Faulk, Camilla

From: Juhl, John [jjuhl@co.snohomish.wa.us]
Sent: Wednesday, April 25, 2012 1:07 PM
To: Faulk, Camilla
Subject: Opposition to proposed changes to Criminal Court Rule 4.6 - Depositions

I am writing in opposition to the proposed changes to Criminal Court Rule 4.6. The proposed changes erode both the integrity of the deposition rule and rights of the witness/victim.

The use of the deposition process as a means of pre-trial discovery on non-parties in a criminal case is quite rare in the United States. The GR 9 coversheet is incorrect when it claims that, "The ability to obtain a deposition in a criminal case in Washington Courts is more limited than in other jurisdictions." In fact, the ability to obtain a deposition in Washington is equal to if not significantly more liberal than in most other jurisdictions. In Arizona, California, Oregon, Wisconsin and the federal courts, the ability to take a pre-trial deposition of victims in criminal cases is explicitly disallowed as a means of pre-trial discovery.[i]

The use of depositions is properly limited in criminal cases. Under the current rule a deposition is ordinarily only used when it is expected that a witness will be unavailable to testify at trial. This limitation is appropriate in a criminal case where courts do not have the general authority to order a non-party to do anything except to appear at trial. The proposed change lowers the requirements to obtain a deposition such that it will likely jeopardize the rights of non-parties who do not have attorneys to represent their interests.

Of particular concern is the elimination of the requirement that the testimony is "necessary ... in order to prevent a failure of justice." This language is critical to insuring that the imposition of a deposition does not impose unnecessary burdens on the witness or the parties. Treating depositions as pre-trial interviews will greatly increase both the time and the cost of prosecuting and defending criminal cases.

As is made plain from the GR 9 coversheet, the intent of the proposed rule change is to allow the use of the deposition process as a means to authorize the recording of pre-trial interviews. It is well established under both Washington and Federal law that while a defendant has the right to attempt to interview a witness, the witness has an equal right to refuse to be interviewed.[ii] Many states, including Alabama, Arizona, California, Idaho, Louisiana, Massachusetts, Oregon, Tennessee, and Wisconsin specifically give a witness the right to refuse a pre-trial interview.[iii] As noted in *State v. Mankin*,[iv] Washington also recognizes the right of a witness to refuse a pre-trial interview. While a defendant is entitled to access to a witness, access may not lead to an actual interview.[v] A government witness who does not wish to speak or be interviewed by the defense prior to trial may not be required to do so.[vi]

These cases and statutes demonstrate the long standing precedent for a witness' self-determination in whether to give an interview at all and, if giving an interview, to determine when, where, how long, the manner, and what persons shall be present at a pre-trial interview. The proposed rule contradicts this precedent. The recording of pre-trial interviews should be addressed in a separate rule; it should not be incorporated into the rule regarding depositions.

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[i] Arizona State Constitution, Article 2, Section 2.1(5); California State Constitution Article 1, Section 28 (b)(5); Oregon State Constitution Article I, Section 42(c); Wisconsin Statutes § 950.04; and Federal R. Crim P. (15) See In re United States, 348 F,2d 624, 625 (1st Cir. 1965) and US v. Carrigan 804 F.2d 566; 1986 U.S. App.

[ii] *State v. Wilson*, 108 Wn. App. 774, 77-781 (2001); *State v. Hofstetter*, 75 Wn. App. 390, 397 *review denied,* 125 Wn.2d 1012 (1994); *U.S. v. Black*, 767 F.2d 1334 (9th Cir. 1985); *U.S. v. Pinto*, 775 F.2d 150, 152 (10th Cir. 1985); *U.S. v. Bittner,* 728 F.2d 1038, 1041 (8th Cir. 1984); *Kines v. Butterworth,* 669 F.2d 6, 9 (1st Cir. 1981) *cert denied,* 456 U.S. 980 (1982); *U.S. v. Rice,* 550 F.2d 1363, 1374 (5th Cir. 1977); *U.S. v. Scott,* 518 F.2d 261, 268 (6th Cir. 1974); *Gregory v. U.S.,* 125 U.S. App. D.C.140, 369 F.2d 185 (1966); *Byrnes v. U.S.,* 327 F.2d 825, 833 (9th Cir. 1964).

[iii] Alabama Code 15-23-70; Arizona State Constitution, Article 2, Section 2.1(5), Arizona Revised Statutes 8-412 & 13-4433, California State Constitution Article 1, Section 28(b)(5), Idaho State Constitution Article 1, Section 22(8) and Idaho Statutes 19-5306(1)(g); Louisiana State Constitution Article 1, Section 25 and Louisiana Revised Statutes § 46:1844; Massachusetts General Laws Chapter 258B, § 3; Oregon State Constitution Article 1 Section 42(c); Tennessee Code Ann. § 40-38-117; Wisconsin Statutes § 950.04.

[iv] *State v. Mankin*, 158 Wn. App. 111, 124 (2010).

[v] *Rice,* 550 F.2d at 1374; *Scott,* 518 F.2d at 268.

[vi] *U.S. v. Benson,* 495 F.2d 475, 479 (5th Cir. 1972).