

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES

v.

Criminal No. 2:S20-cr-114-FTM-66MRM

CASEY DAVID CROWTHER

Defendant.

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**DEFENDANT'S MOTION IN *LIMINE* TO PERMIT PRESENCE OF
REBUTTAL EXPERT WITNESS IN THE COURTROOM**

Defendant, Casey David Crowther ("**Crowther**"), through undersigned counsel, and pursuant to Fed. R. Evid. 615, hereby files his Motion in Limine to Permit Presence of Rebuttal Expert Witness in the Courtroom.

I. INTRODUCTION

Crowther hereby requests that Jessica L. Hollobaugh, CPA/ABV, CFE, Crowther's rebuttal expert witness, be permitted to be physically present in the courtroom during the entire trial. As the Court is aware, experts who are responding to the theories of an adversary's expert are rarely sequestered. Here, in order to adequately, appropriately, and fully respond to testimony from the Government's expert witnesses, it is necessary for Ms. Hollobaugh to observe testimony from the Government's financial and summary witnesses.

Additionally, Ms. Hollobaugh should be permitted to observe live trial testimony from lay witnesses. Ms. Hollobaugh's presence in the courtroom during

testimony from lay witnesses is appropriate because the Federal Rules of Evidence specifically contemplate that a permissible source of facts or data upon which the opinions of an expert witness may be based is firsthand observation of witness testimony. For this reason, courts from around the country have allowed expert witnesses to be present in the courtroom during trial to observe firsthand testimony from lay witnesses.

Finally, Ms. Hollobaugh's presence in the courtroom throughout the trial is essential to defense counsel's management of the case. In particular, given the complex and detailed accounting and financial issues that will be the subject of the Government's summary witness trial testimony, the undersigned requires Ms. Hollobaugh's assistance in formulating questions and lines of inquiry for cross examination of the Government's financial and summary witnesses.

Accordingly, Crowther requests that Ms. Hollobaugh's presence in the courtroom be permitted during the entire trial.

II. MEMORANDUM OF LAW

A. Standard

A motion in limine is the appropriate vehicle to request that a party's expert witness be permitted to be present in the courtroom. *See Yu v. Idaho State Univ.*, No. 4:15-cv-00430-REB, 2019 U.S. Dist. LEXIS 9470 at *4-5 (D. Idaho Jan. 17, 2019) (granting motion in limine for the presence of plaintiff's rebuttal experts during trial proceedings); *Williams v. Schwarz*, No. 15 C 1691, 2018 U.S. Dist. LEXIS 92754 at *32-34 (N.D. Ill. June 1, 2018) (denying a party's motion in limine seeking to exclude

presence of adverse party's expert witnesses in the courtroom). Fed. R. Evid. 615 states:

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;*** or
- (d) a person authorized by statute to be present.

(emphasis added).

"The exclusion of fact witnesses rests on a concern that having heard the testimony of others, the witnesses may inappropriately tailor their testimony to conform to the testimony of previous witnesses." *Williams*, 2018 U.S. Dist. LEXIS 92754 at *33 (quoting *Client Funding Solutions Corp. v. Crim*, 943 F. Supp. 2d 849, 868 (N.D. Ill. 2013)). The *Williams* court stated:

No such danger is present with expert witnesses, whose testimony, by nature, is based on facts and information provided by others. Indeed, Federal Rule of Evidence 703 expressly provides that "[a]n expert may base an opinion on facts or data personally observed," and the Seventh Circuit has noted that "there is little if any difference between counsel disclosing prior testimony to an expert and having an expert listen to such testimony in the courtroom."

Williams, 2018 U.S. Dist. LEXIS 92754 at *33 (quoting *United States v. Crabtree*, 979 F. 2d 1261, 1270 (7th Cir. 1992)); see also *Below v. Yokohama Tire Corp.*, No. 15-CV-529-

WMC, 2017 U.S. Dist. LEXIS 27280 at *7 (W.D. Wis. Feb. 27, 2017) (stating that “[t]he court’s general practice is to exclude all lay witnesses from the courtroom until they have completed their testimony, while allowing experts to remain”).

