Law Office of Amy Muth, PLLC

April 30, 2019

Rules Committee
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Via email: supreme@courts.wa.gov

Dear Supreme Court & Rules Committee:

I am in support of many of the proposed changes to the rules. However, any change that may limit the discretion of the court in individual cases and/or cause unintended dissonance with well settled case law must be looked at with caution. With that in mind, the purpose and practical application of some of the proposed changes are worth consideration. These proposed changes provide efficiency, clarity, and accuracy, and support due process. In reviewing comments in opposition to the proposed changes, it is worth noting the role of the State in prosecutions: to seek justice, not just convictions. Our fallibility as individuals is why these changes are necessary. The technology and science available today far exceed what was considered when the current rules were created.

The specific areas I support are as follows.

3.8: The current rules do not reflect what we now know about the science behind identification procedures, and still not all law enforcement agencies have/follow a protocol consistent with the science. Even in the most effective defense interview and cross-examination it is impossible to recreate the identification process. Any bias that went into the process would not be known. Given what we also now know about implicit bias makes it even more necessary that these procedures be recorded – a law enforcement witness would not be aware of their own suggestiveness.

I support the change in this rule. Initially, I hesitated as to the "shall not be admissible" language as a blanket rule (3.8(a)). However, that is only in reference to a specific identification not being recorded in *any* manner, which is inherently suspect. It prevents the creation of an identification, which is incredibly difficult to disprove, yet carries exceptional weight with lay juries. The last section (3.8(c)) provides the court with discretion as to the admissibility of identifications that are lacking in reliability based on the science. The burden should be on the State to overcome a presumption of inadmissibility absent a

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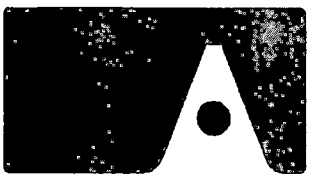


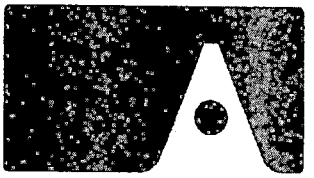
showing of why the rules, as outlined in the proposed changes and supported by science, was not followed.

As an example, I have interviewed an officer about the procedure he followed that involved having a witness look at each individual photo in a montage separately, and allowing the witness to turn the photos over at their own pace, rather than putting the photos in front of the witness as a group of six on one page. (The science being that the identification procedure should not be comparing possible suspects against one another for which one looks most like the perpetrator, but comparing each photo individually against the witness's memory of the perpetrator's appearance. Also, that the person administering the montage should not be deciding how long a photo is viewed, so as not to suggest one suspect is more relevant than any other. The witness should be turning the photos. The person administering the montage should not be aware of who the suspect is, if there is one, so they do not inadvertently favor that suspect's identification by the witness. The procedure should be double-blind by both the officer and the witness.)

The officer I interviewed was candid in that he had no understanding/training/education as to why the procedures existed. He made a comment that there may be other "suggested" procedures, but he did not choose to employ them, nor did he understand their relevance. Most jurors do not have real life exposure to the criminal justice system. It is not reasonable to expect that they would fully understand what has taken the legal community years to learn and accept. Having a video of the identification process greatly reduces the cost and time devoted to unpacking the circumstances around the identification. Having law enforcement document and be aware of how an identification occurred is a reasonable and appropriate request. It will not negate the use of experts and the need for a diligent defense investigation, but it would eliminate much of the debate. Most importantly, we (including the court and the state) could have more confidence in the identification.

4.7: Addressing *Brady* material in a court rule puts some responsibility on law enforcement to have an understanding of what *Brady* means, and to understand that exculpatory evidence must be provided. The primary role of law enforcement in this context is to investigate, not simply to bolster a particular case theory. I have seen the frustration some prosecutors expressed when law enforcement has made decisions to withhold information and therefore compromise the State's credibility. It also erodes the public's trust in law enforcement.

There is immense practical value in a rule that provides defendants with a copy of their discovery, with certain limitations. In my 17 years as a criminal defense attorney, and primarily as a public defender, I have spent countless hours sitting with a client (especially at the jail) while they read through hundreds of pages of discovery. A defendant has a right to know every aspect of the case the State has filed against them. The ability to provide a redacted copy to a client is invaluable. This option is not always available. For example, in King County I have been told that if I want my proposed redactions reviewed



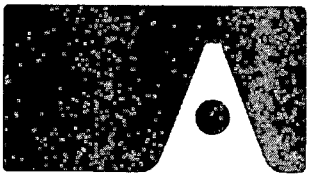
for "approval" by the State, I must set the case for trial (consequently, ending negotiations) so that a dedicated assigned trial prosecutor can review them. A concern expressed by the State is that it would take too much of their time to review the redactions. This new rule alleviates them of that burden and creates an equitable playing field. I am attaching the KCPAO redaction guidelines and an email stating that the rule, as currently in place, provides the State with leverage.

These proposed changes would not alter the fact that every defendant can review the unredacted discovery in the presence of their attorney, and would therefore see names, addresses, identifying information, etc. It only impacts the copy they have that would be out in the public, similar to what would be available in a public records request. Although I am now in private practice, I cannot stress enough the need to seriously consider *any* rule change that would keep a defendant better informed and allow a public defender to use their finite and valuable time more wisely.

