

## Tracy, Mary

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Thursday, February 28, 2019 2:00 PM  
**To:** Tracy, Mary  
**Subject:** FW: Comments on proposed rule changes

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**From:** Jerry Costello [mailto:jcostel@piercecountywa.gov]  
**Sent:** Thursday, February 28, 2019 1:54 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comments on proposed rule changes

This is to comment on proposed new rules of criminal procedure 3.7, 3.8, 3.9, 4.11 and the proposed amendment to CrR 4.7.

I have served as Judge of the Superior Court since 2013. After graduating law school in 1983, nearly all of my work as an advocate has been in the criminal law in both state and federal court, to include courts martial, serving as both defense counsel and prosecutor. Thus, I have a broad perspective on these issues and deep practical experience. My comments are my own and I am not trying to speak for other judges.

I understand that the proposed rules have been drafted by the WA Association of Criminal Defense Lawyers. I have great respect for the role of criminal defense counsel – especially after working in that role - but it appears to me that the defense bar, through these proposed rules, is narrowly advocating for their clients, criminal case defendants, and is seemingly blind to the huge impacts these rules would have on the criminal justice system and the public.

It is my observation and belief that the constitutional due process rights of defendants, purportedly at issue here, are fully protected right now by the rules of evidence, by judicial discretion and by existing constitutional, statutory and case law. These proposed rules are unnecessary and they would create far more harm than do good.

On a practical level, the rules are simply unworkable as written. They have unrealistic mandates and they sweep too broadly. Trial judges will not be able to apply them fairly or efficiently. Unjust results for crime victims and the public will surely follow.

A critical role of a trial judge is to exercise discretion in applying the rules of evidence so that all litigants receive a fair trial. But the proposed rules would undermine the most fundamental rule of evidence, which is, that all relevant evidence is admissible for a jury's consideration. Simultaneously, the discretion of trial court judges in applying the rules of evidence to unarguably pivotal evidence in criminal cases would be removed.

If these rules are adopted years of litigation will be spawned. I also predict that the public, whom judges are elected to represent, will be justifiably angry. These rules would greatly hamstring and, frankly, be insulting to law enforcement officers in whom the public has invested great trust and confidence. Crime victims and witnesses will be humiliated and deterred from participating in the investigation and prosecution of cases. More importantly, they will be recklessly endangered. The rules ignore Washington's constitutional and statutory laws protecting victims. They also would appear to violate Washington's Privacy Act (although I cannot prejudge this issue). The exclusive province of juries to weigh all relevant evidence would be violated. Public prosecutors' ability to present clearly admissible evidence would be blocked and the trial court would have no say in the decision.

I urge the Supreme Court to continue to trust trial judges to protect the rights of criminal defendants and crime victims by leaving intact our discretion to apply existing law.

Judge Jerry Costello  
Pierce County Superior Court, Dept. 7