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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN THE MATTER OF THE ESTATE OF MAXIMO LAIROPI OLOPAI, **Deceased**.	**CIVIL ACTION NO. 09-0379** **ORDER GRANTING IN PART AND DENYING IN PART THE ADMINISTRATRIX'S MOTION TO RECONSIDER THE COURT'S SEQUESTRATION ORDER**

I. INTRODUCTION

THIS MATTER came before the Court on December 12, 2011 for a hearing to reconsider the Court's sequestration order. The Estate was represented by the Administratrix Jennifer Tanaka ("the Adminstratrix") and Stephen J. Nutting, Esq. Heir claimants Gregoria O. Sablan, Maria O. Laniyo, Tarsicio K. Olopai, and Manuel Mangarero ("Claimants") were represented by Robert Tenorio Torres, Esq. The Administratrix filed a Motion to Reconsider sequestration.

Based on the papers submitted and oral arguments of counsel, the Court GRANTS in part and DENIES in part the Administratrix's motion.

II. BACKGROUND

This is a probate matter involving the Carolinian custom of *mwei-mwei* adoption. During the proceedings, the parties stipulated to the sequestration of all nonparty witnesses, which the Court accepted.

On November 29, 2011, the parties appeared before the Court for a continued evidentiary hearing on the *mwei-mwei* claims. During the hearing, a dispute arose between the parties regarding the Court's sequestration order. The Administratrix, through counsel, argued the sequestration order should not prevent counsel from discussing courtroom testimony with prospective witnesses. The Claimants objected, noting that counsel may confer with witnesses but may not discuss the substance of courtroom testimony with them. The Administratrix replied that the nature and circumstances of this probate matter renders sequestration inappropriate altogether. The Court ended and postponed the evidentiary hearing to give the parties time to brief the issue as to the appropriateness and scope of the Court's sequestration order.

Presently, the Court must determine whether to lift its sequestration order or, in the alternative, exempt certain witnesses and allow counsel to discuss courtroom testimony with nonexempt witnesses.

III. LEGAL STANDARD

The court has discretion to reconsider and alter a previous ruling to prevent "manifest injustice." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997); *see also Swietlowich v. Bucks County*, 610 F.2d 1157, 1164 (3d. Cir. 1979) ("A trial judge has the discretion to reconsider an issue and should exercise that discretion whenever it appears that a previous ruling, even if unambiguous, might lead to an unjust result.").

Under Commonwealth Rule of Evidence 615[1], the trial court has discretion to sequester witnesses, unless the witness falls within one of Rule 615's three exemptions. There is a strong presumption in favor of sequestration, *U.S. v. Jackson*, 60 F.3d 128, 135

[1] NMI R. Evid. 615 provides:

> At the request of a party the court may 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 presentation of the party's cause.

(2d Cir. 1995)[2], and thus, the party opposing sequestration has the burden to prove that it is inappropriate. *Government of Virgin Islands v. Edinborough*, 625 F.2d 472, 476 (3d Cir. 1980). Also, while the court has discretion to determine whether a witness qualifies under one of Rule 615's exemptions, *Polythane Sys. v. Marina Ventures Int'l., Ltd*., 993 F.2d 1201, 1209 (5th Cir. 1993), the Rule 615 exemptions are construed "'narrowly in favor of the party requesting sequestration.'" *Opus 3 v. Heritage Park*, 91 F.3d 625, 628 (4th Cir. 1996) (quoting *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986).

IV. DISCUSSION

The Administratrix contends that her counsel is unable to adequately represent the Estate in its case-in-chief and in preparing for cross examination without the assistance of its witnesses present in the courtroom during the proceedings. Therefore, the Administratrix moves the Court to lift its sequestration order entirely. In the alternative, the Administratrix seeks to exempt certain witnesses and to permit counsel to discuss the substance of courtroom testimony with nonexempt witnesses.