“[E]xperts who are responding to the theories of an adversary’s expert are infrequently sequestered.” *Williams*, 2018 U.S. Dist. LEXIS 92754 at *34 (citing *Ty Inc. v. Softbelly’s Inc.*, No. 00 C 5230, 2006 U.S. Dist. LEXIS 100736 at *18 (N.D. Ill. Apr. 7, 2006); see also *Polythane Sys., Inc. v. Marina Ventures Int’l, Ltd.*, 993 F. 2d 1201, 1209 (5th Cir. 1993) (stating that “[e]xpert witnesses clearly fall within Rule 615([c])’s exception” for individuals whose presence is essential to the presentation of a party’s case). The *Williams* court stated:

Here there is no suggestion that Dr. Barkoff will be providing factual testimony that she could alter to conform with the statements of others. In addition, to the extent that she is properly called as a rebuttal witness, her presence in the courtroom during Defendant’s testimony will limit the need to “repeat previous testimony in the form of lengthy hypothetical questions.” *United States v. Dimora*, 843 F. Supp. 2d 799, 821 (N.D. Ohio 2012). On the record presented, the Court finds that in light of the uncertainty regarding what Defendant will testify to at trial, Plaintiff has adequately shown that Dr. Barkoff’s presence in the courtroom is essential for the management of the case since she may well be necessary as a rebuttal witness.

Williams, 2018 U.S. Dist. LEXIS 92754 at *34-35.

As a rebuttal expert, Ms. Hollobaugh should be permitted to be present in the courtroom during the entire trial. Besides the fact that she should be permitted to personally observe the trial testimony of the Government’s financial and summary witnesses, Ms. Hollobaugh should also be permitted to observe testimony from lay

witnesses, since such testimony is a proper foundation and basis for her own testimony and opinions. Moreover, Ms. Hollobaugh's presence in the courtroom is essential for the undersigned's management of the case because Ms. Hollobaugh's assistance is necessary with respect to formulating questions and lines of inquiry for the undersigned's cross examination of the Government's witnesses.

B. Ms. Hollobaugh Should Be Permitted to Be Present in the Courtroom to Observe the Government's Financial and Summary Testimony

As a rebuttal expert, Ms. Hollobaugh should be permitted to personally observe live trial testimony from the Government's financial and summary witnesses. *See, e.g., Williams*, 2018 U.S. Dist. LEXIS 92754 at *33-35. A copy of Ms. Hollobaugh's Curriculum Vitae is attached hereto. *See Ex. "A"*. Her expert rebuttal testimony may include, *inter alia*, subject matter regarding (a) interpretation of Generally Accepted Accounting Principles ("GAAP") in reference to S Corporations; (b) fungibility of co-mingled funds; (c) the CARES Act; (d) Small Business Administration ("SBA") interim rules; (e) loan forgiveness eligibility; (f) stock redemption agreements, as may be applicable to GAAP principles and the books and records of Target Roofing and Sheet Metal, Inc. ("Target"); and (g) loan documents in reference to S Corporations. In order to properly formulate her own opinions and respond to evidence that is rendered by the Government's witnesses, it is imperative that Ms. Hollobaugh be permitted to personally observe live trial testimony from the Government's witnesses, including the Government's Rule 1006 witness (who is expected to testify regarding a

summary of funds held in various bank accounts), along with the Government's SBA-related witnesses.

As noted by the *Yu* court:

On balance, the Court is persuaded in this setting that Plaintiff should be permitted to have his rebuttal witnesses present during trial proceedings. Expert testimony will be important to each party's trial presentations. To the extent that evidentiary disputes might arise over opposing experts' competing testimony, having experts present in the courtroom during other witnesses' testimony could reduce the number and complexity of such disputes.

Yu, 2019 U.S. Dist. LEXIS 9470 at *3-4.

To address the same types of considerations in the instant case, Ms. Hollobaugh should be permitted to personally observe live trial testimony from the Government's witnesses. Given that she is a rebuttal witness, it is typical and customary to allow her presence in the courtroom. *See, e.g., Williams*, 2018 U.S. Dist. LEXIS 92754 at *34 (stating that "experts who are responding to the theories of an adversary's expert are infrequently sequestered" and citing *Ty Inc.*, 2006 U.S. Dist. LEXIS 100736 at *18); *see also Polythane Sys., Inc.*, 993 F. 2d at 1209 (5th Cir. 1993) (stating that "[e]xpert witnesses clearly fall within Rule 615([c])'s exception" for individuals whose presence is essential to the presentation of a party's case).

