

CODE OF CRIMINAL PROCEDURE
TITLE 1. CODE OF CRIMINAL PROCEDURE
CHAPTER 39. DEPOSITIONS AND DISCOVERY

Art. 39.01. IN EXAMINING TRIAL. 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 any officer authorized by this chapter. The state or the defendant may not use the deposition for any purpose unless that party first acknowledges that the entire evidence or statement of the witness may be used for or against the defendant on the trial of the case, subject to all legal objections. The deposition of a witness duly taken before an examining trial or a jury of inquest and reduced to writing or recorded and then certified according to law, provided that the defendant and the defendant's attorney were present when that testimony was taken and that the defendant had the privilege afforded of cross-examining the witness, or taken at any prior trial of the defendant for the same offense, may be used by either the state or the defendant in the trial of the defendant's criminal case under the following circumstances:

When oath is made by the party using the deposition that the witness resides outside the state; or that since the witness's testimony was taken, the witness has died, or has removed beyond the limits of the state, or has been prevented from attending the court through the act or agency of the other party, or by the act or agency of any person whose object was to deprive the state or the defendant of the benefit of the testimony; or that by reason of age or bodily infirmity, that witness cannot attend; or that the witness is 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. When the testimony is sought to be used by the state, the oath may be made by any credible person. When sought to be used by the defendant, the oath must be made by the defendant in person.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Amended by:

Acts 2005, 79th Leg., Ch. 1021 (H.B. 975), Sec. 1, eff. September 1, 2005.

Acts 2011, 82nd Leg., R.S., Ch. 104 (S.B. 1680), Sec. 2, eff. September 1, 2011.

Art. 39.02. WITNESS DEPOSITIONS. Depositions of witnesses may be taken by either the state or the defendant. When a party desires to take the deposition of a witness, the party shall file with the clerk of the court in which the case is pending an affidavit stating the facts necessary to constitute a good reason for taking the witness's deposition and an application to take the deposition. On the filing of the affidavit and application, and after notice to the opposing party, the court shall hear the application and determine if good reason exists for taking the deposition. The court shall base its determination and shall grant or deny the application on the facts made known at the hearing. This provision is limited to the purposes stated in Article 39.01.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1741, ch. 659, Sec. 24, eff. Aug. 28, 1967.

Amended by:

Acts 2005, 79th Leg., Ch. 1021 (H.B. 975), Sec. 1, eff. September 1, 2005.

Art. 39.025. DEPOSITIONS OF ELDERLY OR DISABLED PERSONS.

(a) In this article:

(1) "Disabled person" means a person with a disability as defined by Section 3, Americans with Disabilities Act (42 U.S.C. 12102).

(2) "Elderly person" means a person 65 years of age or older.

(b) The court shall order the attorney representing the state to take the deposition of an elderly or disabled person who is the alleged victim of or witness to an offense not later than the 60th day after the date on which the state files an application to take the deposition under Article 39.02.

(c) The attorney representing the state and the defendant or

the defendant's attorney may, by written agreement filed with the court, extend the deadline for the taking of the deposition.

(d) The court shall grant any request by the attorney representing the state to extend the deadline for the taking of the deposition if a reason for the request is the unavailability, health, or well-being of the victim or witness.

(e) The Texas Rules of Civil Procedure govern the taking of the deposition, except to the extent of any conflict with this code or applicable court rules adopted for criminal proceedings, in which event this code and the rules for criminal proceedings govern. The attorney representing the state and the defendant or defendant's attorney may agree to modify the rules applicable to the deposition by written agreement filed with the court before the taking of the deposition.

(f) If a defendant is unavailable to attend a deposition because the defendant is confined in a correctional facility, the court shall issue any orders or warrants necessary to secure the defendant's presence at the deposition. The sheriff of the county in which a deposition under this subsection is to be taken shall provide a secure location for the taking of the deposition and sufficient law enforcement personnel to ensure the deposition is taken safely. The state's application to take a deposition or notice of deposition is not required to include the identity of any law enforcement agents the sheriff assigns to the deposition and may not serve as a basis for the defendant to object to the taking of the deposition.

(g) If a defendant is unavailable to attend a deposition for any reason other than confinement in a correctional facility, the defendant or defendant's attorney shall request a continuance from the court. The court may grant the continuance if the defendant or defendant's attorney demonstrates good cause for the continuance and that the request is not brought for the purpose of delay or avoidance. A defendant's failure to attend a deposition or request a continuance in accordance with this subsection constitutes a waiver of the defendant's right to be present at the deposition.

Added by Acts 2009, 81st Leg., R.S., Ch. 678 (H.B. [2465](#)), Sec. 1, eff. September 1, 2009.

