Faulk, Camilla

From: Greg Walsh [pacificconfidential@yahoo.com]
Sent: Thursday, April 28, 2011 1:14 PM
To: Faulk, Camilla
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Subject: Re: Recording Witness interviews

Ms. Faulk,

I am sending this as public comment on proposed CrR 4.11 Recording Interviews. The WA Supreme Court proposed rule, as I understand it, allows the defense to record defense victim/witness interviews or use a stenographer, and forbids dissemination of statements or transcripts outside the parties without a court order. My understanding is that the difference between this rule and current law and practice is that the rule would potentially allow overt recording without the consent of the witness, although, presumably, a discomfited witness would still have recourse to silence unless compelled by a subsequent order for deposition.

I understand many on the prosecution side are voicing objections, citing concerns that defense interview recordings are somehow traumatic or intimidating to witnesses and victims.

I have an award-winning 30-year career in public safety, and have worked for the past 4 years as a criminal defense investigator, primarily handling felony, federal, and violence cases, over 400 in all.

I fail to see how proposed CrR 4.11 differs substantially from present practice, what the prosecution and police find objectionable in either current or proposed practice, or what the ethical basis is for arguments against either current or proposed practice.

While the manner and conduct of the interviewer may give rise to concerns, recording, in my experience, is a non-issue. So-called victims and witnesses are virtually always supported by counsel or an advocate, can decline to speak, can take breaks for composure, and may opt to respond to a particular question with the recorder off, or refuse to speak or be recorded. My practice is to so advise them in advance of interviews, in writing or on the recording. Few seem to remain mindful of a recorder during interviews, even when in plain view before them.

Effective interviews rely on the social nature of human beings, our innate desire to be understood, and our shared culture of communication. Recording neither promotes nor hinders that process; it merely documents it, and thereby serves the interests of justice.

Humane conduct is the key to a fruitful interview. Recording establishes, among other things, whether a witness was badgered or manipulated. I am at a loss to understand how anyone concerned with the truth would object to recording.

In the past 2 years I have had a capital murder case hinge on attribution of a pronoun, and a witness's recorded assertion of interference by the prosecution; an Assault 1 self-defense jury instruction hinge on nuance and subtle content of a recording; and 3 child rape allegations proven to be false in reliance on recordings.

The assertion that recording compounds victimization is erroneous on two fronts. First, it doesn't; the problem usually doesn't exist,and in cases where it arguably does, appropriate remedies are already available. Second,

even if it did, protecting presumed victims by depriving defendants of one of the most objective and effective means of eliciting and documenting relevant truth requires buying into a flawed premise; that the defendant is an offender, and the victims and witnesses innocent. That conflicts with the presumption of innocence, and makes the police and prosecutor's account the presumptive truth. We might as well dispense with the trial. Concealing the truth is what compounds victimization, not eliciting and recording it.

Witnesses and their utterances do not belong to the government or the defense; they belong to the truth, and ideally, recording establishes to the fact-finder in our adversarial system that the government and defense treat witnesses accordingly. If recording is made unavailable to the defense investigation in the field and offices, I must presume that, consistent with the presumption of innocence, it will be equally unavailable to police and prosecutors.

There is an economic benefit; it is several times more efficient to record than annotate. Defense investigation will be either more costly or less effective if recording is unavailable. Cynics may view enactment of CrR 4.11 as an attempt to institutionalize ineffective assistance of counsel and make it the new low standard.

Current law seems entirely adequate, and already accommodates the concerns of witnesses when valid. Enacting proposed CrR 4.11 seems to conflict with the principles of non-interference underlying WSBA Advisory Opinion 1020, 1986, Advice by Prosecuting Attorneys to Prospective Witnesses.

Defense victim interviews are already, in terms of representation from both sides, one of the most well-attended, carefully controlled and conducted, and abundantly documented fact-finding exercises in the process of a criminal case. The truthful have nothing to fear from interviews or from recording, whether asking, answering, or listening to questions. Only injustice benefits when truth and reality are subordinate to another agenda.

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"In matters of Power, let no more be heard of confidence in men, but bind him down from mischief by the chains of the Constitution."
Thomas Jefferson

"Freedom isn't for wimps."
Neal Boortz

"If you have ten thousand regulations, you destroy all respect for the law."
Winston Churchill

"If a man neglects to enforce his rights, he cannot complain, if, after a while, the law follows his example."

Oliver Wendell Holmes

"When fascism comes, it will be wrapped in a flag and carrying a cross."
Sinclair Lewis

"An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."
Thomas Paine