee v. Jackson, 889 S.W.2d 219, 223 (Tenn. Crim. App. 1994) ("Rule 615 of the Tennessee Rules of Evidence provides in part that '[t]he court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony . . . by a witness.'").

[237] *See, e.g.*, Plowman v. Arizona State Liquor Bd., 732 P.2d 222, 229 (Ariz. App. 1986) ("[T]he testimony of [the witness] was given by deposition . . . and presumably no other witnesses were present . . . [The witnesses] did not hear each other testify, *and there is no showing that they otherwise conversed about their testimony*.") (emphasis added); *cf.* Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451, 453 (M.D. Ga. 1987) (discussing the federal courts' authority under Rule 26(c) "to prohibit communication between or among witnesses between deposition and trial").

[238] *See, e.g.,* Schaffrath v. Hamburg Twp., No. 07-14909-CV, 2009 WL 56031, at *2 (E.D. Mich. Jan. 8, 2009) ("It is clear that if [the witness] was . . . 'briefed' on what the other witnesses had testified to, this . . . may have induced him to conform his testimony to the other witnesses in the case who had already been deposed."); *cf.* Milanovich v. United States, 275 F.2d 716, 720 (4th Cir. 1960) ("If witnesses are excluded but not cautioned against communicating . . ., the benefit of the exclusion may be largely destroyed."), *aff'd in part and rev'd in part on other grounds*, 365 U.S. 551 (1961).

B. Attorneys Discussing Prior Testimony With Prospective Witnesses

The witness sequestration rule does not prohibit prospective witnesses from discussing the case with the parties' attorneys,[239] and lawyers routinely confer with witnesses before they testify.[240] On the other hand, witness sequestration orders would be of little value if an attorney could simply disclose to a prospective witness the substance of testimony previously given, or expected to be given, by other witnesses.[241] Thus, the rule is often interpreted to prohibit attorneys from discussing the actual or potential testimony of other witnesses with a witness who has yet to testify.[242]

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[239] *See, e.g.,* State v. Gulbrandson, 906 P.2d 579, 596 (Ariz. 1995) ("Rule 9.3 states that witnesses shall 'not . . . communicate *with each other* until all have testified.'"); State v. Sowards, 406 P.2d 202, 204 (Ariz. 1965) (discussing "the standard instruction that . . . witnesses must not discuss the case nor their testimony, given or expected to be given, with anyone other than the attorneys"). *See generally* Moffett v. Mississippi, 540 So.2d 1313, 1317 (Miss. 1989) ("The purpose of the rule is *not*, and never has been, to prevent attorneys from consulting with . . . witnesses.").

[240] *See* United States v. Scharstein, 531 F. Supp. 460, 463 (E.D. Ky. 1982) ("It is . . . common practice and an essential part of trying a case for the trial attorney to confer with . . . prospective witnesses . . . before trial."); Hamdi & Ibrahim Mango Co. v. Fire Ass'n of Phila., 20 F.R.D. 181, 182 (S.D.N.Y. 1957) ("It is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given on deposition or at trial."); Sanders v. Drane, 432 S.W.2d 54, 57 (Ky. Ct. App. 1968) (noting that "any competent lawyer in the preparation for trial will consult with his witnesses").

[241] *See* SEC v. Higashi, 359 F.2d 550, 552 (9th Cir. 1966) ("[T]he purpose of sequestration could be defeated by an attorney advising witnesses as to the testimony which had been given by others."); *cf. Scharstein*, 531 F. Supp. at 464 ("If counsel can relate to a witness what another witness has said, it would seem to be an exercise in futility for the court to try to prohibit one witness from talking to another about the case outside the courtroom.").

