Colorado National Bankshares, Inc. v. Commissioner, 92 T. C. 246 (1989)

Showing an exhibit prepared during trial to an expert witness outside the courtroom violates witness exclusion rules, but sanctions may not be imposed without showing prejudice.

Summary

In Colorado National Bankshares, Inc. v. Commissioner, the U. S. Tax Court addressed a violation of its Rule 145, which excludes witnesses from the courtroom to prevent them from hearing other witnesses' testimony. During the trial, petitioner's expert witness prepared a graph during a recess to clarify his testimony. Respondent's counsel later showed this graph to their expert witness before he testified, prompting a motion to strike the testimony of both experts. The court held that showing the graph was a violation of Rule 145, but declined to strike the testimony due to a lack of demonstrated prejudice to the petitioner. The ruling emphasizes the court's disapproval of such violations and its readiness to impose sanctions in cases where prejudice is evident.

Facts

During the trial, the court invoked Rule 145 to exclude all witnesses, including experts, from the courtroom. Petitioner's expert witness, Dale Winter, prepared a graph during a recess to clarify his testimony in response to a graph drawn by respondent's counsel. This graph, admitted as petitioner's Exhibit 81, was later shown by respondent's counsel to their expert witness, Professor Edward Kane, outside the courtroom before he testified. This action led petitioner to move for sanctions, seeking to strike portions of the testimony of both experts.

Procedural History

The case was tried in the U. S. Tax Court to determine the valuation of core deposit intangibles. At the trial's outset, Rule 145 was invoked at respondent's request, excluding all witnesses from the courtroom. After the incident with Exhibit 81, petitioner moved to strike portions of the testimony of respondent's expert, Professor Kane, and portions of the cross-examination of petitioner's expert, Mr. Winter. The court addressed the motion within the trial itself, resulting in the decision not to impose sanctions due to lack of prejudice.

Issue(s)

1. Whether showing Exhibit 81 to respondent's expert witness violated Tax Court Rule 145.
2. Whether and what sanctions should be imposed for the violation of Rule 145.

Holding

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1. Yes, because Exhibit 81 constituted testimony for the purposes of Rule 145, and showing it to respondent's expert witness outside the courtroom violated the rule.
2. No, because there was no showing of probable prejudice to petitioner, thus no sanctions were imposed.

Court's Reasoning

The court reasoned that Exhibit 81, prepared during a trial recess to clarify testimony, was equivalent to oral testimony for the purposes of Rule 145. Therefore, showing it to Professor Kane violated the rule. However, the court distinguished this case from others where exhibits were not prepared in response to testimony. The court emphasized that the purpose of witness exclusion is to prevent tailoring of testimony, but found no evidence that Professor Kane altered his expert opinion based on Exhibit 81. The court also noted that respondent's counsel prepared his cross-examination of Mr. Winter independently, further supporting the decision not to strike any testimony due to lack of prejudice. The court disapproved of violations of Rule 145 but declined to impose sanctions absent a showing of probable prejudice.

Practical Implications

This decision clarifies that exhibits prepared during trial to clarify testimony are considered testimony for the purposes of witness exclusion rules. Attorneys must be cautious not to show such exhibits to excluded witnesses, including experts, outside the courtroom. The ruling also underscores the importance of demonstrating prejudice when seeking sanctions for violations of these rules. Practically, this means that in future cases, attorneys should be prepared to show how a violation of witness exclusion rules has directly impacted the fairness of the trial or the integrity of the testimony. The decision also serves as a reminder that courts will not hesitate to impose sanctions when prejudice is evident, reinforcing the seriousness with which such rules are regarded.

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