

## Tracy, Mary

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Monday, April 8, 2019 1:45 PM  
**To:** Tracy, Mary  
**Subject:** FW: Comments to proposed rules 3.7, 3.8, 3.8, 4.7 and 4.11

**From:** Larson, Michelle [mailto:Michelle.Larson@kingcounty.gov]  
**Sent:** Monday, April 8, 2019 1:17 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comments to proposed rules 3.7, 3.8, 3.8, 4.7 and 4.11

Dear Sir or Madam,

I am writing to note my objection to the proposed changes to the criminal rules. I am concerned about the consequences the rules have – whether intended or not – on the victims of crime, and those who witness criminal acts. There are many other issues with the proposed rules, but the chilling effect they will have on victims of crime stands out.

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 3.8:

- Proposed CrR 3.8 will impede effective law enforcement, because many individuals are reluctant to be recorded. With respect to DV victims, human trafficking victims, and any victim of a violent crime or gang-related violence, they will fear retaliation because they will anticipate (accurately) that their assailant will have access to the recording and their image may be circulated to associates of the defendant for purposes of retaliation.
- The rule will result in intimidation of victims (and witnesses) of violent crimes when recordings of them making an identification are circulated by the defendant. The recordings will be available under the Public Records Act upon the filing of charges.

Proposed CrR 4.11:

- The people of this State intend that victims and witnesses in criminal cases be “treated with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.” RCW 7.69.010. This proposed rule effectively allows attorneys to mislead or intimidate witnesses who are reluctant to be recorded, which is inconsistent with this most basic principle of justice.

- Because the rule coerces victims and witnesses to agree to recording, it violates Article I, Section 35 of the Washington Constitution which requires that crime victims be afforded due dignity and respect.
- The vast majority of witnesses already agree to recording of interviews by the parties. In the rare instances when a witness is reluctant to be recorded, there are likely to be good reasons for that related to the subject matter (e.g. sexual assault) or because of their fear of the defendant. Coercing such a witness to be interviewed (by a negative jury instruction if they refuse) is simply offensive.
- The proposed rule coerces the witness to agree to recording, by failing to inform them of the right to refuse and by punishing refusal. It is likely to result in some witnesses refusing to further cooperate with prosecution, defeating the interests of justice and reducing community safety.
- The rule invites a court to craft a jury instruction “to examine the statement carefully,” inviting a comment on the credibility of a particular witness without giving any real direction to the trial court. Judicial comments on the evidence are unconstitutional in Washington.
- It is inappropriate to use a person’s right to refuse to be recorded against them.
- It is inappropriate for a jury in a criminal case to be directed to determine the legitimacy of a person’s refusal to be recorded, which is that person’s right.
- If a jury is to be instructed to consider the reasons for the refusal, which it must be in order to evaluate its legitimacy, it must be permitted to hear of the prior bad acts (including threats and intimidation) of the defendant and the character of his or her associates to evaluate the witness’s fear of retaliation. The witness’s subjective fears, even if not based on verifiable facts, also should be considered by the jury in order to fairly evaluate the reason for the refusal. The rule should specify that if the victim is not permitted to explain the refusal in full, no instruction should be given.

Thank you for your consideration of the comments to the proposed changes.

Michelle Larson  
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