



Washington Defender Association
110 Prefontaine Place S., Suite 610
Seattle, Washington 98104

Christie Hedman, *Executive Director*
L. Dental Fessler, *President*

Telephone (206) 623-4321
Web: www.defense.net.org

January 19, 2011

Washington State Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Re: Comment on Proposed Rule CrR 4.11

I am writing on behalf of the Washington Defender Association (WDA) to urge the Court to adopt proposed rule CrR 4.11 Interview of Witnesses. WDA is a non-profit professional membership organization for Washington public defender agencies, attorneys, social workers and investigators committed to providing resources and support to indigent defenders.

WDA supports proposed rule CrR 4.11 for the following reasons:

1. It provides both prosecutors and defense counsel the ability to obtain a clear and unambiguous record of a witness's statement in an expedient and cost-efficient manner, thus furthering the goals of fairness and equity in the administration of justice.
2. Attorneys in civil practice have always had the ability to accurately preserve witness and party statements in depositions. Preservation of a witness or party's statement is not sinister and assists all parties and the court in the discovery, settlement, and trial phases of litigation. Criminal cases should be no different. Many times they involve consequences that exceed those at stake in civil cases, yet the attorneys in criminal practice do not have the ability to do what lawyers in civil practice do. As the Washington Supreme Court has recently reminded, in the decision of *State v. A.N.J.*¹, public defense attorneys are held to the same rules of competence that apply to all attorneys. This proposed rule reinforces professionalism in the practice of law in criminal cases by making an appropriate and common professional tool available to them.
3. Although victim rights groups have voiced concerns that a recorded interview may be traumatizing for an alleged victim, the same can be said any interview. The same can also be said about interviews and depositions in many civil torts. The court system and the attorney profession deal with trauma to parties and witnesses all the time in both civil and criminal law cases, including public jury trials. It is done professionally and with safeguards. The same is true under the proposed rule, which implements new strict controls on dissemination of witness statements and an opportunity for them to obtain a copy of the interview. The fear that defense attorneys will abuse the new rule is simply a

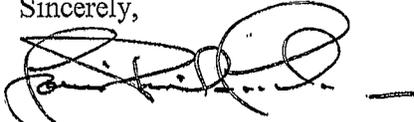
¹ 168 Wn. 2d 91 (2010)

fear. Defense attorneys must follow the rules and do so professionally. If not, there is both an opportunity for resort to the court for a protective order or sanctions in the professional setting. We note that complainant interviews in child rape cases are now routinely recorded by the State to eliminate concerns about manner of the interview and to protect against deterioration of the witness's memory. Additionally, law enforcement records witness and victim interviews.² These examples only validate the purpose and need for the proposed rule in other contexts.

Arguments that witnesses themselves will not be able to afford a copy are not valid. As technology has improved, most 'audio recordings' are now actually taken in digital format by both law enforcement and attorneys. Electronic copies of these recordings can be made for the cost of a blank CD Rom and provided to witnesses on request as specifically provided by the rule. The only potential for significant costs at the expense of the witness is if the recording is taken by a court reporter. Such occurrences will be rare since the rule itself encourages the use of less expensive and more efficient audio recordings, not court reporters.

For these reasons, we strongly urge the Court to adopt proposed Rule 4.11 Interview of Witnesses.

Sincerely,



L. Daniel Fessler
President

² The new rule may provide greater protection than currently provided for recordings and transcripts of victims and witnesses taken by law enforcement during its investigation of crimes. Such recordings are routinely taken by law enforcement during investigation of crime, including the most violent and most sensitive events. However, once the investigation is completed and the matter is transmitted to the prosecutor for charging such recordings are available to the media and members of the public by means of a Public Records Act request to law enforcement and/or the prosecuting attorney. Ironically, the only party in the criminal justice system that is not able or required to provide a copy of investigative recordings since CrR.4.7(h) requires such material to be maintained in their exclusive possession. The same will be true of any recorded statement taken under the new rule.