

**SUBJECT:** Allowing the prosecution to depose witnesses in criminal actions

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

**VOTE:** 7 ayes — Keel, Riddle, Pena, Denny, Escobar, Raymond, Reyna  
0 nays  
2 absent — Hodge, P. Moreno

**WITNESSES:** For — Shannon Edmonds, Texas District and County Attorneys Association; John R. Rolater, Bill Hill, Dallas County District Attorney; Whitney S. Wiedeman, Caldwell County Criminal District Attorney  
  
Against — None

**BACKGROUND:** Under Code of Criminal Procedure (CCP), art. 39.01, a defendant, under certain circumstances, may have a deposition taken of a witness. The defendant may not use the deposition until agreeing that the prosecution may use admissible evidence from the deposition against the defendant. For the deposition testimony to be used against the defendant, the defendant must have been present at the deposition and had an opportunity to cross examine the witness. Deposition testimony may be used by either the prosecution or the defendant when the witness is 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.  
  
Under art. 39.02, to depose a witness, a defendant must apply to the court, stating the reasons it is necessary for the defendant to take the deposition. In deciding whether to grant or deny the application, the court must determine if the defendant has shown good reason for the deposition.

**DIGEST:** HB 975 would amend CCP, arts. 39.01 and 39.02 to allow the state to take depositions of witnesses under the same circumstances as a defendant is allowed to take depositions. To use a deposition the prosecution had taken, the prosecution would have to acknowledge that the defendant could use admissible testimony from the deposition to the defendant's advantage.

The bill would take effect September 1, 2005.

**SUPPORTERS  
SAY:**

Under current law, prosecutors have no way to preserve the testimony of witnesses who may not be available at trial. This particularly impacts victims of violent crime who have been seriously injured and may not live until the trial. Also affected are the elderly, who may not live until trial, and members of the military, who may be called to duty before the trial.

Defendants already have the right to preserve testimony by deposing witnesses, and extending this right to the prosecution would help level the playing field between victims and defendants. Defendants could use admissible testimony from a deposition the same as the prosecution and still would have to have been present and able to cross-examine before deposition testimony could be used against the defendant.

**OPPONENTS  
SAY:**

In practice, judges rarely allow defendants to depose witnesses in order to preserve testimony. Many criminal defense attorneys assert that judges already favor the prosecution, and extending the ability to preserve testimony through depositions would give judges another opportunity unfairly to favor the state. Judges inevitably would grant depositions for the prosecution more frequently than for defendants.