Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, May 1, 2019 8:24 AM
To: Tracy, Mary
Subject: FW: Court rule changes - comments

From: Kaake, Angela [mailto:Angela.Kaake@kingcounty.gov]
Sent: Tuesday, April 30, 2019 5:05 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Court rule changes - comments

Dear Justice Johnson and the Supreme Court Rules Committee:

I am writing to express my opposition to proposed court rules 3.7, 3.8, 4.7, and 4.11. As a Senior Deputy Prosecuting Attorney, I have concerns over the form of many of these proposed rules and unintended/intended effects from these proposals, and how it may impact law enforcement's ability to do their job, public safety, the integrity of the criminal justice system, as well as how they will adversely affecting victim's rights.

Comments on both proposed CrR 3.7 and 3.8:
The fact finder is the sole judge of credibility. Proposed CrR 3.7 and 3.8 propose something extraordinary: the suppression of constitutionally valid evidence that a jury may still find credible. CrR 3.7 and 3.8 presuppose that police lack credibility and therefore having an officer say what a defendant said (3.7) or say that a witness identified someone (3.8) are so inherently unreliable that they should be inadmissible, unless there is video proof. In essence CrR 3.7 and 3.8 say that police, just because they are police, cannot satisfy hearsay exceptions (party opponent, statement of identification). This undermines the fundamental nature of our fact finding system: allowing the jury to determine credibility. In addition, proposed CrR 3.8 unconstitutionally infringes on a person's privacy rights, unfairly and disproportionately affecting including victims of sexual assault and domestic violence, who are often the most marginalized in our communities.

Comments on Proposed CrR 3.7:

- Proposed CrR 3.7 will **impede effective law enforcement** because many individuals are reluctant to be recorded. Requiring them to be recorded will decrease cooperation with police. It is illogical and a violation of the Washington Privacy Act to record the refusal of a person who refuses to be recorded.
- Proposed CrR 3.7 appears to be **predicated on a belief that police are inherently untrustworthy** and cannot be taken at their word. The credibility of witnesses is a matter for the judge or jury to decide after hearing all of the evidence.
- The rule is **impractical** – most police agencies in Washington lack the resources to record and preserve the broad range of interactions that would fall within the rule. The additional burden of preserving detailed maintenance records of every recording device used also is unwarranted. The cost of outfitting all police agencies in the state will come from where??? This is a huge taxpayer cost OR police agencies may have to cut staff/officers to have the funding to comply with this rule causing serious issues with public safety.
- At the beginning of an investigation, almost everyone is under investigation and requiring audio-visual recording of the questioning of everyone at the scene of a violent crime **will obstruct justice**, as many

will be reluctant to speak when video recorded. The rule does not take into account that a person may first appear to be only a witness but later become a suspect.

- The rule is **much too broad**. Proposed CrR 3.7 is not limited to interrogations by law enforcement. Does it apply to retail security? Child/ Adult Protective Service employees? Any state employee or agent? Private citizens? Judges? Defense investigators?
- Proposed CrR 3.7 imposes an **impossible burden**. It would require universal recording of everyone with whom an investigator speaks/ interacts to avoid errors, violating the privacy rights of citizens and producing a massive amount of recordings that will be subject to public disclosure.
- Proposed CrR 3.7 is an **improper exercise of the court's authority**, forcing specified investigative procedures without legal authority to direct police use of resources and the nature of their interrogations.
- The **remedy** for violation of CrR 3.7, exclusion of the statement and all subsequent statements, **is extreme and unnecessary**.
- This rule will keep **relevant and sometimes critical evidence from the jury** when there is no question that a statement was voluntarily given.
- In order to admit a statement that is not recorded the rule imposes a burden on the State to prove the defendant's statement is reliable, when the probative value may be in the lies that the defendant is telling. This is contradictory to common sense.

Comments on Proposed CrR 3.8:

- **It is unclear that the lack of availability of recording devices would be a legitimate reason not to video record the procedure.** Such an exception must be included.
- **The rule does not make clear that a witness's assertion of their right not to be recorded (under the Privacy Act) would establish that recording was not possible.**
- The rule does not define "when practicable." Who makes that decision?
- What does the reference to "administrators" mean? Supervisors?
- What "is possible" is a standard that is impossible to interpret. Does it allow an exception for exigent circumstances, lack of equipment, or community safety?
- The term "exact words" is **unreasonably vague** (as used in section (2) "confidence statement"). How many words must be documented? What if the procedure is not recorded and the witness provides a lengthy explanation of the choice? What if the person is a non-English speaker – must the non-English words be documented? Should it not also require documentation of the relevant context of the words used, including the demeanor of the suspect and the witness?

Comments on Proposed CrR 4.7

- Under this amendment, defense counsel does not have to provide notice to the State before giving the discovery to the defendant. So, in order to protect the safety and privacy of victims and witnesses, prosecutors will have to review all discovery before providing it to the defense, to be able to move for protective orders preventing release of sensitive information to the defendant. This will delay providing discovery to the defense in most cases, and increase the workload of all parties and the courts as the requests for protective orders are litigated
- **My experience as a prosecutor is that defense counsel (and usually their paralegal or assistant does the actual redactions) often do not properly redact discovery that they have submitted to the prosecutor for approval before providing it to the defendant, pursuant to the current rule.** There is usually at least one or 2 times where a redaction is inadvertently missed. It poses unnecessary risks to the safety and privacy of victims and witnesses to eliminate this second set of eyes reviewing the redactions.

- There will be no incentive for defense counsel to carefully redact the discovery, as there is **no penalty** for failure to do so except as to endanger victims' and witnesses' privacy.
- The amendment requires disclosure of all evidence that "tends to impeach" any State witness, without limiting that obligation to material evidence. There is no justification for such a radical expansion of the Brady obligation, which is limited by a materiality requirement.
- The overbreadth of the State's obligation to learn of all evidence that "tends to impeach" any State witness regardless of materiality is further exacerbated by the imposition of a duty to learn of such evidence and disclose it until the end of time.

I also am reiterating and incorporating the comments from David Martin, the Chair of the King County Prosecutor's office Domestic Violence Unit. As the current Vice Chair of the KCPAO Kent/MRJC DV Unit, I share David's concerns about victims who are the most marginalized in our community. Over half of the cases in the south end of our county disproportionately involve victims who are women of color. I incorporate David Martin's comments as follows:

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

Thank you for your time and consideration.

Angela Kaake

Angela Kaake

Senior Deputy Prosecuting Attorney
Office of the King County Prosecuting Attorney
Vice Chair, Domestic Violence Unit, MRJC
206-477-6204
Angela.Kaake@kingcounty.gov