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25 April 2011

Honorable Charles W. Johnson, Justice  
The Supreme Court of the state of Washington  
Temple of Justice  
P.O. Box 40929  
Olympia, WA 98504

Dear Justice Johnson:

I write today to address the pending change to CrR4.11 (recording witness interviews). The proposed change would eliminate the application of CrR 4.6(a). Neither does it require the giving of reasonable notice to the witness

CrR4.6(a) spells out the circumstances in which an attorney can take the deposition of a witness. It requires that the prospective witness be "unable to attend trial" or would be prevented from attending the trial or hearing. Or, a deposition could be ordered where the witness refuses to discuss the case with either attorney, and, that witness's testimony would be material. The rule goes on to explain the need for the deposition. If the proposed changes to CrR4.11 were to become the rule, there would be no use for CrR4.6(a). The attorneys would not have to meet the standards set out therein, rather, they would just notify opposing counsel of their desire to interview (and record) the witness.

A deposition carries with it a certain degree of formality and decorum. And, while the proposed change addresses how the attorney is to act in an interview, there is nothing in the proposed change to insure that the witness will have any appreciation for the importance or significance that might be attributed to the recorded interview. A witness who receives a formal document (a subpoena) might ask an attorney whether he/she needs to have an attorney present during the deposition. Over my many years in private practice, I received many such inquiries every year from friends and former clients. I cannot recall having ever received an inquiry about whether someone needed an attorney for a mere interview. The proposed language is silent about notifying the witness that the interview will be recorded. So, that enhances the likelihood that the witness will not seek legal advice before attending the interview.

Not only is the proposed language silent regarding notifying the witness that the interview will be recorded, it is silent about giving the witness notice at all. There would be a requirement that the attorney seeking the interview would provide reasonable notice to the

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opposing attorney. Is there a presumption, then, that the opposing attorney would notify his/her witness?<sup>1</sup>

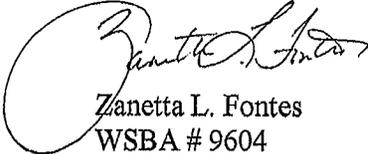
Separate and apart from these two problems with the proposed rule change, I believe it is unfair to witnesses and victims of crime to require that they be forced into providing a recorded statement without the safeguards found in CrR4.6. Witnesses and victims did not choose to become involved in the criminal justice system. They are performing a civic duty by coming forward at all. I think we do a disservice to our system by further imposing on them.

I understand that there can be some good to come from a recorded statement. A witness who provides a recorded statement cannot be misquoted. But, absent a court's unbiased determination (as would be called for in CrR4.6(a)), shouldn't it be the witness's decision to weigh the benefits of having his/her statement recorded? Has anyone on the WSBA committee represented that community?

I respect a criminal defendant's right to have his/her attorney prepare for trial. The rules, as they currently exist, have managed to meet that need with defense counsel having investigators present to take notes to which he/she can refer if the need to impeach arises. Prosecutors, too, could have an investigator or police officer present during an interview. If there is a greater need, let the disinterested magistrate decide.

Thank you for your consideration of my remarks.

Very truly yours,



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<sup>1</sup> Doesn't that then put the opposing attorney in a possible conflict? Is that attorney expected to play secretary or counselor to insure the witness 1) appears, 2) knows of the date/time of the interview, 3) understands it will be recorded, 4) understands the significance of the fact that the interview will be recorded, and/or 5) understands he/she (witness) is entitled to have an attorney represent him/her?