

SUBJECT: Deadline for taking the deposition of an elderly or disabled person

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 9 ayes — Gallego, Christian, Fletcher, Kent, Miklos, Moody, Pierson,  
Vaught, Vo

0 nays

2 absent — Hodge, Riddle

WITNESSES: (*On original version:*)

For — Katrina Daniels, Bexar County District Attorney Susan D. Reed;  
John Rolater, for John Roach, Collin County Criminal District Attorney;  
(*Registered, but did not testify:* Carlos Higgins, Texas Silver-Haired  
Legislature; Ballard C. Shapleigh, El Paso District Attorney Jaime  
Esparza; Charley Wilkison, Combined Law Enforcement Associations of  
Texas)

Against — None

BACKGROUND: Under Code of Criminal Procedure, art. 39.02, the state or defendant in a  
criminal case may apply to take the deposition of a witness.

DIGEST: CSHB 2465 would amend Code of Criminal Procedure, ch. 39 by adding  
sec. 39.025 to require a court to order the state attorney to take the  
deposition of an elderly or disabled witness or alleged victim no later than  
60 days after the state filed the deposition application. The attorney  
representing the state and the defendant or defendant's attorney could  
extend the deadline by filing a written agreement with the court. The court  
would be required to grant the extension request if the reason for the  
request was the unavailability, health, or well-being of the victim or  
witness.

The taking of the deposition of an elderly or disabled person would be  
governed by the Rules of Civil Procedure. The Code of Criminal  
Procedure or applicable court rules for criminal proceedings would govern  
in the case of a conflict with the Rules of Civil Procedure. The attorney  
representing the state and the defendant or defendant's attorney could

modify the applicable rules by written agreement filed with the court before the taking of the deposition.

If a defendant was unavailable due to confinement in a correctional facility, the court would issue any necessary orders or warrants to secure the defendant's presence at the deposition. The sheriff of the county in which the deposition was to take place would be required to provide a secure location and sufficient law enforcement personnel to ensure the safety of the deposition. The state's deposition application would not have to identify the law enforcement agents assigned to the deposition, and failure to identify them could not be the basis for the defendant's objection to the deposition.

If a defendant was unavailable for a reason other than confinement in a correctional facility, the defendant or the defendant's attorney would have to request a continuance from the court. The court could grant the continuance if the defendant demonstrated good cause and that the request was not made for the purpose of delay or avoidance. A defendant's failure to attend a deposition or request a continuance would constitute a waiver of the defendant's right to be present at the deposition.

"Elderly person" would be defined as a person 65 years of age or older. "Disabled person" would be defined as a person with a physical or mental impairment that substantially limited one or more major life activities, a record of such an impairment, or who was regarded as having such an impairment.

The bill would take effect on September 1, 2009, and would apply only to deposition applications filed on or after this date.

**SUPPORTERS  
SAY:**

By placing a 60-day deadline on when the state's deposition of an elderly or disabled witness or victim would have to be taken, CSHB 2465 would allow the state to preserve testimony and see that justice was done. Currently, a defendant is able to delay court proceedings to the extent that, when a trial occurs, an elderly or disabled witness or victim may be unable to testify.

In cases where the victim was disabled or elderly, CSHB 2465 would be a tool to help the state prosecute offenses against some of the most vulnerable members of society. The bill would be narrowly tailored to

apply only to elderly or disabled victims or witnesses, a segment of society the law already recognizes as deserving extra protection.

The bill would eliminate the advantage a defendant would gain by postponing trial, while still protecting the rights of the defendant. The timeline would apply only to depositions taken by the state attorney, but the defense still would have the right to cross examine the witness.

**OPPONENTS  
SAY:**

The defense should have the same opportunity to quickly depose an elderly or disabled defense witness. Defense attorneys are officers of the court, the same as state attorneys, and it should not be assumed that a defense attorney would abuse the deposition process. This bill would extend a privilege to state attorneys but not offer the same consideration to the defense or to elderly or disabled defense witnesses.

**NOTES:**

CSHB 2465 differs from the bill as filed by applying the requirements to elderly or disabled victims or witnesses, rather than just to elderly or disabled victims; removing a provision requiring the court in which the application was filed to grant the application; requiring the court to order the state attorney to take the deposition within 60 days of application, rather than excluding the court order; authorizing the court to grant a defense motion for continuance for good cause; adding that the Code of Criminal Procedure or applicable court rules adopted for criminal proceedings govern in case of conflict with the Rules of Civil Procedure, rather than the Rules of Criminal Procedure governing in case of conflict; and requiring the court to issue orders or warrants to secure the defendant's attendance at a deposition if the defendant is confined in a correctional facility, rather than if the defendant is incarcerated.