

SUBJECT: Depositions in a Medicaid or Medicare fraud prosecution

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 9 ayes — Gallego, Hartnett, Aliseda, Burkett, Carter, Christian, Y. Davis, Rodriguez, Zedler
0 nays

WITNESSES: For — Kevin Petroff, Harris County District Attorney's Office;
(*Registered, but did not testify:* Darrell Davila, Tarrant County District Attorney; Anne Dunkelberg, Center for Public Policy Priorities; Doug Lowe, Office of Anderson County Criminal District Attorney)

Against — None

BACKGROUND: Code of Criminal Procedure, sec. 39.01 provides that when an examination takes place in a criminal action before a magistrate, the state or the defendant may have the deposition of any witness taken by an authorized officer. The deposition cannot be used for any purpose by a party unless that party first acknowledges that the entire evidence or statement of the witness may be used for or against the defendant at trial, subject to all legal objections. For the deposition to be used at trial, the defendant must have been present, the defendant must have had the opportunity to cross-examine the witness, and the witness must be unavailable for trial because the witness does not live in Texas, has died, has been prevented from appearing, or is too old or ill to attend the trial.

To prosecute criminal Medicaid or Medicare fraud cases where an account is charged but no product or service is provided or rendered, each Medicaid or Medicare recipient must be called separately to testify at trial. Cases may involve large classes of recipients, and many recipients are ill or elderly.

DIGEST: CSHB 3375 would add a provision to the Code of Criminal Procedure allowing an attorney for the state to prove by direct or circumstantial evidence that a Medicaid or Medicare recipient did not consent or effectively consent to a transaction. The provision would apply only to trials involving an allegation of a continuing scheme of fraud or theft that

was alleged to have been committed with respect to a large class of Medicaid or Medicare recipients in an aggregate amount or value.

Depositions. The bill would amend the conditions for using a deposition at trial. The bill would allow a recorded deposition to be used. Both the defendant and the defendant's attorney would have to have been present when testimony was taken. A deposition could be used at trial if the witness was a Medicaid or Medicare recipient, or a caregiver or guardian of the recipient, and the recipient's Medicaid or Medicare account was charged for a product or service that was not provided or rendered to the recipient.

The bill would add language to the Code of Criminal Procedure governing depositions of Medicaid or Medicare recipients or caregivers. A court would be allowed to order the attorney for the state to take the deposition of a recipient or caregiver who was the alleged victim of or witness to an offense constituting Medicaid or Medicare fraud or theft. The court would be required to issue an order by the 180th day after the date the state filed an application to take the deposition. On the motion of either party, the court could order the attorney for the state to take the deposition by video. The person operating the video equipment would have to be available to testify on the authenticity of the video and the taking of the deposition for the video to be admissible. The court would be able to allow a party to offer the entire video into evidence without requiring the jury to view the entire video during the trial.

If the defendant was unavailable to attend a deposition due to being confined in a correctional facility, the court would be required to issue any orders or warrants necessary to secure the defendant's presence at the deposition. The sheriff of the county where the deposition was to be taken would be required to provide a secure location for the deposition and sufficient law enforcement personnel to ensure the deposition was taken safely. If the defendant was unavailable to attend a deposition for some other reason, the defendant would be required to request a continuance from the court. The court could grant the continuance if the defendant demonstrated good cause for the continuance and the request was not brought for 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.

The deadline for taking the deposition could be extended by written agreement filed with the court between the attorney for the state and the defendant. The court would be required to grant any request by the state to extend the deadline for the taking of the deposition if the reason for the request was unavailability, health, or well-being of the recipient or caregiver.

Effective date. The bill would take effect on September 1, 2011, and would apply to a criminal proceeding that commenced on or after the effective date.

NOTES:

The substitute differs from the original by requiring the defendant's attorney to be present at a deposition.

The companion bill, SB 1680 by Ellis, passed the Senate by 30-0 on April 14 and has been referred to the House Criminal Jurisprudence Committee.