A. LIFTING THE COURT'S SEQUESTRATION ORDER

The court may exclude witnesses from the courtroom during proceedings so they cannot hear the testimony of other witnesses. NMI R. Evid. 615. The United States Supreme Court noted that the practice of sequestration dates back "centuries ago" and serves as a "restraint on witnesses 'tailoring' their testimony to that of earlier witnesses" and as an "aid in detecting testimony that is less than candid." *Geders v. United States*, 425 U.S. 80, 87 (1976) (citing 6 J. Wigmore on Evidence §§ 1837-1838 (3d ed. 1940)); *see also Jackson*, 60 F.3d at 133 ("Rule 615 codified a well-established common law tradition of sequestering

[2] NMI R. Evid. 615 has not previously been interpreted by this Court. However, Rule 615 is modeled on Federal Rules of Evidence 615, which contains identical language to its counterpart in the Commonwealth, with the one exception that a court in the Commonwealth has discretion to grant a party's request for sequestration. In the absence of local law, we turn to counterpart federal law for guidance. *Commonwealth v. Lucas*, 2003 MP 9 ¶ 9 (citing *Tudela v. Marianas Pub. Land Corp*., 1 NMI 179, 184 (1990)).

witnesses 'as a means of discouraging and exposing fabrication, inaccuracy, and collusion.'") (quoting Fed. R. Evid. 615, Advisory Committee Notes).

The Administratrix attempts to meet her burden in opposing sequestration by noting that (1) sequestration is less prevalent in civil cases than in criminal cases, and (2) the purpose of sequestration is intended to prevent collusion of testimony by witnesses *on the same side*. First, the Court agrees that sequestration is less prevalent in civil cases; however, numerous civil cases have explored the issue of sequestration and have reinforced its importance and favorable presumption in their proceedings. *See, e.g., Opus 3*, 91 F.3d at 628. Second, the prevailing case law reveals that the purpose of sequestration is not limited to avoiding conformed testimony among witnesses only on the same side. *See id*.; *see also* Kurtis A. Kemper, Annotation, *Exclusion of Witnesses Under Rule 615 of Federal Rules of Evidence*, 81 A.L.R. Fed. 549 (1997) (citing cases). Sequestration is routinely granted in civil proceedings without reference to whether it will prevent only same-side witnesses from conforming their testimony. *Id*.

In the instant case, the parties earlier stipulated to sequestration, which the Court accepted. No specific facts, evidence, or unusual circumstances have been presented to persuade the Court to reconsider its prior ruling and depart from the long-standing tradition of sequestration.

B. EXEMPTIONS TO THE COURT'S SEQUESTRATION ORDER

The Administratrix seeks to exempt two witnesses, Carmen Tanaka[3] and John Taitano[4], from the Court's sequestration order under NMI R. Evid. 615(3). Rule 615(3) exempts a witness "whose presence is shown by a party to be essential to the presentation of

[3] Carmen Tanaka is the decedent's sister. Ms. Tanaka lived with the decedent and their parents at their parents' home at the time the Claimants moved in with them. Ms. Tanaka has personal knowledge of the facts, circumstances and events surrounding the Claimants' taking residence in their home and the events which transpired thereafter.

[4] John Taitano was principally responsible for taking care of the decedent for the four or five years immediately preceding his death.

the party's cause." The party moving to exempt a witness under Rule 615(3) must show that the witness "has such specialized expertise or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness." *Oliver B. Cannon and Son v. Fidelity and Cas. Co*., 519 F. Supp. 668, 678 (D. Del. 1981).

The persons who generally fall within the "essential person" exemption pursuant to Rule 615(3) are "expert witnesses" and "agents who handled the transaction being litigated." *Arkansas Power & Light Co. v. Melkovitz*, 668 S.W.2d 37, 45 (Ark. Ct. App. 1984) (citations omitted). The purpose of sequestration to avoid witnesses from tailoring their testimony to that of earlier witnesses does not usually apply to experts because experts do not testify independently as to the facts of a case. Rather, they offer their expert opinion based on the facts presented at trial. *Id*. Therefore, an expert witness "will not be in a position to conform his testimony to that of others even if so inclined." *Morvant v. Construction Aggregates Corp*., 570 F.2d 626, 630 (6th Cir. 1978).

The other frequent type of witness that falls within Rule 615(3) is an agent or an attorney "who handled the transaction being litigated." *Cannon*, 519 F. Supp. at 678 (citing Fed. R. Evid. 615, Advisory Committee's Note). For instance, in *Cannon*, the court held that an attorney who handled a transaction that gave rise to the litigation should be exempt from sequestration. *Id*. at 679. The court reasoned that the attorney was "most familiar with all the complex factual details underlying [the] case and an individual without whose presence Cannon's attorney probably could not effectively represent his client at trial." *Id*.

