

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1037 Depositions of Witnesses in Criminal Proceedings

SPONSOR(S): Criminal Justice Subcommittee, Yarkosky

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	15 Y, 2 N, As CS	Padgett	Hall

SUMMARY ANALYSIS

A deposition is “out-of-court testimony made under oath and recorded by an authorized officer for later use in court.” Generally, in a felony criminal proceeding, a party may take depositions at any time after the filing of the charging document. Depositions are not allowed in cases where a defendant is charged with a misdemeanor or criminal traffic offense unless good cause is shown to the trial court.

A parent, guardian, attorney, guardian ad litem, or other advocate appointed by the court for a victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness, may file a motion with the court for an order to protect the victim or witness in any judicial proceeding or other official proceeding from severe emotional or mental harm due to the presence of the defendant if the victim or witness is required to testify in open court. In entering such a protective order, a court may prohibit a victim or witness from being deposed in a criminal proceeding.

CS/HB 1037 amends s. 92.55, F.S., to prohibit a defendant in a criminal proceeding, or his or her representative, from taking the deposition of specified victims or witnesses absent a showing of good cause. Such specified victims or witnesses include:

- A victim in a sexual offense case who is under the age of 18; or
- Any person who has an intellectual disability.

Under the bill, a court may authorize a defendant to take a deposition of the specified victims or witnesses upon receiving a written motion by the defendant, or his or her representative, stating the following:

- A deposition is necessary to assist at a criminal trial;
- The evidence sought is not reasonably available by any other means; and
- The probative value of the testimony outweighs any potential harm to the person to be deposed.

In ruling on a motion to take the deposition of a specified victim or witness, the court must consider the following:

- The mental and physical age and maturity of the victim or witness.
- The nature and duration of the offense.
- The relationship of the victim or witness to the defendant.
- The complexity of the issues involved.
- Whether the victim or witness would suffer moderate psychological harm as a consequence of being compelled to testify at a deposition.
- The functional capacity of the victim or witness if he or she has an intellectual disability.
- The willingness of the victim or witness to be deposed.
- Any other fact that the court deems relevant.

The bill requires the court to make specific written findings of fact, on the record, as to the basis of its ruling on whether to allow a deposition.

The bill prohibits depositions for specified victims and witnesses in criminal proceedings unless authorized by a court pursuant to a written motion by the defendant or his or her representative. Under current law, a defendant may generally take the depositions of such victims or witnesses without permission from the court. Thus, the bill may increase judicial workload resulting from reviewing motions and conducting hearings to authorize depositions that are currently permitted without a motion or hearing.

The bill provides an effective date of July 1, 2023.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Depositions in Criminal Proceedings

A deposition is “out-of-court testimony made under oath and recorded by an authorized officer for later use in court.”¹ Generally, in a felony criminal proceeding, a party may take depositions at any time after the filing of the charging document.² Depositions are not allowed in cases where a defendant is charged with a misdemeanor or criminal traffic offense unless good cause is shown to the trial court.³ In determining whether to allow a deposition, a court may consider the:

- Consequences to the defendant;
- Complexity of the issues involved;
- Complexity of the witness’ testimony; and
- Other opportunities available to the defendant to discover the information sought by deposition.⁴

The ability to depose a witness is also limited by the role of the person to be deposed to the criminal proceeding.⁵ Generally, a defendant may, without leave of court, depose any witness listed by the prosecutor as a Category A witness⁶ or listed by a co-defendant as a witness to be called at trial. No party may take the deposition of a Category B⁷ witness except upon leave of court with good cause shown.⁸ In determining whether to allow a deposition, a court may consider the same factors for determining whether good cause exists to depose a witness in a misdemeanor or criminal traffic case.⁹ A Category C¹⁰ witness may not be deposed unless the court determines that the witness should be listed in another category.¹¹

Depositions of children under the age of 18 are required to be videotaped unless a court orders otherwise.¹² A court may order the videotaping of a deposition of a witness with fragile emotional strength or an intellectual disability, or may order that such deposition be taken in the presence of the court or a special magistrate.¹³

Judicial Proceedings Involving Specified Victims or Witnesses

¹ Merriam-Webster, <https://www.merriam-webster.com/dictionary/deposition> (last visited Mar. 29, 2023).

² Fla. R. Crim. P. 3.220(h)(1), F.S.

³ Fla. R. Crim. P. 3.220(h)(1)(D), F.S.

⁴ *Id.*

⁵ *Id.*

⁶ Category A witnesses include:

- Eye witnesses;
- Alibi witnesses and rebuttal to alibi witnesses;
- Witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category;
- Investigating officers;
- Witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged;
- Child hearsay witnesses;
- Expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify; and
- Informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried. Fla. R. Crim. P. 3.220(b)(1)(A)(i), F.S.

⁷ Category B witnesses include all witnesses not listed in Category A or Category C. Fla. R. Crim. P. 3.220(b)(1)(A)(ii), F.S.

⁸ Fla. R. Crim. P. 3.220(h)(1)(B), F.S.

⁹ *Id.*

¹⁰ Category C witnesses include all witnesses who perform only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense. Fla. R. Crim. P. 3.220(b)(1)(A)(iii), F.S.

¹¹ Fla. R. Crim. P. 3.220(h)(1)(C), F.S.

¹² Fla. R. Crim. P. 3.220(h)(4), F.S.

