



Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 26, 2019

The Honorable Representative Jennifer Williamson, Chair
House Judiciary Committee, Members

Re: Testimony in support of HB 3261

Dear Chair Williamson and Members of the Committee:

My name is Norah Van Dusen, and I am here to testify in support of HB 3261. Thank you for opportunity to testify before you today and for your consideration of this important bill.

I am a juvenile defense attorney practicing at Metropolitan Public Defender in Portland, Oregon. I have represented young people in juvenile delinquency and criminal proceedings for nearly 13 years. Before moving to Oregon, I worked at the Legal Aid Society in New York in the Juvenile Rights and Criminal Defense Practices. Prior to joining Metropolitan Public Defender, I represented young people at Youth, Rights and Justice. Over the course of my career representing youths, I have litigated dozens of hearings involving the admissibility of youths' statements to law enforcement, most often without any recording of the interview at issue. The absence of an objective recording of what transpired during an interview jeopardizes the rights of young people and erodes public trust in law enforcement. Furthermore, without the best evidence of an interview, judges and lawyers are left to parse what occurred between the youth and law enforcement, often months or years after the interaction took place. Fact finders are forced to make important decisions based solely on imperfect human memory. This is unfortunate, because in the majority of cases, law enforcement officers conduct juvenile interviews "by the book."

The benefits of recording interviews between youths and law enforcement are manifest. Recorded interviews serve the interest of vulnerable youth and law enforcement alike. Recorded interviews conserve judicial resources by providing a clear path to the swift resolution of contested issues. Most importantly, the practice of recording interviews between youth and law enforcement promotes the primary aim of our juvenile and criminal systems: to achieve justice.

House Bill 3261 expands the work of HB 3242 passed by this legislative body in 2017. That bill required police officers to record interviews of youth under 18 in law enforcement facilities in connection to acts that would constitute a felony if committed by an adult. When I moved to Oregon, I was impressed that state law required law enforcement officials to record interviews with youths on felony cases at law enforcement facilities. HB 3242 placed Oregon at the forefront of juvenile justice reform by recognizing that youths deserve extra protection and that both law enforcement and youths benefit when full content of interviews are recorded for later review. Oregon is one of a minority of states to require recording of youth interviews with law enforcement on felony cases at law enforcement facilities.

HB 3261 builds on the necessary work of requiring the best evidence of recording by expanding that law to require peace officers, school resource officers, and campus security record interviews with youths under 18 years old for any crime, not just felonies. This bill also requires recording of interviews anywhere they are conducted if the peace officer, school resource officer, or campus security officer has reasonable means to record, such as a bodycam or cell phone. The concerns that prompted the passing of HB 3242 exist whether a youth is charged with a felony or a misdemeanor.

Recording interviews between youth and the law enforcement officers who interact with them provides protection to both parties. The practice of recording custodial interviews (where the youth is not free to leave) dispels questions of whether a law enforcement officer properly Mirandized the youth, whether the youth voluntarily waived his constitutional rights, whether any undue pressure was exerted upon the youth, and whether the youth was cooperative. Video recording provides answers to even subtler questions: the demeanor of the youth and the law enforcement officer, the exact questions asked and the manner of questioning, the exact answers given, whether the youth appeared tired or alert, whether the law enforcement officers were gentle or imposing. In the absence of such recordings, judges and attorneys are left without a clear picture of exactly how an interview unfolded. Instead, contested issues must be litigated in the courtroom relying solely on the testimony of witnesses whose memories of the interview at issue will have inevitably faded. A recorded interview provides the best, most objective evidence of a crucial interaction between law enforcement and a youth.

As a practicing lawyer in a large public defender's office, I spoke to many of my colleagues about this proposal. I am here today to share case examples from my own experience as well as from my colleagues who do this type of work.