[242] *See, e.g.*, United States v. Buchanan, 787 F.2d 477, 485 (10th Cir. 1986) ("Counsel know, and are responsible to the court, not to cause any indirect violation of the Rule by themselves discussing what has occurred in the courtroom with the witnesses."); United States v. Ortiz, 10 F. Supp. 2d 1058, 1067 (N.D. Iowa 1998) (stating that a "sequestration order would prevent . . . counsel from communicating to someone outside the courtroom, who might later testify, the content of other witnesses' testimony").

The Arizona Supreme Court addressed a variation of this issue in *State v. Presley*,[243] where a defendant invoked the rule at the outset of his criminal trial.[244] The court ordered all of the witnesses to remain outside the courtroom when they were not testifying, and also instructed them to refrain from discussing the case among themselves when they were not in the courtroom.[245] Nevertheless, on the second day of trial, the prosecuting attorney held a joint meeting with two prospective witnesses to discuss their anticipated testimony.[246]

The defendant argued that the trial court's decision to permit those witnesses to testify after they had an opportunity to coordinate their testimony during the meeting tainted the jury's verdict, and required the reversal of his conviction.[247] The prosecuting attorney insisted that he did not use the meeting to attempt to reconcile any conflicts in the witnesses' testimony.[248] The Arizona Supreme Court nevertheless concluded that his conduct violated the witness sequestration rule, and also may have constituted a breach of legal ethics.[249]

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[243] 514 P.2d 1234 (Ariz. 1973).

[244] *See id.* at 1236.

[245] *See id.*

[246] *See id.*

[247] *See id.* at 1235-36.

[248] *See id.* at 1236.

[249] *See id.; cf.* State v. Hadd, 619 P.2d 1047, 1054 (Ariz. App. 1980) (finding the witness sequestration rule was violated when "[a]fter recessing for the first day, the prosecutor adjourned with several of his witnesses into a conference room near the courtroom"). *See generally* Louisiana v. Firmin, 637 So.2d 1143, 1145 (La. Ct. App. 1994) ("Professional ethics require that lawyers exercise restraint and prevent the witnesses from tailoring of their testimony or instructions to eliminate inconsistencies.").

Significantly the court reached this conclusion even though the trial court's sequestration order did not prohibit the attorneys from discussing the case with potential witnesses.[250] The court reasoned that an order prohibiting witnesses from discussing the case also necessarily prohibits an attorney from preparing a witness to testify while another potential witness is present.[251] The same reasoning undoubtedly would prevent lawyers from conducting joint deposition preparation sessions in cases in which witnesses are sequestered during discovery.[252]

C. Witnesses Reviewing Transcripts of Other Witnesses' Testimony

Attorneys also frequently use transcripts of other witnesses' deposition testimony to prepare a witness to testify,[253] and Rule 615 does not specifically prevent

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[250] The trial court admonished the witnesses to "refrain from discussing any of the facts of the case among themselves or with anyone else *except the attorneys*." *Presley*, 514 P.2d at 1236 (emphasis added); *cf.* Aalon v. State, 543 S.E.2d 78, 80 (Ga. Ct. App. 2000) ("The rule of sequestration does not prohibit discussions between an attorney in the case and a prospective witness, *as long as the attorney talks to him separately from the other witnesses* and does not inform him of previous testimony.") (emphasis added).

[251] *See Presley*, 514 P.2d at 1236:

> It makes no difference that the order did not specifically exclude the attorneys talking to more than one witness at a time. The purpose of the order was to prevent one witness from learning what another would say, so that he could consciously or unconsciously tailor his own story to conform to the other. That should be plain to any lawyer, . . . and it should not be necessary for the judge to include every contingency in his directions on the rule, before conduct such as this becomes wrongful.

[252] *See generally* John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 286 n.31 (1989) ("Preparing witnesses for deposition and preparing witnesses for trial . . . are generally viewed as equally important, and the same practices apply.").

