WSAMA
Washington State Association of Municipal Attorneys

October 23, 2018

Clerk of the Washington Supreme Court
P.O. Box 40949
Olympia, WA 98504-0929

RE: Comments on proposed amendments to criminal rules (No. 25700-A-1236)

Sir/Madam:

This letter is submitted on behalf of the Board of Washington State Association of Municipal Attorneys ("WSAMA"), in order to express our serious concern with the proposed changes to the criminal rules. If adopted, these changes would have significant impacts on victims of crime, on law enforcement responding to calls and investigating crimes, on community safety, and on an already strained criminal justice system and its resources. Our concerns are summarized below.

PROPOSED NEW CRIMINAL RULE CrRLJ 3.7 & CrR 3.7 (RECORDING INTERROGATIONS)

The new proposed rule requires an "audiovisual recording" of all police interrogations of a suspect. The rule provides exceptions for exigencies, booking process, spontaneous statements, equipment malfunction, and when the suspect declines to be recorded. Failure to comply with the rule requires suppression of evidence. Recordings must be preserved until all appeals are exhausted, preserved under Public Records Act requirements and for 99 years on all class A felonies.

Impact on local government: The rule would require each police department to purchase audiovisual recording equipment for each officer. A few jurisdictions already have the equipment; however, the vast majority of municipal departments do not. Additionally, each jurisdiction would be responsible for storing these recordings, producing them in response to public records requests and responding to requests for discovery in civil and criminal cases. The resources needed to properly store and access these recordings and respond to requests would require additional employees to meet the requirements of this proposed new rule.

PROPOSED NEW CRIMINAL RULE CrRLJ 3.8 & CrR 3.8 (RECORDING EYEWITNESS IDENTIFICATIONS)

The new proposed rule would require all out-of-court identifications to be audio or video recorded, unless it is not "possible." This would include identifications out on the field.

Impact on local government: The reality is that most police departments have at least one recording device. So, it would be "possible" and therefore required to have a recording of an identification. Victims and witnesses would need to voluntarily wait for the availability of a recorder. If they decline, critical evidence would be inadmissible.
The practical impact of this rule is that each police department would need to purchase recording equipment for each officer. Additionally, each jurisdiction would be responsible for storing these recordings and producing them in response to discovery requests and public records requests. The resources needed to properly store and access these recordings would be extensive.

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PROPOSED NEW CRIMINAL RULE CrRLJ 3.9 & CrR 3.9 (IN-COURT EYEWITNESS IDENTIFICATION)

The new proposed rule renders any in-court identification *inadmissible* where there is no prior out-of-court identification procedure.

Impact on local government: This rule would undermine effective prosecution and community safety, even in circumstances that are *not within the control* of law enforcement. For example, a 911 caller reports a DUI driver has collided with a utility pole and has stumbled out of his car. When officers respond, defendant admits to being the driver and to being drunk. The 911 caller returns home without identifying the defendant. In this situation, the patrol officer's primary focus is on the drunk driver. The fact that the 911 caller is no longer at the scene is not within the officer's control. Although a detective could later follow up with a photo montage, the reality is that most jurisdictions do not staff detectives on high volume misdemeanor caseloads.
Under this rule, even if the witness clearly recalls the driver's face, the witness will not be able to identify defendant in court. Without this identification, defendant's admission to driving may be excluded under the doctrine of corpus delicti unless there is additional corroboration.

AMENDMENT TO DISCOVERY RULES CrRLJ 4.7 & CrR 4.7

The current version of Rule 4.7 limits the prosecutor's discovery obligation to material information within the possession and control of the members of the prosecuting attorney's staff. The current version already requires disclosure of any known exculpatory information, provides a process for obtaining evidence held by others, and provides safeguards with regard to a defense attorney's ability to investigate his/her case and seek relevant evidence or impeachment evidence. The proposed amendment to Rule 4.7 would drastically expand the scope of a prosecutor's discovery obligation.

Specifically, it would require the prosecutor to actively search for, obtain, and disclose any evidence that is favorable to defendant (even if only known by others) or which would "tend to impeach" a government witness. A specific definition or scope for the evidence that would tend to impeach a witness is not provided. Thus, the scope is without limit.

Impact on local government: In order to fully comply with the proposed amendment, every police department or other agency working on behalf of the prosecutor's office would need to create a database to log and document every encounter with a member of the public. Prosecutors in *every criminal case* would need to search the name of each potential witness and decipher impeachment value of any prior contact with law enforcement. For example, a 911 caller reports a DUI driver has collided with a utility pole and has stumbled out of his car. When officers respond, defendant admits to being the driver and to being drunk. The 911 caller is a witness in the DUI case. If this 911 caller was previously a victim of domestic violence and had recanted a statement, the prosecutor would have the obligation of finding this information (without time limit) and obtaining documentation to disclose to defense. Aside from the cost of implementing a database to store all police contacts, additional prosecution staff would be needed to comply with this expansive discovery obligation.

The current version of Rule 4.7 also requires all discovery to remain in the custody of the attorney unless approved by the court or prosecutor. In most jurisdictions, prosecutor agreement to disclosure is handled via email and addressed in cases where defense makes this request. In general, current practice does not require additional motions, pleadings, or court hearings.

The new proposed rule would remove this condition and would allow disclosure of police reports and other evidence without any verification of or discussion about redactions by the court or prosecutor.

Impact on local government: This amendment would undermine effective prosecution and community safety. Allowing the attorney for the defendant to be solely responsible for making appropriate redactions to discovery threatens victim safety and a victim's willingness to cooperate with law enforcement. Additionally, there may be witness or victim safety concerns, which are not known to defense and would be ignored with a quick disclosure to the defendant. For example, if a defendant is charged with stalking and the victim is in hiding, disclosure of the police report may provide details as to victim's location or safety plan which would place this victim in danger.

Although there is a process for obtaining protective orders, relying on this process would require the prosecutor to immediately initiate court proceedings in order to address the *possibility* of disclosure even if such disclosure is not needed or requested by defense and prior to fully grasping whether there are safety concerns.

PROPOSED NEW CRIMINAL RULE CrRLJ 4.11 & CrR 4.11 (RECORDING WITNESS INTERVIEWS)

The new proposed rule would allow witness interviews to be recorded *without consent.* Although the rule provides that a "witness may refuse to be recorded," this consideration is hollow. Once the attorney has initiated the recording device, a victim or witness would need to affirmatively articulate the decision to not be recorded, in which case he or she is being recorded anyway, OR not say anything at all, whereby the attorney would be able to compel deposition (despite a willingness to otherwise be interviewed) and thereafter use the victim or witness decision against them in trial. In the domestic violence context a victim could be re-victimized.

Impact on local government: This rule would undermine effective prosecution and community safety. Coercing a recorded interview would also impact a victim's willingness to cooperate with law enforcement. It is important to note that a victim and/or witness is brought into the criminal system without any allegation of criminal conduct. However, this new rule removes the safeguards and privacy rights that others, including *criminal defendants,* enjoy. Due to these negative impacts, we believe the proposed rule should be rejected, consistent with the Washington Supreme Court's rejection, in 2006, of a proposed rule that would have permitted the open recording of witness interviews.

For the reasons outlined above, the WSAMA Board respectfully requests that the proposed amendments be rejected.

Sincerely,

Dawn Reitan

Dawn Reitan,
WSAMA Board President