

Committee on Criminal Rules Regarding Victims

State Courts Building, Phoenix

Meeting Minutes: June 18, 2021

Members attending: Hon. John R. Lopez IV (Chair), Hon. Ronald Reinstein (Vice Chair), Tim Agan, Colleen Clase, Hon. Maria Elena Cruz, Ryan Green, Hon. Kellie Johnson by her proxy Hon. Kent Cattani, Hon. Patti Starr, Rick Unklesbay, Hon. Maria Del Mar Verdin, Cathryn Whalen

Guests: Theresa Rassas

AOC Staff: Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the sixth meeting of the Committee on Criminal Rules Regarding Victims ("CRV") to order at 10:04 a.m. The Chair began by reaffirming the committee's immediate objectives: (1) to review each rule and rule amendment proposed by the Arizona Voice for Crime Victims ("AVCV") in petition number R-20-0031, and (2) to improve the AVCV's proposed language as necessary. This process presumes the abrogation of Rule 39. The Chair acknowledged that some members might oppose the AVCV's proposal to completely integrate Rule 39 into other rules. However, CRV will determine whether to recommend integrated rules, or an alternative, at the conclusion of the rule review process. CRV has an October 1, 2021 deadline for submitting its recommendations to the Court. To expedite the review process, the Chair considered assigning certain rules to workgroups, which would report back to the full committee. He prefers not to do so, and instead favors that the full membership complete the review it began in April. Members had no disagreement with these objectives and plan.

The Chair then requested members to review draft minutes of the May 21, 2021 meeting. Members had no corrections to the draft.

Motion: A member moved to approve the draft May 21, 2021 meeting minutes. The motion received a second and it passed unanimously. **CRV-006.**

The Chair noted that today's meeting packet included a 4-page table dated June 15, 2021, showing the status of each of the 51 rules that the AVCV proposes to amend. The packet also included a June 18, 2021 meeting version of the consolidated R-20-0031 appendix. ("Consolidated" means this document consolidates the R-20-0031 appendix with the amendments proposed by the Rassas/Twist table.) Staff's most recent amendments to Rules 1.2, 1.8, 1.9, 1.10, 4.1, 5.1, 5.8, and 6.3, which stem from discussions at the May meeting, are shown in the updated consolidated appendix in bold green font.

2. Continuing review of proposed rule amendments. Members proceeded to a review of staff's most recent amendments.

Rule 1.2 ("purpose and construction"). The previous version of subpart (c)(2) ("legal entities") said that the victims' rights of legal entities "are limited as provided by statute." Staff substituted "A.R.S. §§ 13-4401.01 and 13-4404" for the word "statute." Members verified that the statutory references were correct and concurred in this revision. Members then discussed other Rule 1.2 issues that had not been fully resolved. Some members were particularly concerned that draft Rule 1.2(b) ("construction of victims' rights") enumerated certain victims' constitutional rights, but that defendant's constitutional rights were not similarly detailed. After discussion, members agreed to the following changes to the most recent version of Rule 1.2, with the intent that these changes would bring greater parity to the respective rights. The title of Rule 1.2(b) would be retained. The title of Rule 1.2(c) ("limitations on victims' rights") would be deleted. The content of Rule 1.2(b) would be deleted, and instead, current subparts (c)(1), (c)(2), and (c)(3) would become the content of Rule 1.2(b), with modifications to subpart (c)(1) as follows:

(b) Construction of Victims' Rights.

- (1) *Cessation of Victim Status.* A victim retains the rights provided in these rules and under Article II, Section 2.1(A) of the Arizona Constitution until the rights are no longer enforceable under A.R.S. §§ 13-4402 and 13-4402.01.
- (2) *Legal Entities.* [No change other than what is shown above.]
- (3) *Victims Are Not Parties.* [No change.]

Rule 1.8 ("clerk's distribution of minute entries and other documents"); Rule 1.9 ("motions, oral argument, and proposed orders"); Rule 1.10 (victims' rights: exercising the right to be heard, the right to representation; victim and court obligations); and Rule 6.3 ("duties of counsel; withdrawal"). Staff's amendments to these four rules would add related provisions regarding a notice of appearance by victims' counsel, and the standing of victims' counsel to file and to receive court filings and distributions. Staff's proposed amendments are shown with underline below.

