

## Faulk, Camilla

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**From:** timlearyl@ gmail.com on behalf of Tim Leary [tim@learydefense.com]  
**Sent:** Thursday, April 28, 2011 5:11 PM  
**To:** Faulk, Camilla  
**Subject:** CrR 4.11 - Recording Witness Interviews

Dear Supreme Court Rules Committee,

I am writing in support of proposed Superior Court Criminal Rule 4.1 - Recording of Witness Interviews. The rule will only serve to enhance the criminal justice system and work to the benefit of all the parties involved.

From 2000 until 2008, I was a Deputy Prosecutor in the King County Prosecutor's Office. When I left, I was a Senior Deputy Prosecutor in what was then the Complex Prosecution and Investigations Division. Over that time, I witness the practices associated with witness interviews evolve. When I began my rotation in the Sexual Assault Unit, the audio and video recording of forensic child interviews had just begun. While there was skepticism and reluctance by some in the beginning, the practice of recording interviews has to be described as a positive development in the field.

"DVD Recording the Forensic Child Abuse Victim Interview: Washington State's Pilot Project 2003 - 2005" was a report that examined the results. See <http://www.waprosecutors.org/docs/05finalDVD.pdf>. On page nine, the report noted that:

Participants found that recording the interviews was effective for all age groups.

Younger children often communicate non-verbally, and the recording captured those acts for subsequent viewing and decision making. It also helped with competency determination in younger children. **For older children, who often give long answers, the recording allowed for taking these statements without interruptions to catch up the notetaking.** Deputy Prosecutors appreciated being able to view the demeanor of children in conjunction with review of any recorded statements. This was also helpful in cases that processed over a long period of time, or that included many instances of interviewing. In those situations, often the demeanor of the child loses affect. The recording preserved the original emotions present during the first interview. **The recordings also present a better record** in evaluating a failure to report versus a denial of abuse.

(Emphasis Added.)

With the proliferation of video cameras, cellular telephones, police car videos and other recordings, jurors get the benefit of receiving much more accurate and detailed accounts of events. Written reports or handwritten notes by police officers, detectives, attorneys or investigators fail to capture what was said word for word and the context of the question and answer.

The judicial system has come to recognize the benefits of recordings and the shortcomings of witnesses recounting what someone else said during an interview. In 2004, the Supreme Judicial Court of Massachusetts expressed its strong displeasure with custodial interrogations that were not audio recorded. *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-43 (2004). In an attempt to compel the police to record all interviews, it permitted the defense to have an instruction read to the jury that called into question the practice of not recording interviews:

Thus, when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is

entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care.

*Id.*

The recording of witness interviews will only serve to enhance and protect the witness. If the witness needs to have his/her memory refreshed, it will not be done with someone notes detailing what they thought the witness said. Rather the witness will be able to listen to or read her/his exact answer. Further, if there is a dispute about the appropriateness of the interviewer, the judge and/or the jury will be able to hear exactly what transpired.

Since I left the King County Prosecutor's Office in 2008, I have been engaged in criminal defense in private practice. I have found that prosecutors largely prefer and encourage their witnesses to consent to being recorded. Witnesses prefer to know that their words will not be subjected to interpretation.

The proposed rule is appropriate and I strongly encourage its passage.

Regards,

Tim Leary

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