

By: Ellis  
(Murphy)

S.B. No. 1680

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to certain evidence in a prosecution of fraud or theft  
3 involving Medicaid or Medicare benefits and to certain criminal  
4 procedures involving offenses in general.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Chapter 38, Code of Criminal Procedure, is  
7 amended by adding Article 38.46 to read as follows:

8 Art. 38.46. EVIDENCE IN AGGREGATION PROSECUTION FOR FRAUD  
9 OR THEFT COMMITTED WITH RESPECT TO NUMEROUS MEDICAID OR MEDICARE  
10 RECIPIENTS. In trials involving an allegation of a continuing  
11 scheme of fraud or theft that involves Medicaid or Medicare  
12 benefits and is alleged to have been committed with respect to a  
13 large class of Medicaid or Medicare recipients in an aggregate  
14 amount or value, the attorney representing the state is not  
15 required to prove by direct evidence that each Medicaid or Medicare  
16 recipient did not consent or effectively consent to a transaction  
17 in question. It is sufficient if the lack of consent or effective  
18 consent to a particular transaction or transactions is proven by  
19 either direct or circumstantial evidence.

20 SECTION 2. Article 39.01, Code of Criminal Procedure, is  
21 amended to read as follows:

22 Art. 39.01. IN EXAMINING TRIAL. When an examination takes  
23 place in a criminal action before a magistrate, the state [~~State~~] or  
24 the defendant may have the deposition of any witness taken by any

1 officer authorized by this chapter. The state [~~State~~] or the  
2 defendant may not use the deposition for any purpose unless that  
3 party first acknowledges that the entire evidence or statement of  
4 the witness may be used for or against the defendant on the trial of  
5 the case, subject to all legal objections. The deposition of a  
6 witness duly taken before an examining trial or a jury of inquest  
7 and reduced to writing or recorded and then certified according to  
8 law, provided that [~~where~~] the defendant and the defendant's  
9 attorney were [~~was~~] present when that testimony was taken[~~7~~] and  
10 that the defendant had the privilege afforded of cross-examining  
11 the witness, or taken at any prior trial of the defendant for the  
12 same offense, may be used by either the state [~~State~~] or the  
13 defendant in the trial of the defendant's criminal case under the  
14 following circumstances:

15       When oath is made by the party using the deposition that the  
16 witness resides outside the state [~~State~~]; or that since the  
17 witness's testimony was taken, the witness has died, or has removed  
18 beyond the limits of the state [~~State~~], or has been prevented from  
19 attending the court through the act or agency of the other party, or  
20 by the act or agency of any person whose object was to deprive the  
21 state [~~State~~] or the defendant of the benefit of the testimony; or  
22 that by reason of age or bodily infirmity, that witness cannot  
23 attend; or that the witness is a Medicaid or Medicare recipient or a  
24 caregiver or guardian of the recipient, and the recipient's  
25 Medicaid or Medicare account was charged for a product or service  
26 that was not provided or rendered to the recipient. When the  
27 testimony is sought to be used by the state [~~State~~], the oath may be

1 made by any credible person. When sought to be used by the  
2 defendant, the oath must be made by the defendant in person.

3 SECTION 3. Chapter 39, Code of Criminal Procedure, is  
4 amended by adding Article 39.026 to read as follows:

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

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

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

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

13 (4) "Medicare" means the federal health insurance  
14 program that is operated under the Health Insurance for the Aged Act  
15 (42 U.S.C. Section 1395 et seq.).

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

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

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

1 deposition under Article 39.02.

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

8 (d) If the court finds that the video recording of the  
9 deposition is properly authenticated and that requiring the jury to  
10 view the entire recording would unnecessarily prolong the trial,  
11 the court may allow a party to offer the entire video recording into  
12 evidence without requiring the jury to view the entire video  
13 recording during the trial. This subsection does not preclude the  
14 attorney representing the state, the defendant, or the defendant's  
15 attorney from offering into evidence and playing for the jury a  
16 portion of a video-recorded deposition.

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

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

24 (g) The Texas Rules of Civil Procedure govern the taking of  
25 the deposition, except that, to the extent of any conflict with this  
26 code or applicable court rules adopted for criminal proceedings,  
27 this code and the rules for criminal proceedings govern. The

1 attorney representing the state and the defendant or the  
2 defendant's attorney may agree to modify the rules applicable to  
3 the deposition by written agreement filed with the court before the  
4 taking of the deposition.

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

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

1 SECTION 4. Article 39.12, Code of Criminal Procedure, is  
2 amended to read as follows:

3 Art. 39.12. PREDICATE TO READ. Depositions taken in  
4 criminal actions shall not be read unless oath be made that the  
5 witness resides out of the state [~~State~~]; or that since the [~~his~~]  
6 deposition was taken, the witness has died; or that the witness [~~he~~]  
7 has removed beyond the limits of the state [~~State~~]; or that the  
8 witness [~~he~~] has been prevented from attending the court through  
9 the act or agency of the defendant; or by the act or agency of any  
10 person whose object was to deprive the state or the defendant of the  
11 benefit of the testimony; or that by reason of age or bodily  
12 infirmity, the [~~such~~] witness cannot attend; or that the witness is  
13 a Medicaid or Medicare recipient or a caregiver or guardian of the  
14 recipient, and the recipient's Medicaid or Medicare account was  
15 charged for a product or service that was not provided or rendered  
16 to the recipient. When the deposition is sought to be used by the  
17 state [~~State~~], the oath may be made by any credible person. When  
18 sought to be used by the defendant, the oath shall be made by the  
19 defendant [~~him~~] in person.

20 SECTION 5. The change in law made by this Act applies to a  
21 criminal proceeding that commences on or after the effective date  
22 of this Act. A criminal proceeding that commences before the  
23 effective date of this Act is covered by the law in effect when the  
24 proceeding commenced, and the former law is continued in effect for  
25 that purpose.

26 SECTION 6. This Act takes effect September 1, 2011.