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April 30, 2012

The Honorable Barbara A. Madsen
Chief Justice, Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, Washington 98504-0929

Re: Suggested Amendment to Rule 4.6 of the Superior Court Criminal Rules

Greetings Chief Justice Madsen:

Your Court Rules Committee asked the Washington State Bar Association to provide input regarding the Superior Court Judges' Association's (SCJA) proposed amendment to Superior Court Criminal Rule 4.6. According to the GR 9 cover sheet, the proposal seeks to "provide some flexibility for taking depositions in a less costly fashion than is presently the case" and to provide trial judges "broader discretion to allow or disallow a deposition based on the particular circumstances of each case."

This proposal also responds to State v. Mankin, 158 Wn. App. 111, 241 P.3d 421 (2010), in which a criminal defense attorney sought to tape record an interview with a law enforcement officer. The officer refused to allow the interview to be taped, so the trial court authorized the officer's deposition under the existing CrR 4.6; the State appealed. The State's first argument was that the attorney could not record the interview because it was a private conversation under RCW 9.73.030, but the appellate court rejected that argument. The State's second argument was that a witness' refusal to be tape recorded is not sufficient grounds to authorize a deposition, which the appellate court accepted.

The first half of SCJA's proposal proffers a third alternative, "good cause" to take a deposition. The WSBA agrees that this proposal is worthwhile, and fully responds to the SCJA's concerns. But the second half of the SCJA proposal seems to authorize tape recording an interview in lieu of a deposition. Tape recording is not equivalent to taking a deposition. We do not believe that this second half of the proposal fits well within the context of CrR 4.6.

Moreover, this second half seems to achieve the same result sought by a recent proposal, CrR 4.11, but with fewer protections for witnesses than were incorporated into the proposed CrR 4.11 (copy attached). Your Court Rules Committee recently rejected proposed CrR 4.11, which the WSBA had recommended after obtaining a great deal of input from stakeholders, including criminal law practitioners, judges, and victim's advocates. Proposed CrR 4.11 prompted a great deal of comment from within the legal community and beyond. It would seem inconsistent then to adopt CrR 4.6 as now proposed immediately after rejecting CrR 4.11.

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The WSBA therefore is recommending an alternative approach that incorporates the first half of the SCJA proposal and omits the second half. Our proposed language is enclosed.

Thank you for giving us an opportunity to provide feedback regarding this proposed rule change.

Very truly yours,

Steve Crossland

Stephen R. Crossland, President

Enclosures

cc: Honorable Charles W. Johnson, Chair, Supreme Court Court Rules Committee
Paula C. Littlewood, WSBA Executive Director
Michele Radosevich, WSBA President-Elect
Ken Masters, Chair, WSBA Court Rules & Procedures Committee
Elizabeth Turner, Staff Liaison, WSBA Court Rules & Procedures Committee
Nanette Sullins, Administrative Office for the Courts
Honorable Laura Inveen, SCJA President

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SUGGESTED AMENDMENT

CRIMINAL RULES (CrR)

Rule 4.6 – Depositions

(a) **When Taken.** ~~Upon a showing~~ The court may order a deposition when (1) the
court finds that a prospective witness may be unable to attend or prevented from attending a
trial or hearing, (2) or if a witness refuses to discuss the case with either counsel and that his the
witness' testimony is material and that it is necessary, or (3) there is good cause shown to take
his the deposition ~~in order to prevent a failure of justice.~~ †The court at any time after the filing
of an indictment or information arraignment, may upon motion of a party and notice to the
parties, order that ~~his testimony be taken by a deposition and~~ require that any designated books,
papers, documents or tangible objects, not privileged, be produced at the same time and place.
A witness who is sought to be deposed, or a party, may seek a protective order as provided in
the Civil Rules.

(b) – (e) [unchanged]

(CLEAN)

(a) **When Taken.** The court may order a deposition when (1) the court finds that a prospective witness may be unable to attend or prevented from attending a trial or hearing, (2) a witness refuses to discuss the case with either counsel and the witness' testimony is material and necessary, or (3) there is good cause shown to take the deposition. The court at any time after arraignment may, upon motion of a party and notice to the parties, order a deposition and require that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. A witness who is sought to be deposed, or a party, may seek a protective order as provided in the Civil Rules.

(b) – (e) [unchanged]