Art. 39.026. DEPOSITIONS OF MEDICAID OR MEDICARE RECIPIENTS OR CAREGIVERS. (a) In this article:

(1) "Caregiver" means a person, including a guardian, who is authorized by law, contract, or familial relationship to care for a recipient.

(2) "Medicaid" means the state Medicaid program.

(3) "Medicaid recipient" has the meaning assigned by Section 36.001, Human Resources Code.

(4) "Medicare" means the federal health insurance program that is operated under the Health Insurance for the Aged Act (42 U.S.C. Section 1395 et seq.).

(5) "Medicare recipient" means an individual on whose behalf a person claims or receives a payment under Medicare, without regard to whether the individual was eligible for benefits under Medicare.

(6) "Recipient" means a Medicaid recipient or a Medicare recipient.

(b) The court may order the attorney representing the state to take the deposition of a recipient or caregiver who is the alleged victim of or witness to an offense constituting fraud or theft that involves Medicaid or Medicare benefits. Any order under this subsection must be issued not later than the 180th day after the date on which the state files an application to take the deposition under Article 39.02.

(c) On the motion of either party, the court may order the attorney representing the state to take the deposition of a recipient or caregiver by video recording. The person operating the video recording device must be available to testify regarding the authenticity of the video recording and the taking of the deposition in order for the video recording to be admissible.

(d) If the court finds that the video recording of the deposition is properly authenticated and that requiring the jury to view the entire recording would unnecessarily prolong the trial, the court may allow a party to offer the entire video recording into evidence without requiring the jury to view the entire video recording during the trial. This subsection does not preclude the

attorney representing the state, the defendant, or the defendant's attorney from offering into evidence and playing for the jury a portion of a video-recorded deposition.

(e) The attorney representing the state and the defendant or the defendant's attorney, by written agreement filed with the court, may extend the deadline for the taking of the deposition.

(f) The court shall grant any request by the attorney representing the state to extend the deadline for the taking of the deposition if a reason for the request is the unavailability, health, or well-being of the recipient or caregiver.

(g) The Texas Rules of Civil Procedure govern the taking of the deposition, except that, to the extent of any conflict with this code or applicable court rules adopted for criminal proceedings, this code and the rules for criminal proceedings govern. The attorney representing the state and the defendant or the defendant's attorney may agree to modify the rules applicable to the deposition by written agreement filed with the court before the taking of the deposition.

(h) If a defendant is unavailable to attend a deposition because the defendant is confined in a correctional facility, the court shall issue any orders or warrants necessary to secure the defendant's presence at the deposition. The sheriff of the county in which a deposition is to be taken under this subsection shall provide a secure location for the taking of the deposition and sufficient law enforcement personnel to ensure that the deposition is taken safely. The state's application to take a deposition or notice of deposition is not required to include the identity of any law enforcement agent the sheriff assigns to the deposition under this subsection, and the defendant may not object to the taking of the deposition based solely on the state's omission of the identity of that agent.

(i) If a defendant is unavailable to attend a deposition for any reason other than confinement in a correctional facility, the defendant or the defendant's attorney shall request a continuance from the court. The court may grant the continuance if the defendant or the defendant's attorney demonstrates good cause for the continuance and that the request is not brought for the purpose

of delay or avoidance. A defendant's failure to attend a deposition or request a continuance in accordance with this subsection constitutes a waiver of the defendant's right to be present at the deposition.

Added by Acts 2011, 82nd Leg., R.S., Ch. 104 (S.B. 1680), Sec. 3, eff. September 1, 2011.

Art. 39.03. OFFICERS WHO MAY TAKE THE DEPOSITION. Upon the filing of such an affidavit and application, the court shall appoint, order or designate one of the following persons before whom such deposition shall be taken:

1. A district judge.
2. A county judge.
3. A notary public.
4. A district clerk.
5. A county clerk.

Such order shall specifically name such person and the time when and place where such deposition shall be taken. Failure of a witness to respond thereto, shall be punishable by contempt by the court. Such deposition shall be oral or written, as the court shall direct.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1741, ch. 659, Sec. 25, eff. Aug. 28, 1967.

Art. 39.04. APPLICABILITY OF CIVIL RULES. The rules prescribed in civil cases for issuance of commissions, subpoenaing witnesses, taking the depositions of witnesses and all other formalities governing depositions shall, as to the manner and form of taking and returning the same and other formalities to the taking of the same, govern in criminal actions, when not in conflict with this Code.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 39.05. OBJECTIONS. The rules of procedure as to objections in depositions in civil actions shall govern in criminal actions when not in conflict with this Code.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 39.06. WRITTEN INTERROGATORIES. When any such deposition is to be taken by written interrogatories, such written interrogatories shall be filed with the clerk of the court, and a copy of the same served on all other parties or their counsel for the length of time and in the manner required for service of interrogatories in civil action, and the same procedure shall also be followed with reference to cross-interrogatories as that prescribed in civil actions.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 39.07. CERTIFICATE. Where depositions are taken under commission in criminal actions, the officer or officers taking the same shall certify that the person deposing is the identical person named in the commission; or, if they cannot certify to the identity of the witness, there shall be an affidavit of some person attached to the deposition proving the identity of such witness, and the officer or officers shall certify that the person making the affidavit is known to them.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1742, ch. 659, Sec. 26, eff. Aug. 28, 1967.

