

Faulk, Camilla

---

**From:** Blaine Gibson [Blaine.Gibson@co.yakima.wa.us]  
**Sent:** Thursday, December 15, 2011 4:33 PM  
**To:** Faulk, Camilla  
**Subject:** Comment on Proposed CrR 4.6

The sole motivating factor for the SCJA's proposal to amend CrR 4.6 (depositions in criminal cases) appears to be *State v. Mankin*, 158 Wn. App. 111 (2010), the case in which the Ct. of Appeals ruled that refusal of a law enforcement witness to allow an interview to be recorded is not grounds for ordering a deposition.

I agree this problem must be addressed. There is no good reason law enforcement officers should be allowed to avoid having their statements recorded. However, trying to address the *Mankin* case by expanding the deposition rule creates a new set of problems. First, depositions are expensive. They should only be used as a last resort, or if the witness will not be available for trial. Although the rule allows for depositions without a stenographic record, this is asking for trouble. If a deposition is taken without a court reporter, the parties do not find out if the "record" is defective until after the deposition is over. In *State v. Turnipseed*, 162 Wn. App. 60 (2011) a video deposition was taken without a stenographic record, and it turned out part of the recording was garbled. Despite that fact, the trial court allowed the deposition to be played for the jury. The appellate court found that the defendant's right of confrontation had been violated, but did not order a new trial because the error was deemed harmless.

Second, it is my understanding that a deposition cannot be used as substantive evidence unless the defendant was given the right to be present, because of the confrontation rule. Many of the people who opposed proposed new rule CrR 4.11, which would have allowed recording of witness statements, did so because of the "traumatic effect" they believed recorded statements would have on the witnesses, especially fragile victims. They would certainly object to a rule that would allow the defense to depose the victim with the defendant actually present.

I think the SCJA proposal is overbroad. A much simpler solution would be to adopt a new rule similar to the recently proposed CrR 4.11. The new rule would specifically allow recording of statements from law enforcement, experts, professionals, and other non-victim witnesses in criminal cases. The concern raised by *Mankin* would be addressed without creating new problems.

If the Supreme Court decides CrR 4.6 should be amended, I suggest the proposal be forwarded to the WSBA Court Rules Committee for redrafting. For example, the language about notice to the parties should be in subpart (b) of the rule, not subpart (a).

Blaine Gibson  
Yakima County Superior Court Judge