In the instant case, the Administratrix seeks to exempt two witnesses, Carmen Tanaka and John Taitano (collectively "the Witnesses"), who are neither expert witnesses, nor agents who handled any relevant transaction. The Witnesses are purely fact witnesses, which rarely qualify as "essential persons" under Rule 615(3). *See Cannon*, 519 F. Supp. at 678; *see Windsor Shirt Co. v. New Jersey Nat'l. Bank*, 793 F. Supp. 589, 618 (E.D. Penn. 1992). Nevertheless, the Administratrix argues that they should be exempt because they possess critical knowledge of very complex facts that span over the course of several

decades. Also, Ms. Tanaka possesses knowledge unavailable to the Administratrix because, unlike Ms. Tanaka, the Administratrix was not even born at the time of the alleged *mwei-mwei* adoption. Because the Witnesses possess critical and exclusive information about the case, the Adminstratrix contends their presence during the proceedings is essential. This argument is unpersuasive.

The assertion that the Witnesses are extremely knowledgeable about the facts in this case, and thus, would be of great assistance to counsel is insufficient to justify a Rule 615(3) exemption. *Windsor Shirt Co.*, 793 F. Supp. at 618 ("[T]he least weighty reason for considering a witness 'essential' to a case is the factual knowledge he possesses" because facts "can easily be communicated before and after trial."). Similarly, Ms. Tanaka's possession of exclusive information, unavailable to the other parties or witnesses in the case, is insufficient. *Id*. Exempting witnesses from sequestration simply because they are knowledgeable about the facts of the case would, in essence, obliterate the long-standing rule of excluding witnesses because, "[p]resumably, every witness has essential testimony or evidence." *Cannon*, 519 F. Supp. at 678.

Although the Court agrees with the Administratrix that Ms. Tanaka and Mr. Taitano are *critical* witnesses, the standard to warrant an exemption is "essential." NMI R. Evid. 615(3); *see also Opus 3*, 91 F.3d at 629 n.2 (citing *Miller v. Universal City Studios, Inc*., 650 F.2d 1365, 1374 (5th Cir. 1981)). "The word 'essential' connotes necessary; not preferable, or better than some other state of affairs." *Windsor Shirt Co.*, 793 F. Supp. at 617.

The Eighth Circuit Court of Appeals found a lay witness met the "essential person" exception under Rule 615(3) because her testimony was necessarily based on the trial testimony of other witnesses. *Hopkins v. Saunders*, 199 F.3d 968, 980 (8th Cir. 1999). The exempt witness was a member of the appellate administrative board and was called to testify as to how she would have voted at plaintiff's administrative appeal, if one had been held. *Id*. The court held that "in order to credibly testify regarding how she would have ruled in 1994, it was necessary that [the witness] first hear the evidence that she would have heard in 1994, and thus presence in the courtroom was essential." *Id*.

The instant case is easily distinguishable from *Hopkins*. The Witnesses will not be responding directly to, nor basing their testimony upon, the Claimants' testimony. The Witnesses will be testifying only to their firsthand knowledge of the facts, without any need to hear other witnesses' testimony. The Administratrix's concern that she will be unable to verify or challenge the Claimants' testimony without the courtroom presence of the Witnesses is unfounded. The Administratrix is free to confer with all its witnesses throughout the proceedings regarding emerging facts and developments in order to effectively handle its case and prepare for cross examination. Sequestration does not hinder the Adminstratrix's effective representation of the Estate; however, it may make it less convenient. The courtroom presence of the Witnesses is at best "desirable," but not "essential," and thus, the requested exemptions are not warranted. *Cannon*, 519 F. Supp. at 678.

C. SCOPE OF THE SEQUESTRATION ORDER

The Administratrix wishes to discuss the substance of courtroom testimony with sequestered witnesses in order to prepare for more effective cross-examination.