Art. 39.08. AUTHENTICATING THE DEPOSITION. The official seal and signature of the officer taking the deposition shall be attached to the certificate authenticating the deposition.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 39.09. NON-RESIDENT WITNESSES. Depositions of a witness residing out of the State may be taken before a judge or before a commissioner of deeds and depositions for this State, who resides within the State where the deposition is to be taken, or before a notary public of the place where such deposition is to be taken, or before any commissioned officer of the armed services or before any diplomatic or consular officer. The deposition of a non-resident witness who may be temporarily within the State, may be taken under the same rules which apply to the taking of depositions of other witnesses in the State.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 39.10. RETURN. In all cases the return of depositions may be made as provided in civil actions.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 39.11. WAIVER. The State and defense may agree upon a waiver of any formalities in the taking of a deposition other than that the taking of such deposition must be under oath.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 39.12. PREDICATE TO READ. Depositions taken in criminal actions shall not be read unless oath be made that the witness resides out of the state; or that since the deposition was taken, the witness has died; or that the witness has removed beyond the limits of the state; or that the witness has been prevented from attending the court through the act or agency of the defendant; or by the act or agency of any person whose object was to deprive the state or the defendant of the benefit of the testimony; or that by reason of age or bodily infirmity, the witness cannot attend; or that the witness is 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. When the deposition is sought to be used by the state, the oath may be made by any credible person. When sought to be used by the defendant, the oath shall be made by the defendant in person.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 104 (S.B. [1680](#)), Sec. 4, eff. September 1, 2011.

Art. 39.13. IMPEACHMENT. Nothing contained in the preceding Articles shall be construed as prohibiting the use of any such evidence for impeachment purposes under the rules of evidence heretofore existing at common law.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 39.14. DISCOVERY. (a) Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state. The state may provide to the defendant electronic duplicates of any documents or other information described by this article. The rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the state. This article does not authorize the removal of the documents, items, or information from the possession of the state, and any inspection shall be in the presence of a representative of the state.

(b) On a party's request made not later than the 30th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin, the party receiving the request shall disclose to the requesting party the name and address of each person the disclosing party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. Except as otherwise provided by this subsection, the disclosure must be made in writing in hard copy form or by electronic means not later than the 20th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin. On motion of a party and on notice to the other parties, the court may order an earlier time at which one or more of

the other parties must make the disclosure to the requesting party.

(c) If only a portion of the applicable document, item, or information is subject to discovery under this article, the state is not required to produce or permit the inspection of the remaining portion that is not subject to discovery and may withhold or redact that portion. The state shall inform the defendant that a portion of the document, item, or information has been withheld or redacted. On request of the defendant, the court shall conduct a hearing to determine whether withholding or redaction is justified under this article or other law.

(d) In the case of a pro se defendant, if the court orders the state to produce and permit the inspection of a document, item, or information under this subsection, the state shall permit the pro se defendant to inspect and review the document, item, or information but is not required to allow electronic duplication as described by Subsection (a).

(e) Except as provided by Subsection (f), the defendant, the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or other agent of the attorney representing the defendant may not disclose to a third party any documents, evidence, materials, or witness statements received from the state under this article unless:

(1) a court orders the disclosure upon a showing of good cause after notice and hearing after considering the security and privacy interests of any victim or witness; or

(2) the documents, evidence, materials, or witness statements have already been publicly disclosed.

(f) The attorney representing the defendant, or an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant, may allow a defendant, witness, or prospective witness to view the information provided under this article, but may not allow that person to have copies of the information provided, other than a copy of the witness's own statement. Before allowing that person to view a document or the witness statement of another under this subsection, the person possessing the information shall redact the address, telephone number, driver's license number, social security number, date of

birth, and any bank account or other identifying numbers contained in the document or witness statement. For purposes of this article, the defendant may not be the agent for the attorney representing the defendant.

(g) Nothing in this article shall be interpreted to limit an attorney's ability to communicate regarding his or her case within the Texas Disciplinary Rules of Professional Conduct, except for the communication of information identifying any victim or witness, including name, except as provided in Subsections (e) and (f), address, telephone number, driver's license number, social security number, date of birth, and bank account information or any information that by reference would make it possible to identify a victim or a witness. Nothing in this subsection shall prohibit the disclosure of identifying information to an administrative, law enforcement, regulatory, or licensing agency for the purposes of making a good faith complaint.

