

**SUBJECT:** Allowing prosecutors to take witness depositions in criminal cases

**COMMITTEE:** Criminal Jurisprudence — favorable, without amendment

**VOTE:** 7 ayes — Keel, Riddle, Ellis, Denny, Hodge, Pena, Talton  
0 nays  
2 absent — Dunnam, P. Moreno

**WITNESSES:** For — Chuck Noll, Harris County District Attorney’s Office; John Rolater, Dallas County District Attorney’s Office  
Against — None  
On — David Graner, Texas Securities Board

**BACKGROUND:** Code of Criminal Procedure, art. 39.02 allows a defendant but not the prosecutor to take depositions of witnesses in criminal cases. The defendant first must file with the clerk of the court in which the case is pending an affidavit stating the facts that establish good reason to take the deposition. After notice to the prosecutor, the court must hold a hearing on the application and determine if good reason exists to take the deposition. The court must grant or deny the application on the basis of facts presented at the hearing.

**DIGEST:** HB 1000 would allow either the prosecutor or the defendant to take depositions of witnesses. The procedure for applying to take a deposition and for a court to grant or deny the application would remain the same.  
The bill would take effect September 1, 2003.

**SUPPORTERS SAY:** HB 1000 would allow prosecutors to take depositions, which would help preserve evidence in cases when witnesses might not be available for trial. The bill would help the state effectively prosecute cases in which the victims are elderly or infirm and either may not be physically able to testify in court or may not live long enough for the case to go to trial. Specifically, it would assist the prosecution of financial fraud against the elderly, election fraud

cases involving elderly voters who receive mail ballots, and victims of violent crime whose condition deteriorates before trial. It also would assist the prosecution of cases in which key witnesses went overseas to serve in the military. When key witnesses cannot testify at trial, a prosecutor often has no choice but to dismiss the case. A defendant should not escape prosecution for a serious crime simply because a victim cannot testify at trial, and HB 1000 would prevent this injustice.

Prosecutors would have to meet the same burden imposed on defendants to declare the facts necessary to constitute good reason and then argue for the deposition in a hearing, at which the defendant could state any objections. Judges would retain discretion to control when prosecutors could take depositions, just as they have discretion to decide on the admissibility of evidence. Judicial discretion is a foundation of the justice system, and judges should be trusted to make fair, consistent decisions on important matters before them.

Any concern that prosecutors would abuse the right to take depositions of witnesses would apply equally to defendants who take depositions. HB 1000 simply would level the playing field. Furthermore, under Rule of Evidence 804, deposition testimony would not be admissible at trial unless the witness was unavailable to testify at trial and the defendant had an opportunity to cross-examine the witness at the deposition.

**OPPONENTS  
SAY:**

Because HB 1000 would not include specific provisions about when prosecutors could take depositions, prosecutors might abuse the right to take depositions of witnesses before trial, using it as a discovery tool or to coach key witnesses.

Judges would have too much discretion to allow either party to take depositions. In practice, judges would be more likely to favor the state, and prosecutors would have opportunities to depose witnesses that would not be available to the defendant. HB 1000 would do nothing to ensure that if the prosecutor in a given case had the right to take depositions, the defendant had a reciprocal right to do so.