¹³ *Id.*

Section 92.55, F.S., contains protections for certain crime victims and witnesses in criminal proceedings, including a victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness.

“Sexual offense victim or witness” means a person who was under the age of 18 when he or she was the victim of or a witness to a sexual offense.¹⁴

“Sexual offense” means any offense specified in s. 775.21(4)(a)1., F.S., or s. 943.0435(1)(h)1.a.(I), F.S.¹⁵

A parent, guardian, attorney, guardian ad litem, or other advocate appointed by the court under s. 914.17, F.S., for a victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness, may file a motion with the court for an order to protect the victim or witness in any judicial proceeding or other official proceeding from severe emotional or mental harm due to the presence of the defendant if the victim or witness is required to testify in open court.¹⁶ In entering such a protective order, a court may prohibit a victim or witness from being deposed in a criminal proceeding.¹⁷

In ruling upon the motion, the court must consider:

- The age of the child, the nature of the offense or act, the relationship of the child to the parties in the case or to the defendant in a criminal action, the degree of emotional trauma that will result to the child as a consequence of the defendant’s presence, and any other fact that the court deems relevant;
- The age of the person who has an intellectual disability, the functional capacity of such person, the nature of the offenses or act, the relationship of the person to the parties in the case or to the defendant in a criminal action, the degree of emotional trauma that will result to the person as a consequence of the defendant’s presence, and any other fact that the court deems relevant; or
- The age of the sexual offense victim or witness when the sexual offense occurred, the relationship of the sexual offense victim or witness to the parties in the case or to the defendant in a criminal action, the degree of emotional trauma that will result to the sexual offense victim or witness as a consequence of the defendant’s presence, and any other fact that the court deems relevant.¹⁸

Additionally, the court may enter an order:

- Limiting the number of times that a child, a person who has an intellectual disability, or a sexual offense victim or witness may be interviewed;
- Prohibiting depositions of the victim or witness;
- Requiring the submission of questions before the examination of the victim or witness;
- Setting the place and conditions for interviewing the victim or witness, or for conducting any other proceeding; or
- Permitting or prohibiting the attendance of any person at any proceeding. The court shall enter any order necessary to protect the rights of all parties, including the defendant in any criminal action.¹⁹

Effect of Proposed Changes

¹⁴ S. 92.55(1)(a), F.S.

¹⁵ S. 92.55(1)(b), F.S. A conviction for the offenses specified in s. 775.21(4)(a)1., F.S., and s. 943.0435(1)(h)1.a.(I), F.S., results in a person being designated as a sexual predator or sexual offender, respectively.

¹⁶ S. 92.55(2), F.S.

¹⁷ *Id.*

¹⁸ S. 92.55(3), F.S.

¹⁹ S. 92.55(4), F.S.

CS/HB 1037 amends s. 92.55, F.S., to prohibit a defendant in a criminal proceeding, or his or her representative, from taking the deposition of specified victims or witnesses absent a showing of good cause. Such specified victims or witnesses include:

- A victim in a sexual offense case who is under the age of 18; or
- Any person who has an intellectual disability.

Under the bill, a court may authorize a defendant to take a deposition of the specified victims or witnesses upon receiving a written motion by the defendant, or his or her representative, stating the following:

- A deposition is necessary to assist at a criminal trial;
- The evidence sought is not reasonably available by any other means; and
- The probative value of the testimony outweighs any potential harm to the person to be deposed.

In ruling on a motion to take the deposition of a specified victim or witness, the court must consider the following:

- The mental and physical age and maturity of the victim or witness.
- The nature and duration of the offense.
- The relationship of the victim or witness to the defendant.
- The complexity of the issues involved.
- Whether the victim or witness would suffer moderate psychological harm as a consequence of being compelled to testify at a deposition.
- The functional capacity of the victim or witness if he or she has an intellectual disability.
- The willingness of the victim or witness to be deposed.
- Any other fact that the court deems relevant.

The bill requires the court to make specific written findings of fact, on the record, as to the basis of its ruling on whether to allow a deposition.

The bill provides an effective date of July 1, 2023.

B. SECTION DIRECTORY:

Section 1: Amends s. 92.55, F.S., relating to judicial or other proceedings involving victims or witness under the age of 18, a person who has intellectual disability, or a sexual offense victim or witness; special protections; use of therapy animals or facility dogs.

Section 2: Provides an effective date of July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill prohibits depositions for specified victims and witnesses in criminal proceedings unless authorized by a court pursuant to a written motion by the defendant or his or her representative. Under current law, a defendant may generally take the depositions of such victims or witnesses without permission from the court. Thus, the bill may increase judicial workload resulting from reviewing motions and conducting hearings to authorize depositions that are currently permitted without a motion or hearing.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 29, 2023, the Criminal Justice Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differed from the original bill as it:

- Revised a provision that prohibited a defendant from taking the deposition of a victim or witness under the age of 18 in an enumerated list of offenses to prohibit a defendant from taking the deposition of a victim in a sexual offense case who is under the age of 18, absent a showing of good cause.
- Prohibited a defendant from taking the deposition of a victim or witness who has an intellectual disability in *all* criminal cases, absent a showing of good cause, rather than in an enumerated list of offenses.
- Deleted a provision prohibiting a defendant from taking the deposition of any victim or witness in an enumerated list of offenses.
- Changed the effective date to July 1, 2023.

This analysis is drafted to the committee substitute as adopted by the Criminal Justice Subcommittee.