NMI R. Evid. 615 refers only to the exclusion of witnesses from the courtroom. The courts are split as to whether Rule 615 applies to conduct outside of the courtroom. *See, e.g., U.S. v. Sepulveda*, 15 F.3d 1161, 1177 (1st Cir. 1993) (finding that Rule 615 requires *only* that witnesses be excluded from the courtroom so that they cannot hear the testimony of other witnesses); *but see, e.g., U.S. v. Friedman*, 854 F.2d 535, 568 (2d. Cir. 1988) (finding that witnesses may violate an exclusion order entered under Rule 615 by reading trial testimony of other witnesses).

In any event, the majority of jurisdictions agree that reading trial testimony violates Rule 615. *See, e.g., United States v. Jimenez*, 780 F.2d 975, 980 n.7 (11th Cir. 1986) (noting that "there is no difference between reading and hearing testimony for purposes of Rule 615"). Indeed, allowing prospective witnesses to read notes or transcripts that memorialized testimony verbatim would severely undermine the effect of sequestration. Therefore, the Court adopts the prevalent view that reading testimony is a violation of Rule 615.

Conversely, the majority of jurisdictions interpret Rule 615 as placing very little, if any, restraint on counsel in discussing prior testimony to its prospective witnesses. *See, e.g.*, *United States v. Rhynes*, 218 F.3d 310, 316 (4th Cir. 2000) ("It is clear from the plain and unambiguous language of Rule 615 that lawyers are simply not subject to the Rule."); *see also Drilex Sys. v. Flores*, 1 S.W.3d 112, 117 (Tex. 1999) ("A violation of the Rule occurs when a nonexempt prospective witness . . . learns about another's trial testimony through discussions with persons *other than the attorneys in the case*.") (emphasis added).

In *Rhynes*, the court articulated two reasons for finding that an attorney does not violate a sequestration order in discussing the substance of courtroom testimony with a prospective witness. 218 F.3d at 318, 320. First, a lawyer's ethical duties to refrain from presenting perjured testimony or assisting a witness to testify falsely help guard against tailoring, collusion, and fabrication of testimony. *Id*. at 318. Second, attorneys owe a duty to zealously and adequately represent their clients, which necessitates the preparation of witnesses. *Id*. at 319-320. Construing Rule 615 as limiting the scope of discussions between attorneys and witnesses would make it very difficult for attorneys to straddle the fine line between providing effective assistance of counsel and violating Rule 615. *Id*. As a safeguard, if it becomes apparent that counsel has discussed prior testimony in "coaching" a prospective witness, opposing counsel can flesh this clear legal and ethical violation out on cross examination. *Geders*, 425 U.S. at 89.

Case precedent and sound reasoning regarding the scope of sequestration favors allowing attorneys to discuss the substance of prior testimony with prospective witnesses. Nevertheless, witnesses may not read notes or transcripts that contain transcribed courtroom testimony. This distinction between discussing and reading courtroom testimony is not arbitrary because reading testimony provides a greater opportunity for witnesses to tailor their testimony. *Miller v. Universal City Studios, Inc*., 650 F.2d 1365, 1373 (5th Cir. 1981) (noting that a witness who reads trial testimony "need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony"). The Court exercises its broad discretion under NMI R. Evid. 615 to permit the

Administratrix to discuss courtroom testimony with its prospective witnesses,[5] but not to provide them with written notes or transcripts of prior testimony.

V. CONCLUSION

For the foregoing reasons, the Court hereby **DENIES** the Administratrix's motion to lift the Court's its sequestration order, and **DENIES** the Administatrix's request to exempt Carmen Tanaka and John Taitano. The Court hereby **GRANTS** the Administratrix's motion to permit counsel to discuss the substance of courtroom testimony with prospective witnesses.

IT IS SO ORDERED this 5th day of January, 2012.

/s/
ROBERT C. NARAJA, Presiding Judge

[5] The Court finds that the Administratrix's interest in consulting with its witnesses about courtroom testimony is particularly great in these proceedings. First, this probate matter encompasses numerous witnesses and complex facts that span across multiple generations. Second, as argued by the Administratrix during oral argument, Claimants do possess a significant advantage in being exempt from sequestration under NMI R. Evid. 615(1), creating an equitable interest in "leveling the playing field." To that end, the Court finds that allowing the Administratrix to confer freely with its witnesses is adequate, while not sacrificing the valuable truth-seeking goal of sequestration.