

Faulk, Camilla

From: Trieweiler@aol.com
Sent: Thursday, April 28, 2011 4:56 PM
To: Faulk, Camilla
Subject: Proposed CrR 4.11

Members of the Court,

I have reviewed many of the comments of those opposed to the proposed new rule that would allow accurate records of witness interviews. All of these concerns were expressed to the WSBA Board of Governors as well as the WSBA Rules and Procedures Committee while they were drafting the rule. They took many of them into consideration in modifying the rule. Others, they did not consider to be of serious concern or believed that the benefits of an accurate record of witness interviews outweighs any theoretical harm. For the following reasons, the objections are not well taken:

1. Concern about *tape recording*. The rule allows for *taping or use of a court reporter*. All of the opposition to the rule seems to be to tape recording the interviews. Consequently, if a witness cannot bear the thought of having their voice on tape, they can insist on using a court reporter instead.
2. The Tapes or Court Reporter's Transcript Will Be Disclosed. Taping and court reporters have been used for many years now with increasing frequency. Disclosure has not been a problem. In fact, the victim advocates were asked at one of the committee meetings if they could think of even one example of the tape of a complaining witness interview being disclosed to the general public. They could not. It hasn't happened. The rule prohibits it. There is no reason to believe it will a greater problem with the rule than without.
3. Witnesses Have the Right Not to Be Recorded or Have Their Interviews Accurately Memorialized by a Court Reporter. This alleged right is asserted over and over by opponents. However, they cite to no statute, court rule, or regulation for this right. That is because there is no right not to have a non-private conversation recorded in the context of litigation. Also, why is this right raised only in the criminal context. No one seems to believe such a right exists in civil cases or in court during trial.
Witnesses do not have the right to object to the current procedural rules. The proposed recording rule is no different. It is merely a procedural rule to assist in the search for truth and protection of an accused constitutional rights.
4. The Accused Shouldn't Have More Rights Than Witnesses. This claim makes no sense and is a pure appeal to negative emotion. However, it is literally wrong. That is because any witness would have the exact same rights as the accused, were they accused of a crime. Additionally, the accused does not have the right to refuse to be recorded in King County. That is because when they are placed into police cars, a video and audio recorder records everything they say and do in the back of the patrol car. This is before they are even charged with a crime. They are also recorded by a video camera in the booking areas of the jail. They are not asked permission for this. It is done, in part, to protect the police from false accusations of what was said and done while the accused is in their custody. Consequently, without the right of a defendant to accurately record witness statements, a witness would actually have *more* rights in this regard than an accused.
5. Recording Traumatizes Witnesses and Victims. This is simply untrue. The interview itself may be quite uncomfortable for many alleged victims. But defendants have the constitutional right to do these interviews. The recording itself is not traumatic. And again, using a court reporter is always an option for the witness.

6. Recording or Using a Court Reporter Will Prevent Victims From Cooperating With Law Enforcement.
This is simply untrue. I have been practicing criminal law in Washington as both a prosecutor and defense attorney for 25 years. I have never seen an instance of a witness refusing to cooperate with the prosecution because an accurate record of the interview was going to be made. Additionally, if someone would refuse to cooperate because an accurate record was going to be made of their interview, perhaps they shouldn't be a witness upon whose accusations peoples' lives and freedom may depend.

The opposition to this rule is simply about power - who will have the power to bring the facts of a witness's prior statements to the finder of fact. Currently, prosecutors have the advantage in this regard because police, who have interviewed most complaining witnesses and often the accused, are given more credibility by jurors than defense private investigators. This rule will simply level the playing field in presenting prior inconsistent statements to the court and jury. That is why prosecutors and victim rights advocates so vigorously oppose it. This rule is about preserving the truth of witnesses' prior statements for judges and juries so that they can decide whether prior inconsistent statements were made and whether that fact is significant. Nothing more. Nothing less. I urge the Court to adopt it.

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