

6.03. Exclusion of Witnesses

(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.

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 courtroom except the one under examination closely approaches an abuse of discretion.”

The Court of Appeals has not addressed the corollary issues of whether a court may direct an attorney not to give a prospective witness a transcript of the testimony of a witness who has testified, or whether a court may direct a witness who has testified not to discuss his or her testimony with a prospective witness.

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] [“the 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, Practice Commentaries, McKinney’s Cons Laws of NY, Book 11, CPL 260.20.)

The Appellate Division, Second Department, has recognized a party’s constitutional right to be present in a civil trial. (*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”].) The civil party’s right to be present may be waived or forfeited. (*See Ajaeb v Ajaeb*, 276 App Div 1094 [2d Dept 1950], *affd* 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].)