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DESIGNATED IN
TRIAL PRACTICE - GENERAL
CRIMINAL LAW
BY THE FLORIDA BAR.

- WILLS & PROBATE
- MARITAL LAW
- JUVENILE LAW


April 11, 1989



Clerk
Supreme Court of Florida
Tallahassee, FL 32399-1927

Re: Amendment of Criminal Rules of Discovery

Dear Sir:

In reply to the April 1, 1989 inquiry of the Florida Bar and my fifteen years as a Criminal Practitioner, I would like to make the following comments.

Exclusion of a defendant from depositions presents no advantages. The accused can observe the demeanor of the witnesses, comment upon the accuracy of their testimony and provide counsel areas to probe in which counsel may otherwise be unaware. Testimony can "jog" the defendant's memory and open exploration into areas otherwise forgotten. The defendant's presence would help streamline the entire procedure. The witness is protected since he need appear only once under the current rules.

I always encourage my clients to attend the deposition so they hear the actual testimony themselves. Once a defendant is convicted, he may clog the court system seeking post judgment relief claiming counsel did not fully inform him of the deposition content in the event there is no transcript. I would call for the reverse of the proposed revision to Rule 3.220(h)(6) and provide that a defendant may attend his deposition unless the Court orders otherwise "for good cause shown". It should be kept in mind that the majority of depositions do not involve sexual assaults on children under sixteen (16). The vast majority of misdemeanors are offenses committed in the presence of police officers as are many felonies. Most felonies including narcotic charges, burglaries, white collar crime, etc. do not relate to an injured victim. The State attorney is usually present at depositions involving serious cases. Furthermore, a "victim" whose unwilling to face a defendant at a deposition may be unequally willing to face him at trial. The so-called "intimidating effect" of witnesses at depositions just does not exist in a widespread form. In thousands of depositions I personally have never observed this to be the case.

A defendant should have the right to depose all witnesses he feels are relevant. The "unnecessary depositions" frequently turn up favorable information unknown through police reports. I do favor a witness submitting an affidavit stating he has no knowledge of the case or he merely served as a link in the chain of evidence or a custodian who may produce records in lieu of an appearance. This would be a timesaving device. Perhaps a form interrogatory for the "insignificant witness" would be appropriate in lieu of attendance.

A police officer who served a minor role may be granted telephone statements. A lead officer or one who feels the defense is important should be required to physically attend a deposition so counsel may observe his demeanor. As a practical matter, the telephone does not permit the extensive inquiry or "feel" for the witness that physical presence would permit.

Regarding reciprocity between the prosecution and defense, I question the ethical considerations of the attorney vis a vis his duty to his client and his duty of disclosure when the disclosure may result in culpatory evidence. Would this not erode the attorney/client privilege and cause a loss of confidence and communication between the attorney and his client?

Thanking you for your attention and consideration of my observations, I am

Very truly yours,

Lawrence W. Livoti

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LWL/sb