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Clerk of the Supreme Court
Temple of Justice
Post Office Box 40929
Olympia, Washington
98504-0929

February 1, 2012

Re: Proposed Amendment to CrR 4.6

Dear Justices of the Supreme Court;

The following comments are directed at the creation of a good cause justification for ordering a deposition, amending CrR 4.6.

"A procedural convenience for attorneys should not be adopted over the objection and at the expense of a victim's valid concern that an electronic recording of their own face and voice describing intimate details of physical or sexual abuse will be misused."

"An electronic recording, while convenient for either side, is not necessary for access to a witness nor is it indicative of the witness's responsiveness to questions by counsel."

The proposed rule would authorize the deposition of a witness for good cause shown, even when the witness agrees to a defense interview and examination. The proposed rule goes on to allow for the deposition to be audio or video recorded. We believe that this proposed rule is less about traditional deposition practice than it is an alternative method to secure audio or videotaped recordings of crime victims describing their alleged abuse.

The proposed rule raises the issue of the heightened privacy rights secured by both the Washington Constitution and statutory law. As a matter of sound public policy, prosecutors believe that the right of witnesses to consent or refuse to consent to the recording of interviews prior to trial should be respected, whether labeled an interview or deposition.

The recording of an interview/deposition is not a requirement for a successful witness interview. It is not essential to provide access by counsel to the witness, or essential to provide for responsiveness by the witness to questions.

CLERK

BY RONALD R. CARPENTER

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Letter to the Clerk of the Supreme Court
February 1, 2012
Page 2

In fact, it may hinder or complicate both access and the effectiveness of witness interviews. Washington State's current public policy to respect individual rights, particularly in regards to the right to object to electronic recording, should be applied to all witness interviews, whether conducted by the defense or the prosecution.

We are also concerned that these amendments to CrR 4.6 will lend themselves to abuse by pro se defendants. Our concerns go both to the scope of questions asked and the unsupervised interaction between the defendant and the victim. *Cf. State v. Gonzalez*, 110 Wn.2d 738 (1988) (detailing how intrusive questioning can be during a pre-trial interview).

Washington Prosecutors believe the above mentioned policy is consistent with similar public policies adopted in this state, such as the requirement that all persons consent to the recording of private conversations. *See* RCW 9.73.030(1)(b). It can be argued that witness interviews pursuant to discovery in a criminal case are not "private", but these conversations are not "public", and the witness and/or victim should be respected in the same manner as either a motorist stopped for a traffic violation or a felony crime suspect, in their refusal to be recorded.

Respecting a crime victim's right to consent to recording is further supported by the language of Article I, Section 35 of the Washington State Constitution, which demands that crime victims be afforded "due dignity and respect". State Statutes also instruct prosecutors and judges that we should protect the rights of crime victims "in a manner no less vigorous than the protections afforded criminal defendants." *See* RCW 7.69.010.

Supporting these policy statements is the reality that witnesses, particularly victims of crime, will be questioned on numerous personal topics in these depositions. Matters that the court would rule irrelevant and inadmissible in trial are commonly explored during depositions. Creating an audio or verbatim recording of personal, often traumatic, events in a person's life may be violative of their privacy, and more important unnecessary for purposes of criminal discovery.

Sincerely,



Thomas A. McBride
Executive Secretary