[253] *See, e.g.*, Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc., 121 F.R.D. 264, 266 (M.D.N.C. 1988) ("In the course of preparing one of their principal witnesses, . . . plaintiffs' counsel showed him [other witnesses'] depositions. [The

potential witnesses from reviewing the transcribed testimony of other witnesses.[254] Nevertheless, the rule's objectives are clearly implicated by this practice,[255] because witnesses obviously can tailor their testimony to reflect the information contained in transcripts they read.[256] Indeed, using transcripts of other witnesses' deposition testimony to prepare a witness may be a particularly effective -- and therefore

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witness] was allowed to review the deposition transcripts and, in fact, was given a copy of them . . . ."); *see also* Sanders v. Drane, 432 S.W.2d 54, 57 (Ky. Ct. App. 1968) ("Almost inevitably the lawyer will advise his witnesses on a particular point concerning what other witnesses in the same position observed. . . . To show a witness a deposition of another witness is in the same category.").

[254] *See*, *e.g.*, Tennessee v. Coulter, 67 S.W.3d 3, 53 n.5 (Tenn. Crim. App. 2001) ("The advisory commission comments to Tenn.R.Evid. 615 state: 'This rule does not prohibit a witness from reviewing depositions of other witnesses before testifying.'"); *cf.* Campinas Found. v. Simoni, 65 Fed. R. Evid. Serv. 1103, 1107-08 (S.D.N.Y. 2004) ("[B]arring potential deponents from reviewing the deposition transcripts generated during the oral examination of other witnesses[] may be accomplished, if at all, by making an application to the Court pursuant to Fed.R.Civ.P. 26(c).").

[255] *See* Marathon Oil Co. v. United States, 42 Fed. Cl. 267, 269-70 (1998) ("Without an implicit restriction on the review of transcripts . . . by future witnesses, invocation of the rule would serve no purpose."), *aff'd*, 215 F.3d 1343 (Fed. Cir. 1999); James F. Herbison, Note, *Corporate Reps in Deps: To Exclude or Not to Exclude*, 78 WASH. U. L.Q. 1521, 1544 (2000) ("[T]he ability of . . . witnesses to read prior deposition transcripts . . . defeat[s] the purpose for seeking exclusion.").

[256] *See* Naismith v. Prof'l Golfers Ass'n, 85 F.R.D. 552, 568 (N.D. Ga. 1979) (noting that witnesses can "make their testimony more consistent by reading transcripts of one another's depositions"); *cf.* Thompson v. Comm'r, 92 T.C. 486, 494 (1989) ("If a witness is permitted to . . . read the testimony of a witness on the same side, this will allow the later witness the opportunity to sharpen his testimony to correspond with the earlier testimony.").

objectionable -- means of shaping the witness's testimony,[257] because the witness is likely to have more time to study the testimony of the prior witnesses.[258]

Several courts considering this issue have concluded that reviewing transcripts of other witnesses' testimony should be prohibited by the witness sequestration rule.[259] In *Marathon Oil Co. v. United States*,[260] for example, the court found untenable the "strained and hyperliteral argument" that the rule only prohibits witnesses from *hearing* the testimony of other witnesses.[261] The court held that the rule also prohibits witnesses from reviewing transcripts of other witnesses' testimony, and this prohibition is implicit in a witness sequestration order that is silent on the issue.[262]

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[257] *See generally* Maryland v. Earp, 571 A.2d 1227, 1235 (Md. 1990) ("When . . . the testimony in the deposition bears directly on the facts that the reviewing witness will be asked to recount, . . . the potential for influencing the reviewing witness is great.").

[258] *See* Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373 (5th Cir. 1981) ("The harm may be even more pronounced with a witness who reads [a] transcript than with one who hears the testimony . . . because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony."); *In re* Air Crash at Charlotte, N.C. on July 2, 1994, 982 F. Supp. 1092, 1100 (D.S.C. 1997) (observing that reviewing transcripts of prior testimony "provides an even better opportunity to 'match' or 'undermine' the testimony . . . because more of an opportunity is provided to study the precise words used by earlier witnesses").

