

Exclusion of Witnesses at Trial

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Witnesses may be excluded from trial upon the request of either counsel under the so-called "rule of exclusion" (not to be confused with the Fourth Amendment "exclusionary rule" concerning the fruits of the poisoned tree).

Utah Rule of Evidence 615. Excluding Witnesses

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

- (a) a party who is a natural person;*
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;*
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense;*
- (d) a victim in a criminal or juvenile delinquency proceeding where the prosecutor agrees with the victim's presence;*
- (e) a victim counselor while the victim is present unless the defendant establishes that the counselor is a material witness in that criminal or juvenile delinquency proceeding;*
or
- (f) a person authorized by statute to be present.*

As the original comment to the federal rule notes, "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore § 1837-1838." *See also* 181 A.L.R. Fed. 549, *Exclusion of Witnesses Under Rule 615 of Federal Rules of Evidence*.

There are times when exclusion of the other witnesses is a good thing to request, but it is less common to ask for it than in earlier days, at least in civil cases, because routine pretrial depositions usually let everyone know what all the others are going to say. Where there have been no depositions yet, as in temporary restraining order or injunction hearings, you may well want to ask for exclusion of witnesses and some judges will often do so in these circumstances on their own accord.

If you ask to exclude, you generally do so at the beginning of the trial, but this was recently found not to be a requirement under Rule 615.¹

But before invoking the rule of exclusion, have good reason to do so. An example of when you would want to do so might be where certain questions weren't, for tactical reasons, asked in depositions, and you don't want the later witnesses to hear the answers. You may even ask the court for an instruction forbidding the witnesses from discussing their testimony with later witnesses, and occasionally this order may be extended to counsel as well. But this is the unusual case.

Most of the time it smacks of poor form to routinely exclude all witnesses where there is no good reason for doing so. For example, do you really need to exclude a wife from her husband's civil case until she testifies, and have her wait outside in the hall for two days?

And don't forget that it works both ways: by asking to exclude witnesses, the judge is going to exclude *all* witnesses (except those meeting the exception to the rule) from *both* sides. It's rare for a judge to exclude only selected witnesses from open court, but it does happen, at least on stipulation. So don't ask for exclusion unless you have good reason for doing so— the

¹*Miller v UDOT*, ___ P.3d ___, 2012 UT 54, at ¶¶ 47-48.

bailiff (who, to enforce the exclusion order, has to greet each person entering the courtroom and inquire whether they are witnesses) and the judge will appreciate your professionalism.

The "essential person" exception² to the rule of exclusion is often, though not always, interpreted to mean that expert witnesses are entitled to be present. It is a matter committed to the trial court's discretion. *See State v. Stevens*, 797 P.2d 1133 (Utah Ct. App. 1990), Exclusion From Courtroom of Expert Witnesses During Taking of Testimony in Civil Case, 85 A.L.R.2d 478 (1962); *but see Astill v. Clark*, 956 P.2d 1081, 1087 (Utah Ct. App.1998).

There is good reason for this. One would normally want an expert to be present in order to hear the testimony of the opposing experts, so as to meaningfully comment on it in his own testimony. In criminal cases, this exception is often interpreted to permit the chief investigative officer to be present at counsel table, even though he is also likely to be called as a witness. State agency representatives are another example.

The rule of exclusion no longer applies to depositions. Thus, you have no right to exclude other witnesses from depositions under Rule 615, because Rule 30(c) was amended to provide that "examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Utah Rules of Evidence, except Rules 103 *and* 615." You may still exclude witnesses from depositions by getting a protective order upon a showing of good cause, but it is no longer the "default" position.

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² *See, State v. Billsie*, 131 P.3d 239, 2006 UT 13 for a discussion of the breadth of the "essential person" exception to exclusion.