

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 22, 2019 8:03 AM
To: Tracy, Mary
Subject: FW: Comments re proposed CrR 4.11 and CrRLJ 4.11

From: Guthrie, Stephanie [mailto:Stephanie.Guthrie@kingcounty.gov]
Sent: Sunday, April 21, 2019 11:19 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments re proposed CrR 4.11 and CrRLJ 4.11

I am writing to express my concern with many of the propose changes to the criminal rules. My concerns regarding proposed changes to CrR 4.11 also apply to CrRLJ 4.11.

CrR 4.11 RECORDING WITNESS INTERVIEW

- (a) **Counsel for any party** (or an employee or agent of counsel's office) **may** conduct witness interviews by openly using an audio recording device or other means of verbatim audio recording, including a court reporter. Interviews are subject to court's regulation of discovery under CrR 4.7(h). Any disputes about the interview or manner of recording shall be resolved in accordance with CrR 4.6(b) and (c) [depositions] and CrR 4.7(h). This rule shall not affect any other legal rights of witnesses.
- 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 does not address the necessity to obtain consent to recording by all others present.
- (b) **Providing Copies.** Copies of recordings and transcripts, if made, shall be provided to all other parties in accordance with the requirements of CrR 4.7. If recorded by a court reporter and discoverable under CrR 4.7, any party or the witness may order a transcript at the party's or witness's expense.

Dissemination of recordings or transcripts of witness interviews obtained is prohibited except where required to satisfy discovery obligations of CrR 4.7, pursuant to court order after a showing of good cause relating solely to the criminal case at issue, or **as reasonably necessary to conduct a party's case**.

- The limitation on dissemination of recordings is inconsistent with the requirements of the Public Records Act, which will require disclosure upon request.
- The limitation on dissemination to the current case only unreasonably prohibits use of the transcript of an interview to impeach a witness in a different case, whether that case involves the same incident (an accomplice), a related incident, or a completely different case. For example, the statements of an expert witness in one case are often relevant to their testimony in other cases involving the same subject.
- The rule allows unrestricted disclosure of a recording of a witness interview to the defendant or associates of the defendant if defense counsel decides it is reasonably necessary to the defense. This is an invasion of privacy and creates a risk to public safety, where the questions that may be asked during an interview are virtually unlimited, and may include personal questions on subjects that are inadmissible at trial. That risk is unfairly imposed when the witness is being coerced to agree to recording by the provisions of this rule.

(c) **Preliminary Statement.** At the start, person conducting the interview must confirm on the recording that witness has been provided: (1) name, address, and phone number of person conducting interview; (2) identity of party represented by person conducting interview; and (3) that witness may obtain a copy of recording and transcript, if made.

- The proposed rule **does not require that victims or witnesses be informed of their option to refuse to consent to the recording of an interview. The interviewer may accurately assert that he has the "right" to record the interview, which will mislead the witness.**

(d) **Witness Consent.** A witness may refuse to be recorded. If the witness refuses and there is a dispute regarding any statement made by the witness, the jury should be instructed to examine the statement carefully in the light of any reasons for the refusal and other circumstances relevant to that witness's testimony, including, but not limited to, bias and motive.

- **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.
- There is no reason to infer bias from the refusal to be recorded.
- The jury determines the credibility of witnesses. It is already informed if a witness has refused to be recorded. The jury is instructed to consider any relevant circumstances in judging credibility and the defense may argue that the refusal is relevant. The only additional effect of

this rule is to coerce the witness to be recorded and to invite a judicial comment on the witness's credibility – both are improper purposes for a court rule.

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