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January 10, 2011

Camilla Faulk, Supreme Court Clerk
Washington State Supreme Court
Post Office Box 40929
Olympia, Washington
98504-0929

Dear Camilla:

The following comments have arisen during discussion by the elected Prosecutors of Washington State, and have been endorsed for your consideration during the public comment process for creation of proposed CrR 4.11 and CrRLJ 4.11.

"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."

"We have actual instances of photographs and victim statements being circulated in our jails for inmate entertainment – this problem may be exacerbated under the already adopted changes to the possession of discovery rule."

"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."

"To the best of our knowledge, no state in the country has a court rule or statute granting attorneys the right to record victims of crimes over objection by the victim."

CLERK

RECEIVED
SUPREME COURT
CLERK
STATE OF WASHINGTON
2011 JAN 11 AM 8:12
D. J. MALDEN, CLERK

“Prosecutors in Washington have decided that the better public policy is to respect the victim’s decision as to whether or not he or she will be electronically recorded during our forensic victim interviews – though convenient, it is not necessary to do our job.”

Analysis:

The proposed rule would not allow a witness to object to audiotaping or verbatim transcription of counsel interviews. 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. **The recording of an interview 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.**

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.

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 the law is not clear on this point. It is clear that 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 interviews. Matters that the court would rule irrelevant and inadmissible in trial are commonly explored during witness interviews.

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.

Many victims of crime are indigent and will not be able to pay for copies of recordings. They will thus be denied this record. Particularly in domestic violence and familial abuse situations, whether sexual or physical, this proposal may result in the defendant ending up with sole control and the only copy of victim statements - exacerbating the power and control dynamics often found in these cases.

Finally, as we are discovering in child interview videotaping (which respects the rights of the child to refuse to be recorded), standards for recordings are essential. When the tape is turned on. When it is turned off. Pre-recording conversations or partial recordings are all issues that must be addressed in creating reliable and useful records. Requiring witnesses to consent to audiotaping or verbatim court transcription necessarily requires that the rule address minimum standards of accurate recording and interview practices. These issues were raised by the Superior Court Judges Association, and are not meaningfully addressed in the current proposal even after this Court returned the proposal to the WSBA Rules Committee for re-review.

Sincerely,

A handwritten signature in black ink, appearing to read 'TAM', with a long horizontal flourish extending to the right.

Thomas A. McBride
Executive Secretary

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