

6.03 Exclusion of Witnesses & Ban on Discussing Testimony¹

(1) Subject to subdivision two, a court may exclude a witness from a courtroom prior to the time the witness is anticipated to testify in that proceeding.

(2) A court may not exclude from the courtroom:

(a) a party in a civil trial and a defendant in a criminal trial, unless the party or defendant has waived or forfeited the right to be present;

(b) when a party is not a natural person, an officer or employee of the party designated as its representative by its attorney; or

(c) a person whose presence is shown by a party to be essential to the presentation of the party's case.

(3) In a criminal proceeding, a court is not required, but may in its discretion, direct a witness, other than a defendant, not to discuss the witness's testimony with another person or persons during a recess or until the trial is completed; a court may order a testifying defendant not to consult with the defendant's attorney when a recess is taken during the defendant's testimony provided it is a brief recess; a brief recess may include a recess for lunch, but does not include an overnight recess.

Note

Subdivision (1). The Court of Appeals has approved the exclusion of witnesses from the courtroom prior to their testimony. (*People v Cooke*, 292 NY 185, 190-191 [1944] ["It is hard for us to understand . . . why such a motion (to exclude witnesses) should not be granted as of course"]; *see also Levine v Levine*, 56 NY2d 42, 49 [1982].) As further explained by the Appellate Division, First Department, in *Philpot v Fifth Ave. Coach Co.* (142 App Div 811, 813 [1st Dept 1911]): "While such an application is in the discretion of the court, it is often extremely important that witnesses testifying to an [occurrence] of this character

should be examined without having heard the testimony of other witnesses. What is important is that each person’s impression of the occurrence should be stated—not suggested or colored by what he has heard others testify to, and for the court to refuse a request by counsel on either side to exclude all witnesses from the court room except the one under examination closely approaches an abuse of discretion.” (See generally Michael J. Hutter, *Revisiting New York’s Witness Sequestration Rule*, NYLJ, Oct. 5, 2022.)

Once a witness testifies and is not expected to be recalled, the rationale for exclusion of the witness from the remainder of the trial no longer exists. (See *People v Spence*, 239 AD2d 218, 219 [1st Dept 1997]; *People v Lopez*, 185 AD2d 189, 190 [1st Dept 1992] [excluding a defense witness from attending the summation violated the defendant’s right to a public trial].)

Neither New York’s statutory or decisional law has addressed the corollary issue of whether an order of exclusion implicitly directs an attorney not to give the prospective witnesses, before they testify, a transcript of the testimony of a witness who has testified, or if not implicit in an exclusion order, whether a court can expressly so order.

The purpose of an order of exclusion would be defeated if a lawyer were permitted to show an excluded witness a transcript of a witness’s testimony before the excluded witness testified. Thus, a court should, at least by a separate order, have the discretion to regulate the showing of a transcript of a witness’s testimony to an excluded witness before that witness testifies. (See Hutter, *Revisiting New York’s Witness Sequestration Rule*; *United States v Robertson*, 895 F3d 1206, 1215 [9th Cir 2018] [“The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript. An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing”]; *Miller v Universal City Studios, Inc.*, 650 F2d 1365, 1373 [5th Cir 1981] [“The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads trial transcript than with one who hears the testimony in open court, 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”]; Proposed Fed Rules Evid rule 615 [b] [Oct. 19, 2022], available at https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf authorizing a court order prohibiting disclosure of trial testimony to an excluded witness, with a caveat in the Committee Note: “Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. To the extent that an order governing counsel’s disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in

criminal cases, the court should address those questions on a case-by-case basis”].)

Subdivision (2). Subdivision (2) covers three classes of witnesses.

