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State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

P.O. Box 41200 • Olympia, Washington 98504-1200

Telephone (360) 902-8700 • TDD (360) 664-8126 • FAX (360) 586-5068 • <http://www.dfi.wa.gov>

March 26, 2019

Supreme Court of Washington
Office of the Clerk of the Court
P.O. Box 40949
Olympia WA 98504-0929

Subject: Comments on Proposed New Criminal Rules CrRLJ 3.7/ CrR 3.7 (Recording Interrogations)

This letter responds to the Order of the Court dated July 11, 2018, requesting comments on a new criminal rule proposed by the Washington Association of Criminal Defense Lawyers on the topic of recording interrogations. The proposed rule would require that any interrogation of a person under investigation for any crime be recorded through an audiovisual recording in order for the statements made by the person to be admissible in any criminal proceeding against the person other than for purposes of impeachment.

The rule may have substantial consequences for this agency. The Department of Financial Institutions is a regulatory agency and investigates conduct in the financial services arena under a variety of Acts. The primary focus of these investigations is to determine if administrative or civil action is necessary to address violations of a particular Act. Under many of the Acts, however, conduct that is subject to administrative action may also be subject to criminal penalty.¹ In practice, only a small number of cases that are the subject of administrative or civil action ever become criminal matters. However, until investigation is complete it is often impossible to say whether the subject of the investigation has engaged in conduct worthy of criminal referral.

The scope of the proposed rules is unclear in at least two areas of concern to DFI involving non-custodial interrogation. First, the proposed rules do not define interrogation. Interrogation is commonly understood to mean formal questioning by law enforcement. DFI is concerned that its administrative and civil investigative activities might be considered interrogation for the purpose of the proposed rule. DFI investigates hundreds of regulatory complaints each year and speaks with hundreds of people who

¹ See e.g., Franchise Investment Protection Act, RCW 19.100.210(6) (willful violation of any provision is a class B felony); Business Opportunity Fraud Act, RCW 19.110.075 (will violation of .050 or .070 is a gross misdemeanor, willful violation of .050 or .070 is a class B felony); Mortgage Broker Practices Act, RCW 19.146.050 (violation of this section is a class C felony), RCW 19.146.110 (violation of any provision other than .050 or of any rule or order is a misdemeanor); Securities Act of Washington, RCW 21.20.400 (any willful violation of any provision of this chapter except .350 is a class B felony); Commodity Transactions Act, RCW 21.30.140 (willful violation of chapter, rule, or order is a class B felony); Consumer Loan Act, RCW 31.04.175(1) (violation of any provision is a gross misdemeanor); Uniform Money Services Act, RCW 31.45.180 (violation of any provision of the rules or orders of the director is a misdemeanor).

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are suspected of committing a violation of one of the Acts DFI enforces; which violation may also be a crime. DFI also conducts examinations of companies it licenses and regulates, identifies violations of the relevant Act (which may also be a crime), and formally questions representatives of the company concerning those violations. DFI's concern, then, is at what point (if ever) does its questioning for administrative/regulatory purposes become interrogation of a person under investigation for any crime.

DFI's second concern is that the proposed rules do not adequately make clear what it means to be "under investigation for any crime." As noted above, many of the Acts enforced by DFI include a criminal penalty for certain violations. In practice, however, the bulk of DFI's investigations are from an administrative or civil perspective. DFI is concerned that a strict interpretation of the proposed rules could conclude that the administrative or civil nature of a DFI investigation is irrelevant simply because the violation is also a crime.

Because it is not always possible for DFI to know in advance whether an administrative or civil investigation will lead to a criminal investigation, the adoption of the proposed rule could force DFI to make an audiovisual recording of all interviews of targets of administrative and civil investigations even though the likelihood of the case becoming criminal is small. This would be costly. It could also delay the taking of testimony as there are probably not sufficient numbers of qualified videographers available in our area to meet the demand.²

DFI takes no position on whether the proposed rule should be adopted as applied to law enforcement investigations. However, DFI requests that if the proposed rules are adopted, an exception be added for statements made in connection with regulatory investigations for the primary purpose of determining whether administrative or civil action is warranted.

Sincerely,



Charles Clark
Agency Deputy Director

² It is also significant that many of the complaint investigation interviews and examination interviews are with a person located outside the State of Washington over the telephone or outside the State of Washington but in-person. The logistics for arranging hundreds of audiovisual "interrogations" with these out-of-state people would be staggering; the cost even more so.