[259] *See generally* Weeks Dredging & Contracting Co. v. United States, 11 Cl. Ct. 37, 53 (1986) ("[T]he plain language of Rule 615 refers only to the 'hearing of testimony.' But . . . that phrase has had a long-standing and consistent judicial construction of prohibiting all prospective witnesses from hearing, overhearing, being advised of, reading, and discussing, the previously given in-court testimony of witnesses . . . .") (emphasis omitted).

[260] 42 Fed. Cl. 267 (1998), *aff'd*, 215 F.3d 1343 (Fed. Cir. 1999).

[261] *Id.* at 269; *cf.* West Virginia v. Omechinski, 468 S.E.2d 173, 178 (W. Va. 1996) ("[T]he term 'hear' should not be read literally but as including other means of acquiring the information, such as reading a . . . transcript of testimony.") (quoting EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 48.1, at 9 (3d ed. Supp. 1987)).

[262] *See Marathon Oil*, 42 Fed. Cl. at 270 ("[T]here is no need that the sequestration order

Although *Marathon Oil* and several other cases reaching this conclusion involved witnesses reviewing transcripts prior to testifying at trial,[263] the same reasoning applies in the discovery context.[264]

## IX. Conclusion

Attending other witnesses' depositions may influence a witness's own subsequent testimony and thereby undermine the judicial truth-seeking process. To avoid this problem, witnesses who are not exempt from the witness sequestration rule should be prohibited from attending the depositions of other witnesses when a party invokes the rule during the discovery process. Witnesses sequestrated during discovery also should

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specify the obvious: that prospective witnesses cannot read transcripts of prior witness . . . testimony, which is the practical equivalent of listening to the testimony . . . ."); *cf.* Slaathaug v. Allstate Ins. Co., 979 P.2d 107, 111 (Idaho 1999) ("Any person of common intelligence would know that an order preventing witnesses from being present to hear other testimony also prevents them from reading the transcripts of that testimony."). *See generally* United States v. Jiminez, 780 F.2d 975, 980 n.7 (11th Cir. 1986) ("[T]here is no difference between reading and hearing testimony for purposes of Rule 615. Either action can violate a sequestration order.").

[263] *See, e.g.*, *Marathon Oil*, 42 Fed. Cl. at 269 ("[D]uring the cross-examination of . . . a potentially important government witness, [he] revealed that he had reviewed the transcript of testimony given earlier in the trial by one of plaintiff's principal witnesses . . . ."); *Slaathaug*, 979 P.2d at 111 ("To allow a party to provide daily trial transcripts to a witness subject to an exclusion order would unmistakably subvert [its] purpose."); Connecticut v. Falby, 444 A.2d 213, 223 (Conn. 1982) ("[P]roviding witnesses barred from the courtroom during [another witness's] testimony with a verbatim transcript of that testimony [is] a clear violation of any sequestration order . . . .").

[264] *See, e.g.*, Dade v. Willis, No. Civ.A. 95-6869, 1998 260270, at *3 (E.D. Pa. Apr. 20, 1998) ("To avoid . . . circumvention of the [sequestration] order, neither defendant shall be allowed to receive a copy of . . . his codefendant's deposition transcript until after both depositions have been concluded."); SEC v. Musella, Fed. Sec. L. Rep. (CCH) ¶ 99,542, at 97,134 (S.D.N.Y. 1983) (refusing to permit witnesses "to review the transcripts of other deponents prior to testifying themselves," in order to ensure that their testimony was "unaffected by . . . familiarity with [the] prior deponents' responses"); Beacon v. R. M. Jones Apartment Rentals, 79 F.R.D. 141, 142 (N.D. Ohio 1978) (prohibiting the plaintiff's deposition transcript from being "disclosed to, [or] examined by, any of the other persons to be deposed").

be prohibited from discussing their deposition testimony with or in the presence of one another, and from reviewing transcripts of other witnesses' deposition testimony.