Subdivision (2) (a) recognizes that a defendant in a criminal proceeding has a statutory right (as well as a constitutional right) to be present at “trial” unless that right has been waived or forfeited. (CPL 260.20; *People v Dokes*, 79 NY2d 656, 659-660 [1992] [“A defendant’s presence at trial is required not only by the Confrontation and Due Process Clauses of the Federal and State Constitutions (*see*, US Const 6th, 14th Amends; NY Const, art I, § 6), but also by CPL 260.20”]; *People v Byrnes*, 33 NY2d 343, 349 [1974] [“(T)he right may be lost where the defendant engages in misconduct so disruptive that the trial cannot properly proceed with him in the courtroom”].) The statutory term “trial” incorporates “both any ‘material stage’ of the trial [*People v. Turaine*, 78 N.Y.2d 871, 872, 573 N.Y.S.2d 64, 577 N.E.2d 55 (1991)], as well as any ‘ancillary proceeding’ for which the defendant’s presence is ‘substantially and materially related to the ability to defend,’ including proceedings at which the defendant ‘can potentially contribute,’ or at which the defendant’s presence would ensure ‘a more reliable determination’ of the proceeding. *People v. Roman*, 88 N.Y.2d 18, 25-26, 643 N.Y.S.2d 10, 665 N.E.2d 1050 (1996).” (William C. Donnino, *Prac Commentaries*, McKinney’s Cons Laws of NY, Book 11, CPL 260.20.)

Subdivision (2) (a) also recognizes that a party has a constitutional right to be present in a civil trial (*Lunney v Graham*, 91 AD2d 592, 593 [1st Dept 1982] [“In the absence of express waiver or unusual circumstances, a party has a constitutional right to be present at all stages of a trial (NY Const, art I, §6 . . .)”]; *Carlisle v County of Nassau*, 64 AD2d 15, 18 [2d Dept 1978] [“(T)he fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, except deliberations of the jury Such right is basic to due process of law”]; *Ajaeb v Ajaeb*, 276 App Div 1094, 1094 [2d Dept 1950] [“While a party has an absolute and unqualified constitutional right to be present at the trial of a civil action (N. Y. Const., art. I, § 6 . . .), a party may waive that constitutional right”], *affd no op* 301 NY 605 [1950]).

Mental Hygiene Law § 81.11 (c) provides that a hearing to determine whether the appointment of a guardian is necessary for an alleged incapacitated person “must be conducted in the presence of the person alleged to be incapacitated,” with only limited exceptions provided.

Subdivision (2) (b) is derived from long-established decisional law. (*See e.g. Perry v Kone, Inc.*, 147 AD3d 1091, 1094 [2d Dept 2017]; *Sherman v Irving Mdse. Corp.*, 26 NYS2d 645, 645 [App Term, 1st Dept 1941] [“Great caution should be exercised in considering an application to exclude the officers of corporations, or a representative in charge of the matters litigated”].)

Subdivision (2) (c) is derived from Court of Appeals precedent which holds that “ ‘a person whose presence is shown by a party to be essential to the presentation of the party’s cause’ ” is generally exempt from the exclusion requirement. (*People v Santana*, 80 NY2d 92, 99-101 [1992]; *see also Perry*, 147 AD3d at 1094; *Carlisle*, 64 AD2d at 20.) An example of a person whose presence is shown by a party to be essential to the presentation of the party’s cause would be an expert of a party who needs to hear the testimony of the other party’s expert in order to present rebuttal testimony. (*See Santana*, 80 NY2d at 99-101; *R.J. Cornelius, Inc. v Cally*, 158 AD2d 331, 332 [1st Dept 1990].)

Subdivision (3) addresses another corollary to the rule on excluding prospective witnesses and is derived from cases primarily reviewing a trial court’s order barring a testifying defendant from consulting with defense counsel during a recess.

In the context of a testifying defendant, the United States Supreme Court first held “that an order preventing petitioner from consulting his counsel ‘about anything’ during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment” (*Geders v United States*, 425 US 80, 91 [1976]).

Subsequently, in *Perry v Leke* (488 US 272 [1989]), the Court distinguished the overnight recess in *Geders* from a brief recess (15 minutes in *Perry*) during a defendant’s testimony and in the later situation approved a court order barring the defendant from consulting with his or her lawyer.

“The distinction,” the Court explained, “rests . . . on the fact that when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel’s advice.

“The reason for the rule is one that applies to all witnesses—not just defendants. *It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed.* Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections. The defendant’s constitutional right to confront the witnesses against him immunizes him from such physical sequestration. Nevertheless, when he assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve

the truth-seeking function of the trial—are generally applicable to him as well” (*Perry* at 281-282 [emphasis added]).

Even *Geders* recognized that the trial judge’s order in that case sequestering all witnesses for both prosecution and defense and the judge’s order before each recess that the testifying witness not discuss his or her testimony “with anyone” when “[a]ppplied to nonparty witnesses” was “within sound judicial discretion” (*Geders v United States*, 425 US 80, 87-88 [1976]).