(h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

(h-1) In this subsection, "correctional facility" has the meaning assigned by Section 1.07, Penal Code. Notwithstanding any other provision of this article, if the state intends to use at a defendant's trial testimony of a person to whom the defendant made a statement against the defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant, the state shall disclose to the defendant any information in the possession, custody, or control of the state that is relevant to the person's credibility, including:

(1) the person's complete criminal history, including any charges that were dismissed or reduced as part of a plea bargain;

(2) any grant, promise, or offer of immunity from prosecution, reduction of sentence, or other leniency or special treatment, given by the state in exchange for the person's

testimony; and

(3) information concerning other criminal cases in which the person has testified, or offered to testify, against a defendant with whom the person was imprisoned or confined, including any grant, promise, or offer as described by Subdivision (2) given by the state in exchange for the testimony.

(i) The state shall electronically record or otherwise document any document, item, or other information provided to the defendant under this article.

(j) Before accepting a plea of guilty or nolo contendere, or before trial, each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article.

(k) If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court.

(l) A court may order the defendant to pay costs related to discovery under this article, provided that costs may not exceed the charges prescribed by Subchapter F, Chapter 552, Government Code.

(m) To the extent of any conflict, this article prevails over Chapter 552, Government Code.

(n) This article does not prohibit the parties from agreeing to discovery and documentation requirements equal to or greater than those required under this article.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Amended by Acts 1999, 76th Leg., ch. 578, Sec. 1, eff. Sept. 1, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 1019 (H.B. 969), Sec. 1, eff. June 18, 2005.

Acts 2009, 81st Leg., R.S., Ch. 276 (S.B. 595), Sec. 2, eff. September 1, 2009.

Acts 2013, 83rd Leg., R.S., Ch. 49 (S.B. 1611), Sec. 2, eff.

January 1, 2014.

Acts 2015, 84th Leg., R.S., Ch. 459 (H.B. 510), Sec. 1, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1236 (S.B. 1296), Sec. 4.001, eff. September 1, 2015.

Acts 2017, 85th Leg., R.S., Ch. 686 (H.B. 34), Sec. 7, eff. September 1, 2017.

Art. 39.15. DISCOVERY OF EVIDENCE DEPICTING OR DESCRIBING ABUSE OF OR SEXUAL CONDUCT BY CHILD OR MINOR. (a) In the manner provided by this article, a court shall allow discovery under Article 39.14 of property or material:

(1) that constitutes child pornography, as described by Section 43.26(a)(1), Penal Code;

(2) the promotion or possession of which is prohibited under Section 43.261, Penal Code; or

(3) that is described by Section 2 or 5, Article 38.071, of this code.

(b) Property or material described by Subsection (a) must remain in the care, custody, or control of the court or the state as provided by Article 38.45.

(c) A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property or material described by Subsection (a), provided that the state makes the property or material reasonably available to the defendant.

(d) For purposes of Subsection (c), property or material is considered to be reasonably available to the defendant if, at a facility under the control of the state, the state provides ample opportunity for the inspection, viewing, and examination of the property or material by the defendant, the defendant's attorney, and any individual the defendant seeks to qualify to provide expert testimony at trial.

Added by Acts 2009, 81st Leg., R.S., Ch. 276 (S.B. 595), Sec. 3, eff. September 1, 2009.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1322 (S.B. 407), Sec. 9, eff. September 1, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 1322 (S.B. 407), Sec. 10, eff. September 1, 2011.

Art. 39.151. DISCOVERY OF EVIDENCE DEPICTING INVASIVE VISUAL RECORDING OF CHILD. (a) In the manner provided by this article, a court shall allow discovery of property or material that constitutes or contains a visual image, as described by Section 21.15(b), Penal Code, of a child younger than 14 years of age and that was seized by law enforcement based on a reasonable suspicion that an offense under that subsection has been committed.

(b) Property or material described by Subsection (a) must remain in the care, custody, or control of the court or the state as provided by Article 38.451.

(c) A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property or material described by Subsection (a), provided that the state makes the property or material reasonably available to the defendant.

(d) For purposes of Subsection (c), property or material is considered to be reasonably available to the defendant if, at a facility under the control of the state, the state provides ample opportunity for the inspection, viewing, and examination of the property or material by the defendant, the defendant's attorney, and any individual the defendant seeks to qualify to provide expert testimony at trial.

Added by Acts 2015, 84th Leg., R.S., Ch. 955 (S.B. 1317), Sec. 4, eff. June 18, 2015.