Last year, a colleague and I represented a young man who had been interviewed by law enforcement concerning allegations of that the youth had committed a sexual offense. Our client was approximately 14 years old and this was his first contact with law enforcement. The youth was interviewed at a police station, and the interview was recorded. The recording revealed that over the course of approximately an hour and a half, our young client repeatedly asserted his innocence. Two detectives employed "minimization" and "maximization" methods of questioning (commonly referred to as the Reid technique or method) in order to steer the youth toward making an admission.¹ The detectives informed our young client that they were certain of his guilt, that his repeated denials made them doubt whether he was a "good kid," and that he

¹ According to Barry Feld, a leading scholar on juvenile confessions, the Reid technique is the most commonly taught method of law enforcement interviewing in North America. It involves "maximization" and "minimization" techniques to elicit confessions. Maximization tactics convey the interviewer's belief in the suspect's guilt and communicate that the suspect's denials will fail because the evidence against him or her is overwhelming. Minimization techniques provide the suspect with "moral justification and face-saving excuses for having committed the crime in question," and often the interviewer offers sympathy and normalizes the conduct. The Reid technique does not modify interview tactics to accommodate the developmental differences between youth and adults. Feld, Barry; *Real Interrogation: What Actually Happens When Cops Question Kids*. 47 Law & Soc'y Rev. 1 (2013).

could be locked up for many years if he did not take responsibility. The detectives then offered the youth possible justifications for the suspected conduct and suggestions for how it might have happened (few of which matched the original allegations). Desperate to end the interview, our client ultimately agreed with the detectives' suggestions of how the conduct might have occurred.

At a subsequent hearing, the court had the benefit of watching the video of the interview and reviewing a transcript of its content. The court suppressed our client's statements to law enforcement, and in so doing, directly quoted from the recorded interview and found that the questioning techniques employed by the detectives rendered the youth's statement involuntary as a matter of law.

Fortunately, such examples are the exception and not the rule. Most law enforcement officers interview young people in a respectful, non-coercive manner. However, in our client's case, without the benefit of a recorded interview we would never have learned the precise exchange between the detectives and our young client. Those details proved essential to understanding how our client came to confess to a narrative that did not match the initial allegations; in other words, to understanding how he came to falsely confess.

In another example, a colleague represented a young person who was interviewed by law enforcement in connection with a felony arrest. The interview was recorded. The recording documented the officer's most likely accidental, but still fatal, misstatement of Miranda warnings to the youth. The attorney pointed out the issue to the deputy district attorney, who then had access to the clear recorded interview and made the decision to not offer the statements. The recording saved valuable judicial time.

More often than not, however, recorded interviews reveal that law enforcement properly advised the young person of his or her Miranda rights and questioned the youth in a wholly acceptable manner. In such cases, a clear record of what transpired during an interview becomes crucial evidence in support of admitting a youth's statement against him or her in court. Moreover, recorded interviews protect law enforcement officers against future claims of improper tactics during youth questioning. Recorded interviews thus serve as a bulwark against allegations of misconduct that might be hard to refute absent objective evidence provided by a recording.

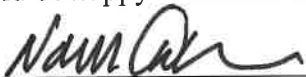
In one such case, a colleague represented a young person whose relatives presented concerns about how the detectives treated the youth during the interview and the youth's level of intoxication. However, the detectives had followed the law and treated the youth appropriately. The youth was not impaired during the interview. This misperception impeded negotiations.

Once the family viewed the video recorded interview, they better understood the youth's situation and the course of the investigation. The neutral evidence of the video benefited all parties and helped move the case to an appropriate negotiated resolution.

HB 3261 protects the interests of youth and law enforcement alike. Passage of this bill will place

For questions or comments contact:
Mary A. Sofia, OSB # 111401
Legislative Director
Oregon Criminal Defense Lawyers Association
503.516.1376 * msofia@ocdla.org

Oregon at the forefront of juvenile justice reform and create an opportunity for full transparency concerning important interactions between youth and law enforcement officers. Thank you to Representative Gorsek and Represented Piluso for bringing this important policy forward. I would be happy to answer any questions.

/s/ 

Norah Van Dusen

Attorney at Metropolitan Public Defender

Member of Oregon Criminal Defense Lawyers Association

Portland, OR

About OCDLA

The Oregon Criminal Defense Lawyers Association (OCDLA) is a private, non-partisan, non-profit bar association of attorneys who represent juveniles and adults in delinquency, dependency, criminal prosecutions, appeals, civil commitment, and post-conviction relief proceedings throughout the state of Oregon. The Oregon Criminal Defense Lawyers Association serves the defense and juvenile law communities through continuing legal education, public education, networking, and legislative action.

OCDLA promotes legislation beneficial to the criminal and juvenile justice systems that protects the constitutional and statutory rights of those accused of crime or otherwise involved in delinquency and dependency systems as well as to the lawyers and service providers who do this difficult work. We also advocate against issues that would harm our goals of reform within the criminal and juvenile justice systems.