The Court of Appeals decisions are in accord with *Geders* and *Perry* (*People v Blount*, 77 NY2d 888 [1991], *affg for reasons stated* at 159 AD2d 579 [2d Dept 1990] [barring a testifying defendant from consulting with his attorney during an overnight recess violated the defendant’s right to the assistance of counsel]; *People v Joseph*, 84 NY2d 995, 997 [1994] [a court order barring the defendant from discussing his trial testimony with his attorney during a weekend recess violated the Federal and State Constitutions, but: “To be distinguished here are those cases upholding a temporary and limited ban on discussions between defendant and attorney during a brief recess (*see, Perry v Leeke*, 488 US 272 . . . ; *People v Enrique*, 80 NY2d 869 [1992], *affg for reasons stated* at 165 AD2d 13 . . .)”).

As *People v Branch* (83 NY2d 663, 666-667 [1994]) explained:

“There can be no question that once a witness takes the stand the truth-seeking function of a trial will most often be best served by requiring that the witness undergo direct questioning and cross-examination without interruption for counseling. Indeed, a trial court may reject a request by a defendant to speak with his or her attorney during testimony despite the defendant’s conceded right to counsel. Nonetheless, in rejecting the contention that trial courts *must* allow attorney-client conferences to testifying witnesses, the Supreme Court and our Court have been careful to note that trial courts *may* allow such conferences as a matter of discretion. Though the *Perry* line of cases dealt with midtestimony conferences involving defendants, we see no reason why the rules articulated in those cases should not apply generally to other witnesses, including the prosecution witness here.

“Thus, the decision to grant a recess and to allow a conference between a lawyer and a testifying witness falls within the broad discretion allowed a trial court in its management of a trial” (citations omitted).

An alternative, with respect to a testifying defendant, which was approved of in *Enrique*, is for the trial judge to permit consultation during a recess on any specific subjects requested by defense attorney, other than the defendant’s

testimony. (The defense attorney in *Enrique* declined to avail himself of that offer.)

With respect to the length of a recess, *Enrique* on its facts held that the trial court did not err in barring the testifying defendant from consulting with counsel during a luncheon recess. (*Accord People v Johnson*, 267 AD2d 403, 403 [2d Dept 1999].)

Enrique also acknowledged *Perry*'s comment that “ ‘[i]t is a common practice . . . to instruct a witness not to discuss his or her testimony with third parties until the trial is completed’ ” (*People v Enrique*, 165 AD2d 13, 18 [1st Dept 1991], *affd* 80 NY2d 869 [1992]; *cf. Matter of Buckten*, 178 AD2d 981, 983 [4th Dept 1991] [where the trial court barred witnesses from discussing their testimony with each other and the Appellate Division did not fault that order but rather, on the issue of the witnesses' credibility, disagreed with the court's finding that they had discussed their testimony]).

The consequences for not adhering to a court's order barring witnesses from discussing their testimony with others include an in camera proceeding to determine what was discussed, allowing cross-examination of the witness about the discussion, and allowing comment in summation on the unauthorized discussion as it may bear on the witness's credibility. (*See Geders v United States*, 425 US at 89 [“prosecutor may cross-examine a defendant as to the extent of any ‘coaching’ during a recess, subject, of course, to the control of the court”]; *Branch*, 83 NY2d at 667-668 [approving of an in camera inquiry, cross-examination of the witness, and appropriate comment in summation]; *People v Lloyde*, 106 AD2d 405, 405-406 [2d Dept 1984] [“Although (the defendant's mother) failed to heed the court's exclusion order, such failure did not render her testimony incompetent, especially when the jury could have considered the fact that she failed to abide by the order as a factor in determining her credibility”]; *cf. People v Rodriguez*, 225 AD2d 396, 397 [1st Dept 1996] [“ ‘(T)he decision to grant a recess and to allow a conference between a lawyer and a testifying witness falls within the broad discretion allowed a trial court in its management of a trial’ (*People v Branch*, 83 NY2d 663, 667), provided the defendant is given an opportunity to cross-examine the witness about the conference and, where appropriate, *voir dire* the other conference participants about the content of the meeting prior to cross-examination”].)

¹ In May 2023, subdivision (3) was added to the rule and the Note was amplified.