



Pacific County
PROSECUTING ATTORNEY

Mark McClain, Prosecutor

August 14, 2018

Supreme Court of Washington
Office of the Clerk of the Court
P. O. Box 40929
Olympia, WA 98504-0920

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Washington State
Supreme Court

This letter is in response to the Order of the Court dated July 11, 2018 seeking comments on proposed Court Rules or Amendments to Court rules put forward by the Washington Association of Criminal Defense Lawyers (WACDL).

WACDL proposes CrR 3.7/CrRLJ 3.7 to require audiovisual recordings of "persons under investigation for any crime." Setting aside the challenge of truly defining this phrase and how it is to be applied, this Court should not discount the enormity of those who would be recorded under such a program. This would also mean that they are identified, and labeled, a person of interest in a crime for whatever the length the retention schedule the Public Records Act may require. This would also place a substantial burden on departments to obtain recording devices (Pacific County having none) and storage and release of these recordings. While the expense may not be something this Court would burden itself with, this Court should consider what is truly to be gained in the truth seeking function of our system should this rule be enacted. It is certainly not to ensure *Miranda* is properly applied, as most of these interactions would not require such warnings be given. If not, then what is truly the purpose. It seems it is intended to limit what may be introduced to a fact finder. Similarly, WACDL's CrR 3.8/CrRJL 3.8 suffers from the same issues.

CrR 3.9/CrRLJ 3.9 appears to be an attempt to solve a problem which does not exist or is more simply addressed by existing evidence rules (ER), such as ER 402, 403, and/or 602.

CrR 4.7/CrRLJ 4.7, as to (a)(2)(iv), law enforcement is expected to provide this to a prosecutor as part of the reports. Incidents of rather poor compliance with the general discovery obligation have occurred in which portions of reports have not been properly provided. However, such incidents are rare and remedied easily. There is no need for such a broadly based rule. Further, law enforcement departments are not under the direction of the Prosecutor's Office. Victims of crimes should not suffer such a catastrophic loss where a simple error may have occurred rather than the conduct already addressed by other rules.

CrR 4.11/CrRLJ 4.11: The language at the beginning of the proposed rule is permissive: "... may conduct witness interviews by openly using ..." some means of verbatim recording. This proposal appears intended to overcome the provisions of CrR 4.6, which limit the taking of depositions to specific circumstances: unavailability for trial or a hearing;

a refusal of a witness to discuss the case with either counsel and the witness' testimony is "material and necessary", or where there is good cause shown. The first circumstance is unremarkable; the second impedes the ability of parties to prepare for trial, and the third requires a motion and a subsequent finding by the court. These criteria protect witnesses from undue harassment and burden. The proposed language is also inconsistent with, and appears to be an attempt to overrule, by rule, the results in *State v. Mankin*, 158 Wn. App. 111, 121-125 (2010) and *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 21, 58-64 (2014). One should note that the conduct in *Dillon* was considered to have been at least potentially a violation of RPC 4.1(a) by the Federal District Court judge hearing the underlying case. *Dillon*, at 55.

As such, this proposed rule completely changes existing law, and has the effect of removing important victim protections. The rule purports to allow the witness to refuse to be recorded, but the effect of that refusal may result in negative jury instructions with regard to the credibility of the witness. Since witnesses may have many valid reasons for not wanting to be recorded, the instructions cannot be justified.

These proposed rules serve no truth-seeking purpose, but instead appear aimed at burdening a legal system already groaning under the weight of a PRA management and limited law enforcement resources. We respectfully request they be rejected entirely.

Respectfully,

A handwritten signature in blue ink, appearing to read "M. McClain", with a long horizontal flourish extending to the right.

Mark McClain
Prosecuting Attorney, #30909