

Faulk, Camilla

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To: Faulk, Camilla
Subject: comment to proposed CrR 4.11

To: Supreme Court Rules Committee

Proposed CrR 4.11 pre-dates the decision in *State v. Mankin*, 158 Wn.App. 111 (2010), in which Division II held that while a recording of a witness interview is not a private conversation pursuant to ch. 9.73, RCW¹, a witness may refuse to be recorded during an interview and the court, pursuant to CrR 4.7, lacks the authority to order a deposition should a witness so refuse. The Supreme Court denied review. It is not a stretch of the imagination to suggest that, with this restrictive interpretation of the court's authority, a witness may refuse to allow a stenographer to record an interview or prohibit an investigator to take notes. Some courts did order depositions when witnesses declined stenographic or recorded interviews, in the interest of accuracy and completeness in the fact-finding process; *Mankin* has precluded this.

The original proposal a few years ago lacked protections for witnesses. There was no provision for a protective order. The proposal did not provide for witnesses to receive copies of the interviews. These flaws have been remedied by the new proposed rule. While the rule does oblige the witness to pay for a transcript, it does not oblige the witness to pay for a copy of the recording.

The court always has had the authority to regulate discovery and investigation, CrR 4.7(h). The proposed rule cannot be clearer:

"Such interviews are subject to the court's regulation of discovery under CrR 4.7(h)."

Regulation applies as well to defendants appearing *pro se*.

Note that many prosecuting authorities write to non-institutional victims and witnesses early in the proceeding advising that they may request the presence of a prosecutor during witness interviews by the defense. This is so common in King County that defense counsel often doesn't bother contacting victims without first advising the prosecutor and asking the prosecutor to set up the interview. As an aside, the King County Prosecuting Attorney has an express written policy that states that if defense demands a witness interview before a trial date is set, negotiations are terminated; while this policy may be an impediment to investigation which is prohibited by CrR 4.7(h)(1), it works; defense counsel fears prejudicing the client's possibility of a more favorable negotiated settlement so victims are not interviewed until shortly before trial, which very often requires a continuance of the trial.

Witness interviews may result in both impeachment evidence and substantive evidence. The Supreme Court of the United States has clearly held that impeachment evidence is exculpatory evidence and comes within the *Brady* rule when not disclosed, *United States v. Bagley*, 473 U.S. 667, 105 S.Ct.3375 (1985). Surely, a recorded interview improves the fact finding function of the court. Some states, recognizing the value of a recorded statement by a defendant, require it at least where it is practicable, *see: Minnesota v. Scales*, 518 N.W. 2d 587 (1994), N.J. Rev. Stat. § 3:17, 44 Idaho L. Rev. 251 (2007); the rationale is accuracy.

When a witness declines to be interviewed, his or her deposition is recorded, either electronically or stenographically. The witness cannot choose. In fact, in some states depositions of witnesses in criminal cases are permitted as a matter of right, *see: Fl. R. Crim. P. Rule 3.220(h)*. Of course, depositions are a more formal proceeding than a witness interview.

The limitations in the rule proposed by the Board of Governors provide a careful balance of the desire for a more complete record and privacy rights of witnesses. I urge the Court to approve the proposed rule.

Ronald Kessler
King County Superior Court

¹Curiously, if a recording is not private, it can be done clandestinely, *State v. Slemmer*, 48 Wn.App. 48 (1987), *State v. Flora*, 68 Wn.App. 802 (1992).