WCCVA
Washington Coalition of Crime Victim Advocates

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April 30, 2012

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

RE: Opposition to proposed amendment to Criminal Court Rule 4.6 – Depositions

Honorable Justices,

The Washington Coalition of Crime Victim Advocates strongly opposes the adoption of the proposed amendments to Criminal Court Rule 4.6 regarding depositions. As is made plain from the coversheet included in this proposed rule change, this proposed change seeks the same end as proposed criminal rule 4.11, which we also opposed and which your honors only a few months ago declined.

The statement on the proposed rule change coversheet that, "the ability to obtain a deposition in a criminal case in Washington Courts is more limited than in other jurisdictions," is a gross misstatement. Upon reviewing the court rules cited on the coversheet and other states, it is clear that Washington State's ability to require a deposition is equal to if not significantly more liberal than in most other jurisdictions.

The intent in changing this rule is to use the deposition process as a means of forced pretrial discovery on non-parties in a criminal case. Such a use of the deposition process is quite rare in the United States. In fact, many states, including Alabama, Arizona, California, Idaho, Louisiana, Massachusetts, Oregon, Tennessee, and Wisconsin specifically give witness the right to refuse a pretrial interview[1]. In some jurisdictions including Arizona, California, Oregon, Wisconsin and the federal government, the ability to take a pretrial deposition of victims in criminal cases is explicitly disallowed as a means of pre-trial discovery.[2]

Per *State v. Wilson* 108 Wn. App. 774, "the defendant has no absolute right to interview potential State witnesses" and "the witness {is} under no obligation to talk to anyone outside of court." In *State v. Hofstetter* 75 Wn. App. 390, 397 (1994) the court cited several cases as well as the American Bar

[1] 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.

[2] 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.

Association *Standards for Criminal Justice* and itself admitted that a witness has no obligation to speak with anyone prior to trial or outside of court and that the prosecuting attorney may advise witnesses of the right to refuse to give an interview as well as his or her right to determine who shall be present at the interview. And, while the courts have determined that a defendant has a right to a pre-trial interview, the courts also recognize that this right to pre-trial access "exists co-equally with the witnesses' right to refuse to say anything." *United States v. Rice*, 550 F.2d 1364 1374 (5th Cic.) *cert denied*, 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312 (1977).

The proposed amendments erode the integrity of not only the deposition rule but the criminal justice system and rights of individuals as well. The imposition of depositions has rightly been strictly limited in criminal cases as courts generally do not have the authority to order a non-party in a criminal case to do anything except to appear at trial. As such, a deposition is ordinarily utilized only when a witness is expected to be *unavailable to testify at trial*. The proposed amended language lowers the requirements to obtain a deposition to such a degree that it would very likely jeopardize the rights of non-parties who, furthermore, do not normally have attorneys to represent their interests.

Of particular concern is the elimination of the requirement that the witness must be "material," the change from the word "and" to "or," the phrase "failure of justice." The change would mean that the witness need not even be material if a judge believes there is a good reason for a deposition (for proponents of the change, this equates with refusing to have one's interview recorded.) For states that do allow pretrial depositions of some kind, most include the language that the witness must be material *and* that a failure of justice would occur should the deposition not be taken. This language is critical to insuring that the imposition of a deposition does not violate the rights of private, non-party citizens.

Beyond the lowered standard required for ordering a deposition, the manner of recording or taking depositions is also of grave concern. The language proposes that depositions be allowed to be recorded via means other than a stenographer. It is self-evident from the multitude of audio and video recordings that the quality of these recordings often lack consistency and many words and whole phrases can be inaudible. As a deposition is testimony and can be used at trial, it is critical and in the best interests of both parties and the witness that every word be accurately recorded in a deposition.

The language suggested for taking the depositions is inadequate to uphold the integrity of a deposition. Section C of 4.6 already states that depositions should be taken in the manner set forth by the civil rule. The civil rule already provides superior language that contemplates alternate methods of taking a deposition other than by stenographic means.[3] However, we believe that even this language does not preserve the rights of the witness. The witness who is being deposed should also have the right to a true and accurate recording of a deposition, particularly when their words may be used to impeach them or be read into the record as testimony at trial. It is our position that any language that does not require stenographic recording should only be allowed upon stipulation of the parities *and the witness.*

This proposed rule change would be a detriment to the protection of the rights of witnesses and their participation in the criminal justice system. We urge you to reject this rule change.

Sincerely,

Karla Salp
Executive Director

[3] Washington State Civil Rule 30 (b)(4).