C. Ms. Hollobaugh Should Be Permitted to Be Present in the Courtroom to Observe Lay Witness Testimony

In addition to observing testimony from the Government's experts, Ms. Hollobaugh should be permitted to personally observe testimony given by lay witnesses. Fed. R. Evid. 703 states:

An expert may base an opinion on the facts or data in the case that the expert had been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

It is widely considered appropriate for expert witnesses to be permitted to observe trial testimony of lay witnesses. *See, e.g., Mayo v. Tri-Bell Industries, Inc.*, 787 F. 2d 1007, 1013 (5th Cir. 1986 (concluding that the trial court properly allowed defense's experts to testify where they were properly exempted from the exclusion of witness order; further, stating that "[b]ecause the experts were not witnesses whose recollections might have been colored by accounts of prior witnesses, there was no prejudice"); *Morvant v. Construction Aggregates Corp.*, 570 F. 2d 626, 629 (6th Cir. 1978) (perceiving "little, if any, reason for sequestering a witness who is to testify in an expert capacity only and not to the facts of the case"); *United States v. Seschillie*, 310 F. 3d 1208 (9th Cir. 2002) (concluding that the district court abused its discretion in excluding expert witness from the courtroom where he was testifying solely as an expert witness, but under the circumstances finding that such error was harmless).

Here, Ms. Hollobaugh will be testifying solely in her expert witness capacity. She will not be testifying as a fact witness; therefore, there is no risk of improperly influencing her testimony by permitting her to observe live trial testimony from lay

witnesses. *See, e.g., Mayo*, 787 F. 2d at 1013. Ms. Hollobaugh's presence in the courtroom therefore should be permitted.

D. Ms. Hollobaugh's Physical Presence in the Courtroom is Essential to Management of the Defense's Case

Ms. Hollobaugh also should be permitted to be physically present in the courtroom during the trial because Ms. Hollobaugh's presence is essential to the management of the defense's case. In *United States v. Benson*, No. 12-cr-480 YGR, 2015 U.S. Dist. LEXIS 8779 at *1 (N.D. Cal. Jan. 23, 2015), the district court stated:

The United States moves for an order permitting its expert, Dr. Jennifer Kirkland, to be present in the courtroom during testimony at the competency hearing set for February 6, 2015. The motion is Granted to the extent Dr. Kirkland intends to opine on matters within her competence. The United States has made a sufficient showing that Dr. Kirkland's advice is necessary to prepare their examination. The Ninth Circuit has found that "[i]n many instances, a potential expert witness will be an 'essential party' within the meaning of Rule 615(c)." *United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002). Indeed, the Advisory Committee Notes to Rule 615 indicate that the exception in Rule 615(c) may include "an expert needed to advise counsel in the management of the litigation." *Here, the United States has made the required "fair showing" that Dr. Kirkland's expert advice is necessary for the government to craft meaningful lines of questioning of the other doctors expected to testify at the hearing. Permitting Dr. Kirkland to be in present in the courtroom during that testimony, and any testimony by Benson himself, will allow the process to proceed efficiently.*

Benson, 2015 U.S. Dist. LEXIS 8779 at *6-7 (emphasis added).

Similarly, Ms. Hollobaugh's expert advice is necessary and critical for the defense to be able to craft meaningful lines of questioning for cross examination of the

Government's financial and summary witnesses. Specifically, Ms. Hollobaugh is a Certified Public Accountant (CPA) who is Accredited in Business Valuation (APV) and also is a Certified Fraud Examiner (CFA). Her expertise regarding the types of accounting and financial matters specific to this case will be essential to the defense's analysis of testimony from the Government's witnesses and preparation of cross examination material directed towards the Government's witnesses. In *Morvant*, the Sixth Circuit stated:

We therefore hold that where a party seeks to except an expert witness from exclusion under Rule 615 on the basis that he needs to hear firsthand the testimony of the witnesses, the decision whether to permit him to remain is within the discretion of the trial judge and should not normally be disturbed on appeal. *See generally* 3 Weinstein's Evidence, supra, para. 615[01] at 615-8. ***On the other hand, where a fair showing has been made that the expert witness is in fact required for the management of the case, and this is made clear to the trial court, we believe that the trial court is bound to accept any reasonable, substantiated representation to this effect by counsel.***

Morvant v., 570 F. 2d at 630 (emphasis added).

Accordingly, given that Ms. Hollobaugh's presence in the courtroom is deemed essential by defense counsel for the aforementioned reasons, Ms. Hollobaugh should be permitted to observe the entire trial.

III. CONCLUSION

Based on the foregoing, Crowther respectfully requests that this Court (a) grant this Motion in all respects; (b) permit the presence of Jessica L. Hollobaugh,

CPA/ABV, CFE in the courtroom during the entire trial; and (c) enter such other and further relief this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Nicole H. Waid, attorney for Casey David Crowther, do hereby certify that I have, this day, filed the foregoing with the Clerk of Court via the CM/ECF system, which has caused a true and correct copy to be served on all counsel of record.

/s/ Nicole H. Waid
Nicole H. Waid, Esq.