CrR 3.7: Having a rule of presumptive recording is the best way to preserve evidence and ensure that all witnesses are truthful and accurate in their testimony when recalling events. Witnesses who are relevant to the investigation will be called to testify, or at a minimum, submit to further interviews. The prosecutor's office used to have a policy of not recording child interviews. Then we learned that the manner of questions being asked of a child are nearly as important as the answers given. Now, in King County, these interviews are routinely audio and video recorded, and the interviewer is trained in child interviewing techniques so as not to be suggestive or to encourage certain responses. This practice has caused cases to resolve. It also limits the opportunity for false allegations.

For law enforcement, their interviews should be recorded almost without exception. We are all human beings with imperfect memories and with our own biases. Law enforcement are professional witnesses and it is in their job description to be a part of the court process, but they are also human. It continues to baffle me that I can interview two officers who were at the scene of an incident and get drastically different impressions of the event from each officer. Like attorneys, particularly public defenders and prosecutors, law enforcement can have contact with several members of the public in a short amount of time. It is not realistic that they are expected to remember every detail of every investigation, often months after the fact. When an interview is recorded it allows us to easily refresh their recollection, and it negates the need to have a defense investigator testify to forgotten/disputed facts. It prevents the jury from hearing a case in a disjointed fashion and makes a trial so much more efficient.

Most importantly, it is more transparent. I had a recent trial where two officers testified. One answered questions as best he could, some he could not recall and some he was not certain of the answer. We recorded his interview so we were able to fill in the blanks. This officer was not argumentative or hostile. He was credible because he was aware of his fallibility and had no issue with reviewing his prior interview. The second officer was completely different. He presented as suspicious of every question I asked him, argued with every point he could, and challenged the easiest questions. I just wanted him to



be consistent with his report and his interview. It only took two instances of impeachment with his audio recorded defense interview to temper the hostility and just move on with the testimony. Recording these interviews keeps us all transparent and protects due process.

In reviewing some of the comments previously submitted, there are a few things that stand out to me: that these changes presume police are dishonest, that this will hurt victims, and that these rules are just too difficult to implement. Change is hard, but it is necessary because we cannot ignore what we, the legal community, have learned over the last several years. Police make mistakes; I think they often want to do the right thing but are not trained properly in how to do so. There are also a few who should not be given the power that comes with being in law enforcement.

These proposed changes reflect an understanding by all of us that in adhering to these rules we acknowledge that we want accuracy and transparency, and the appropriate checks on those with power and discretion. When police procedure fails meet an acceptable standard it can have drastic effects on a defendant and on a victim. Innocent people can be arrested, jailed, and convicted. In the reverse, evidence can be suppressed, and cases dismissed.

Sincerely,

Jennifer L. Atwood, WSBA #31736

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Trujillo, Sue

From: Larson, Mark
Sent: Thursday, September 01, 2005 10:37 AM
To: ZZGrp, PAO Criminal Division
Subject: FW: New CrR 4.7 provisions

As many of you know, the Supreme Court recently revised CrR 4.7 to allow defendants to more routinely get copies of discovery. While we fought this change for many years, the court was finally persuaded and made the change this past spring.

This new rule goes into effect on 9-1-05. The terms of the rules are as follows:

(3) Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

After speaking with J. Kessler, I am confident that the burden of redacting will be placed on the defense AND that the court is not going to sign off on orders without making sure that we have approved the redactions. However, the Criminal Ops Committee is taking this up at the next meeting. However, even if the defense takes the laboring oar on redaction, we will most certainly be left to check their work.

To aid with that process, I have attached a "redaction guide". The goal is to have all of us working off the same sheet of music as we review the proposed redactions by the defense. Please print it off and feel free to share it with the defense so that they know what sort of redactions we are looking for.

My hope is that providing DX to defendants this will not become routine in criminal cases. One of the best ways to accomplish this to make sure that the defense does all the work necessary to make the discovery free of personal and identifying information. It is not our job to do that for them.

The one other bit of leverage we have here is to consider whether to extend early plea offers in cases where the defendant insists on getting discovery. Although we should continue to discuss this, I think it would be reasonable to say that only trial lawyers would be in a position to work through the redaction process and that it cannot be accomplished in a EPU environment.

More to come, I'm sure. Please keep your supervisor and Unit Chair appraised as these requests come in. ML

Redaction Guide - DW 05.doc

REDACTION GUIDELINES

The King County Prosecutor's Office expects the following information to be redacted from any discovery that the defense attorney proposes to provide to any defendant pursuant to CrR 4.7 or CrRLJ 4.7. Additional redaction may be required by the individual prosecutor as relevant to any specific case.

- All names except the names of police officers and the defendant should be replaced with initials.
- Addresses of all potential witnesses
- Phone numbers, facsimile numbers and other contact information for all potential witnesses
- All dates of birth except for the defendant
- All social security numbers
- All credit card numbers
- All bank account numbers
- All driver's license or identification card numbers
- All e-mail addresses
- Job locations and employers of all potential witnesses
- Schools attended by all potential witnesses
- Medical records
- Mental health and counseling Records
- CPS records
- Photographs containing images of any part of any person or animal
- Any description or depiction of actual, attempted or simulated sexual contact
- DVD or other video recordings containing images of any person, animal, or human or animal body part
- CDs or any other type of electronic file containing any of the above information

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 3:34 PM
To: Tracy, Mary
Subject: FW: Comments on Proposed Rule Changes (closes today)
Attachments: SKM_C45819043016310.pdf

From: Jennifer Atwood [mailto:jennifer@amymuthlaw.com]
Sent: Tuesday, April 30, 2019 3:32 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on Proposed Rule Changes (closes today)

Hello Tracy,

My comments to the proposed rule changes are in the attached letter. Thank you.

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