Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, March 20, 2019 11:35 AM
To: Tracy, Mary
Subject: FW: Comments on proposed Criminal Rules changes

Importance: High

From: Robert Perez [mailto:Robert@perezandperezlaw.com]
Sent: Wednesday, March 20, 2019 11:34 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Robert Perez <Robert@perezandperezlaw.com>
Subject: Comments on proposed Criminal Rules changes

Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

SENT VIA US MAIL AND EMAIL:

RE: Proposed Criminal Rule Changes

I write to present my comments concerning proposed amendments to the Superior Court Criminal Rules regarding pretrial procedures. As an attorney licensed in two states since 1977 with a practice almost exclusively limited to criminal defense, I stand in strong support of the proposed changes and bring decades of real-world experience with the implications of such changes.

Proposed Rule CrR 3.7 – Recording Interrogations.

I should like to start by saying that comments from prosecutors asserting that police should just be trusted to do the right thing, are just naïve and unrealistic. One of the most striking results of the proliferation of cell phone cameras has been the vivid demonstration of how some police actually behave in the field. This is not an indictment of police, it is simply a recognition that police are no different from anyone else with respect to their ability to present reliable testimony. A small few will lie; many more will simply paraphrase artfully to support their mission to get the "bad guys"; and some will just paraphrase from faulty memory.

Police do not create police reports out in the field, or even during interrogations. Some take notes, some don't even bother with that. The vast majority create their reports after the fact. And even in those cases where notes were created, the notes are usually destroyed after the reports have been prepared. Without the Best Evidence of a recording to support the police narrative, we are left to trust not only their integrity, but their infallibility.

In civil cases, where nothing more than property is at stake, it is routine and virtually demanded that witness questioning be done via deposition supported by a certified court reporter. It's hard to understand why something so far less demanding – a simple digital recording device – is so eagerly opposed by those who profess to seek the truth.

Indeed, it's hard to imagine legitimate opposition to this proposal. If we are truly interested in obtaining reliable evidence, then we should all demand adherence to this most simple proposal that would address so many problems and eliminate so much unnecessary litigation. We expect it in the courtroom, we should expect no less on the way to the courtroom.

Proposed Rule CrR 3.8 & CrR 3.9 – Eyewitness Identification Procedures

My comments regarding the recording of interrogations apply with equal force and logic to eyewitness identification procedures. With so much at stake, it's hard to defend anything less than the most reliable record we can create of this most critical stage of the proceedings.

It has been well-established in the scientific community that eyewitness identification is not as reliable as commonly believed. Again, if we are truly interested in the search for truth, we should embrace any attempt to enhance that reliability. Recording the process will not only ensure preservation of the record, enabling the kind of scrutiny that such a critical process demands, it will also create incentives to utilize the best practices embodied in proposed CrR 3.9, practices being adopted across many jurisdictions in order to enhance the reliability of this evidence. It's time for our state to join others in recognition of the scientific realities associated with eyewitness identifications.

Proposed Rule CrR 4.7 – Suggested Amendment to CrR 4.7 regarding Discovery

The current interpretation of CrR 4.7(h) prohibiting the defense from providing discovery to his or her client is insulting to the entire defense community. I'm every bit an Officer of the Court as any prosecutor and fully cognizant of my ethical obligations and my responsibilities to properly protect the public. Singling out defense lawyers as incapable of managing this ministerial process or worse, untrustworthy, is appalling.

If I wish to have my client review the evidence against him, I either have to sit in the jail with him while he reads it or go through a cumbersome and time-consuming process of getting the prosecutor to "approve" my redactions, or, alternatively, take the court's time in reviewing my proposed redactions. Why?

Requiring the government to turn over notes from an identification procedure whether there was an identification or not, is just another way to enhance the reliability of the procedure. No one interested in the truth should oppose this common-sense practice.

Proposed Rule CrR 4.11 – Recording Witness Interviews

This rule change is long overdue. Again, in the civil context where mere property interests are in play, we demand the formality of a deposition and a certified court reporter. And yet here, when so much is at stake, we have been unwilling to adopt the simplest and easiest way of enhancing the reliability of testimony – a digital recording device. Opposition to this is simply astonishing.

Witnesses are expected to come into a public courtroom and testify in the presence of either a court reporter or a recording system. In a system that essentially makes it mandatory for a defense lawyer

to interview witnesses prior to trial, why would we only insist on enhancing the reliability of half the witness' testimony? Why would we invite the kind of litigation and cross examination that relies on "he-said, she said" swearing contests, when a simple recording could resolve the issue completely?

In a system of Constitutionally mandated public trials, there is no "right to privacy" that trumps the Sixth Amendment right to effective cross examination. And nothing facilitates efficient and quick cross examination like a transcript of a witness' prior statements.

This is 2019. We live in a digital age and practice in courtrooms that are becoming ever more and more efficient and reliable in their presentation of the truth. It's unconscionable that we continue to require the defense to rely on memory and paper notes, when simple solutions can solve so many problems. This change is long overdue.

Thank you for your consideration of my thoughts. I trust that the Court will make the correct decisions and I am grateful for the opportunity to have presented my thoughts.

Sincerely,

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