

SUBJECT: Making exclusion of certain individuals in criminal trials discretionary

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Talton, Dunnam, Farrar, Galloway, Hinojosa, Keel, Nixon,
A. Reyna

0 nays

1 absent — Place

WITNESSES: For — Wanda Bailey, Woody Clements, Sterlene Donahue and Shirley
Parish, Justice for All; Sherri Wallace, Dallas County District Attorney

Against — None

On — David Weeks, Texas District and County Attorneys Association

BACKGROUND : “Invoking the Rule” is legal shorthand for requesting that the judge exclude all potential witness from the audience of a trial. It is set out currently as Rule 613 of the Texas Rules of Criminal Evidence. Witnesses are usually instructed by the judge to wait outside the courtroom and are prohibited from discussing the case with anyone other than their attorney. The purpose of the rule is to prevent witnesses from tailoring, consciously or unconsciously, their testimony to fit that of other witnesses and, in the case of witnesses testifying on the same side, to enhance the jury’s capability to detect falsehood by exposing inconsistencies in testimony.

Prior to the adoption of the Rules of Criminal Evidence in 1986, the exclusion of witnesses was discretionary with the judge. Under Rule 613, the judge is required to exclude any potential witness at any party’s request unless the person is:

- a party;
- the designated representative of a party that is not a natural person, such as a corporation;

- someone whose presence in the courtroom is essential to the presentation of the case, or
- the victim, unless the judge determines the victim's testimony might be influenced by remaining in the courtroom.

DIGEST:

HB 1689 would give the judge the discretion to remove a potential witness upon the request of a party if such a witness is a victim, was a close relative of a deceased victim, or the guardian of a victim. In order for the court to order exclusion of the witness, the party intending to invoke the rule against such witnesses would have to inform the opposing party before the trial commenced, and the court would have to allow the opposing party the opportunity to object to the witness's exclusion in open court.

Judges would still be specifically allowed to exclude any person from the courtroom on their own discretion without notice or an opportunity to object.

HB 1689 would take effect September 1, 1997.

SUPPORTERS
SAY:

The ability of individuals personally affected by a crime to attend a trial is necessary to allow those individuals to determine for themselves if justice is being served. However, in many cases, these persons are excluded from the courtroom as a tactical matter to prevent the jury from seeing the people affected by the crime. The purposes of Rule 613 are not served by excluding from the trial individuals who are never meant to be called or whose testimony would not be affected by listening to the testimony of other witnesses. HB 1689 would simply allow these people to stay in the courtroom or be excluded based upon a decision by the judge.

HB 1689 is not intended to be a means of forcing parties to divulge which witnesses they intend to call or create another point of error to be argued on appeal. The exclusion of the victim from the courtroom is already discretionary with the judge. HB 1689 would simply extend that discretion to relatives of deceased victims or legal guardians of victims. Before the rules of criminal evidence were adopted in 1986, the exclusion of witnesses had always been discretionary with the judge.

Oftentimes, when people are excluded from the courtroom by invocation of the rule, they were never made aware before the trial began that they would be excluded. Under HB 1689, the party who intended to exclude victims or their guardians or close relatives of a deceased victim from the trial would have to inform opposing counsel before the trial commenced of that party's intention to invoke the rule. This would allow the other side to be prepared when the rule was invoked to argue which persons should be allowed to stay and why. It also would give those individuals some warning about the possibility that they might not be allowed to attend the trial.

Allowing the objection to the exclusion of these individuals to be considered in open court would allow the parties the opportunity to explain why these individuals should or should not be allowed to remain in the courtroom. It is not meant to be a means of requiring the opposing side to show their trial strategy, but simply of allowing those people who might be excluded to feel that they have the opportunity to argue for their rights to stay in the courtroom.

HB 1689 would be fair to both the prosecution and the defense as either side may wish to have these individuals excluded from the courtroom. It would not give one side or the other an advantage in objecting to the exclusion of witnesses, but simply place the determination of which individuals should be excluded in the hands of the judge.

**OPPONENTS
SAY:**

Requiring notice to be given and argument to be made in open court over excluding witnesses may be a way to force parties to divulge their strategy or other privileged work product before the trial commences. While HB 1689 does not address what is needed in the notice or in arguing the motion, in order to exclude a witness, the party may be required to inform the court of what that person will be called to testify about.

The determination of a judge concerning which persons to exclude could be viewed as reversible error if it could be shown that the testimony of a witness was influenced by being allowed to stay in the courtroom.