Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 3:03 PM
To: Tracy, Mary
Subject: FW: Comments on the adoption of proposed CrR 3.7 3.8, 4.7, and 4.11

From: Martin, David [mailto:David.Martin@kingcounty.gov]
Sent: Tuesday, April 30, 2019 3:02 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on the adoption of proposed CrR 3.7 3.8, 4.7, and 4.11

Dear Justice Johnson and the Supreme Court Rules Committee,

I am writing in opposition to proposed criminal court rules 3.7, 3.8, 4.7, and 4.11. The proposed rules impose unfair burdens on victims and witnesses that create, instead of remove, barriers to access justice. The proposed rules also impose penalties for violation so extreme it will undermine the credibility of our justice system.

I have been a prosecutor of gender violence crimes in King County for 21 years, and have supervised the King County Prosecuting Attorney's domestic violence unit for the past 12 years. During that time I have been fortunate to work with many victims in partnership with system and community advocates and law enforcement. I have also been involved in many efforts to improve access to justice for marginalized victims from collaboration with civil legal aid (Project Safety and Evidence Rule 413) to implementation of HB1022 to improve response to immigrant victims. I have also worked with the Gender and Justice Commission to create new sentence alternatives and treatment improvements for domestic violence offenders under recently passed ESHB 1517. The proposed rules are contrary to Washington State's legislative and legal history of reasoned and thoughtful responses to crime victims, most especially to victims of gender violence.

Proposed rules 3.7 and 3.8 are sweeping changes and create an unfair burden on victims and witnesses seeking access to basic public services central to being a citizen. A rule that requires any and all communication with law enforcement to be recorded without exception is an unfair infringement on the rights of victims and witnesses and will chill participation in the system. Many victims and witnesses are reluctant to be recorded and concerned about retaliation. The result will be disproportionate impact on diverse communities and women and children, who make up the vast majority of those victimized. The 2015 Washington State Civil Legal Needs Study details how domestic violence and sexual assault victims already face "the most problems of all." Moreover, the proposed rule further marginalizes undocumented immigrant victims and witnesses, a disproportionate number of whom are women and children. For many immigrant victims the fear of being reported to immigration and fear of deportation are the most intimidating factor from seeking the services they needed—mandatory recording will only make things more difficult. See *GR 9 Proposal to Adopt New Rule of Evidence 413 Concerning Evidence of Immigration Status*.

Proponents do not cite any evidence based literature to show the benefit of mandatory continuous audiovisual recording. In fact, many believe mandatory audiovisual recording, whether inside an individual's home, school, workplace, place of worship, is inconsistent with civil liberties. To mandate continuous recording is inherently more intrusive than other investigative techniques.

The American Civil Liberties Union policy on mandatory continuous police recording recommends police obtain consent from crime victims before recording, discontinue recording if asked by crime victims, and not be retained longer than six months. See also ACLU white paper. The ACLU originally endorsed continuous recording but then changed its position: "[a]n all-public-encounters policy is what we called for in the first version of this white paper, but (as we first explained here), we have refined that position. The problem is that such a policy does not address the issues mentioned above with witnesses and victims, and greatly intensifies the privacy issues....." This position is consistent with policy of the International Association of Chiefs of Police; policy of the Battered Womens Justice Program, and the Police Executive Research Forum; and policy of the National Sexual Violence Resource Center. All call for respecting the right to privacy and enhancing victim autonomy as critical components in any considerations or policy. The prevailing sentiment nationally is to balance recording with the rights of victims and witnesses—no American jurisdiction has proposed or adopted rules mandating police act as a "surveillance state."

The potential for embarrassing and titillating releases of recordings is significantly increased by continuous mandatory recording. Examples include DUI stops of celebrities and ordinary individuals whose troubled and/or intoxicated behavior has been widely circulated and now immortalized online. The above civil liberties, victim advocacy, and law enforcement organizations all call for notice to citizens about recording, limitations on time and place of recording, and limits on retention.

Proposed rule 3.7 is inconsistent with trauma informed practice. The National Council of Juvenile and Family Court Judges promotes a justice system that responds effectively to victims of trauma by creating an environment that promotes safety, agency, and trauma informed practice. See NCJFCJ policy paper. These practices are promoted so courts "appropriately engage families, professionals, organizations, and communities to effectively support child safety, permanency, and well-being; victim safety; offender accountability; healthy family functioning; and community protection. Accordingly, judges should appropriately engage the court system to 'first, do no harm' recognizing that all persons appearing before the court do so with experience and concepts of self, family, community, culture, and history." The evidence based literature on trauma informed practice promotes the policy positions of NCJFCJ, and not the unreasonable approach of the proposed rule.

Proposed rule 4.7 greatly expands in scope, time, and cost the prosecutor's discovery obligations and removes a trial court's discretion under State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993) to regulate the discovery process. The result will be new obligations for victims and witnesses from having to submit their cellular phones for forensic examination to compelled examination of their social media activities to meet the new requirements. Current victim services such as system based victim advocacy or victim assistance specialists will be obligated to detail and share in discovery all interactions with victims from safety planning to shelter referrals. Any and all interactions with victims will need to be recorded.

The new proposed rules stand in stark contrast to the current common sense approach of CrR 4.7(e) requiring materiality and reasonableness thresholds: "The court may condition or deny disclosure authorized by this rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant." [emphasis added], see also Blackwell, 120 Wn.2d at 822. Further, the current common sense rule with regard to whether or not a trial court will hold an *in camera* is within the discretion of the trial court. State v. Diemel, 81 Wn. App. 464, 467, 914 P.2d 779 (1996). See also State v. Mak, 105 Wn.2d 692, 704-05, 718 P.2d 407 (1986); and Blackwell, 120 Wn.2d at 825-830.

I am hopeful the Court will reject these proposals and direct stakeholders to convene working groups to discuss ways to modernize the discovery process in the age of electronic case management and social media balanced with respect for crime victims and witnesses.

Sincerely,

David Martin

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