Sequestration of Interference Witnesses[1]

By Charles L. Gholz[2] and Kenneth D. Wilcox[3]

Introduction

Interferences are a form of litigation. While witness sequestration is not the norm in interferences, as in any other form of litigation, sequestration issues can arise.

The basis for witness sequestration is FRE 615,[4] which reads as follows:

> 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. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the

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[4] 37 CFR 41.152 provides that, with exceptions not relevant here, "the Federal Rules of Evidence shall apply to contested cases" -- including interferences.

presentation of the party's cause, or (4) a person authorized by statute to be present.

The purpose of sequestration is to discourage and expose fabrication, inaccuracy, and collusion.[5] Imposition of the Rule "exercises a restraint on witnesses['] 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid."[6]

There are four exemptions to the Rule. The party seeking to avoid sequestration of a witness bears the burden of proving that a Rule 615 exemption applies.[7] The Rule exempts from sequestration "a person whose presence is shown by a party to be essential to the presentation of the party's cause." The Advisory Committee note states that this exemption "contemplates such persons as … an expert needed to advise counsel in the management of the litigation."[8] This is due in part to the fact that oftentimes the expert will be basing his or her testimony and conclusions on evidence that will be introduced at trial.[9] However, it is always at the court's discretion whether or not to sequester even an expert witness during a trial. For example, an expert witness can be sequestered (1) if he

[5] Fed. R. Evid. 615 advisory committee's note.

[6] Geders v. United States, 425 U.S. 80, 87, 96, S. Ct. 1330, 1335, 47 L. Ed. 2d 592, 598 (1976).

[7] Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996).

[8] Fed. R. Evid. 615 advisory committee's note.

[9] See Fed. R. Evid. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.")

or she is to testify more like a fact witness than like an expert witness[10] or (2) when he or she will opine based upon opinion testimony given earlier by an opponent's expert witness.[11]

When Might Sequestration Be Appropriate

Since one's opponent can simply bring a witness that one wants to have sequestered to a deposition, sequestration of such a witness can only be obtained on motion, and the APJs appear to be hostile to requests for orders sequestering witnesses.

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[10] See, e.g. Opus 3 Ltd., 91 F.3d at 629 (no abuse of discretion to sequester expert because "he was [also] a key fact witness.").

[11] Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373-74 (5th Cir. 1981) (affirming sequestration of defendant's literary expert witness even though the "defendants' expert was to testify about the two works upon which [plaintiff] was giving his own similarity analysis.").

This is a very odd use of sequestration, but that is what the court said. The appeals court even opined in dicta that the defendant's literary expert is "probably not the type of expert intended to be exempt under this exception" because he wasn't "an expert needed to advise counsel in the management of the litigation." An added complication was that the defense counsel knowingly and intentionally violated the court's general sequestration order by providing the daily transcript to the expert witness, which led the court to refuse to allow the defendant's expert witness to testify as a sanction. Why the defense counsel did not request an exemption for defendant's expert witness when the court ordered the blanket sequestration is a mystery!

Moreover, unlike the situation in district court, where the burden of persuading the judge that one of the exemptions applies is on the party seeking to avoid sequestration, in interferences the burden of persuasion appears to be on the movant, as with any other motion.

Lutzker v. Plet, 227 USPQ 1055 (PTOBPI 1985), involved perhaps the classic case for witness sequestration: counsel for Plet[12] suspected that Lutzker's witnesses were going to lie -- or, at a minimum, that the subsequent witnesses were going to learn what to say by listening to the previous witnesses. Accordingly, he moved (unsuccessfully) for an order of sequestration. That motion was denied as follows:

> Plet relies upon 37 CFR 1.671(b), which provides that the Federal Rules of Evidence apply to interference proceedings; upon Rule 615, F.R.E., which provides for a court order for the sequestration of witnesses; and upon *U.S. Dept. of Energy v. White*, 653 F.2d 479, 210 USPQ 425 (CCPA 1981), *cert. denied sub nom., White v. Edwards*, 454 U.S. 1144, 213 USPQ 1136 (1982), which held that the testimony of a nonsequestered witness should be admitted and the possible effect of nonsequestration considered in deciding the weight given to it.
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> This interference is being conducted under the "old rules", 37 CFR 1.201 et seq., rather than under the "new rules", 37 CFR 1.301 et seq. Thus, 37 CFR 1.671(fb) is

[12] Mr. Gholz represented Plet.

> inapplicable to the instant proceeding. See 49 F.R. 48416 (12/12/84), 1050 O.G. 385 (1/29/85) which states,
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> > … these new rules will apply to all interferences declared on or after February 11, 1985 … .
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> Since this interference is being conducted under the "old rules", the board has no sequestration power, as pointed out in *U.S. Department of Energy v. White*, supra at 210 USPQ 435. Accordingly, to the extent that the Plet motion seeks a sequestration order, it is *denied*.[13]

Sehgal v. Revel, Int. Nos. 105,293, 105,302, 105,303, and 105,304,[14] involved a very different sequestration issue but similar to the issue in Miller. Sehgal had two technical expert witnesses. Revel had prepared partially overlapping questions for their depositions. While Revel had no reason to suspect that the expert witnesses were going to lie, it didn't want the second witness to hear the first witness's replies to its "surprise"

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[13] 227 USPQ at 1055-56.

[14] The authors of this article and their colleagues Daniel J. Pereira and Alex E. Gasser are co-counsel representing Revel. Roger Browdy of Browdy & Neimark is lead counsel, and Ronni Jillions, also of Browdy & Neimark, is back-up lead counsel. Robert Schulman of Hunton & Williams's Washington, D.C. office is lead counsel for Sehgal. Gene Rzucidlo of Greenberg Traurig's NYC office is back-up lead counsel. Scott Yarnell of Hunton & Williams's McLean, Virginia office is co-counsel for Sehgal.

questions. Accordingly, it moved for a sequestration order. Judge Lane denied that motion, but this time the movant got slightly over half a loaf:

> According to Revel, it plans to depose two of Sehgal's expert witnesses on similar issues raised in each witness' declaration. Revel asked that Sehgal counsel be ordered to refrain from disclosing to the secondly deposed witness any questions or answers from Revel's cross-examination of the first deposed witness. Sehgal counsel Mr. Schulman agreed that a transcript of the first deposition would not be shown to the secondly deposed witness, however, Mr. Schulman indicated that it would be difficult if not impossible for his preparation of the second witness to be unaffected by what transpired during the first deposition.
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> Sharing questions or answers from the cross-examination of the first deposed witness with the witness to be deposed secondly is a type of witness coaching that is closely akin to the type of witness coaching that is forbidden by the Cross Examination Guidelines (found in the Standing Order (Paper 1, Guideline 4 at 29)). Whether any coaching has occurred is a proper area for inquiry by deposing counsel. (Paper 1, Guidelines 5 and 6 at 30). If such coaching occurs, then the offending party would be subject to sanctions set forth in the Cross-Examination

Guidelines. (Paper 1, Guidelines at 27 (Introduction, ¶ 3)).[15]

Comment

Of course, Judge Lane's solution doesn't help if you really think that both the witnesses and opposing counsel are liars. However, in our little area of the law, that is seldom the case.

[15] Paper No. 62 in the '293 interference.