- The proposed amendment to Rule 1.8(a) ("generally") would require the clerk to send court distributions, including minute entries, "to all parties and to any victim's attorney who has filed a notice of appearance under Rule 6.3(a)."
- A new section in Rule 1.9 would provide:

(e) Standing of a Victim. A victim has standing to file a motion that requests the court to enforce any right guaranteed to victims or that challenges an

order denying any such right. A victim may file a reply concerning the motion. A victim may also file a response to a party's motion if the motion impacts a victim's right. A victim may file a petition for special action as provided by Rule 2(a) of the Rules of Procedure for Special Actions.

- A new subpart in Rule 1.10(b) ("assistance and representation") would provide, "(6) Court Filings. A victim may file a motion, response, or reply, or a complaint for special action, as provided in Rule 1.9(c)."
- A new subpart in Rule 6.3(a) ("notice of appearance") would provide, "(3) Appearance by Victim's Counsel. Before representing a victim in court, counsel - other than the prosecutor - must file a notice of appearance."

Members agreed to staff's proposed amendments with one modification: in Rule 6.3(a), they deleted the words "other than the prosecutor." In Rule 1.9(e), staff inquired whether the above provisions should use the phrase "petition for special action" or "complaint for special action." (See the Rules of Procedure for Special Action, e.g., Rule 2(a)(1) ("the complaint shall join") and Rule 4(c) ("the summons and complaint...shall be served"). Members preferred using the word "petition."

Rule 4.1 ("procedure upon arrest"). As directed by members, staff reorganized the content of Rule 4.1. Staff changed the title of section (a), from "prompt initial appearance" to "generally," and added three subparts: (a)(1), "prompt initial appearance," (a)(2) "victims' right to notice," and (a)(3) "application." After discussion, members agreed to delete the "generally" title of section (a). They also agreed that subparts (a)(1) and (a)(2) would become sections (a) and (b), and subpart (a)(3), with the AVCV's agreement, would be deleted. The remaining sections would be re-lettered accordingly.

Rule 5.1 ("right to a preliminary hearing; waiver; continuance"). In subpart (c)(2), the words "speedy trial" were changed to "speedy disposition." In subpart (c)(2) and in section (d), and elsewhere in these rules, staff added the prefix "A.R.S. §" before the numerical statutory citations. Members concurred in these revisions.

Rule 5.4 ("determining probable cause"). Rule 5.4(a) ("holding a defendant to answer") allows a magistrate upon holding a defendant to answer to reconsider the defendant's conditions of release. A proposed amendment would add, "after giving the victim the right to be heard." Members agreed that the proposed amendment was consistent with the Victims' Bill of Rights.

Rule 5.8 ("notice if an arraignment is not held"). Pursuant to the discussion at the May meeting, members today approved the following change to Rule 5.8(a) ("notice"), subpart (3): "... that magistrate must ... advise the parties and, if requested, the victim pursuant to 13-4409, in writing of the dates set for further proceedings and other

important deadlines, and upon request, the prosecutor will notify counsel for the victim pursuant to A.R.S. § 13-4409; ... "

Rule 6.3 ("duties of counsel; withdrawal"). Members approved adding the words "of the trial date" in the phrase, "if a motion to withdraw may result in a continuance of the trial date ..." in section (c) ("withdrawal"). To be consistent with the change to Rule 5.1 described above, members also agreed to change the words "speedy trial," which appear in the same sentence, to "speedy disposition."

Having concluded a review of amendments to the above rules, members proceeded to review amendments to other rules, beginning with Rule 6.7.

Rule 6.7 ("appointment of investigators and expert witnesses for indigent defendants"). The AVCV proposed an amendment to section (a) ("appointment"), which would require the court, upon appointing an investigator, expert, or mitigation specialist, to "[consider] the victim's right to a speedy trial" and to "impose reasonable deadlines on anyone appointed under this rule." Members expressed concerns with this modification. For example, how would the court know when it appoints an expert how much time the expert will need and what deadline the court should set? Would the court's appointment of an expert depend on who can most quickly complete the work? Why would the court impose a deadline on investigators or mitigation specialists when their work usually continues through trial? One member suggested that the proposed amendment was warranted under A.R.S. § 13-4435(a) ("...the court...shall take appropriate action to ensure a speedy trial for the victim"), but most members thought otherwise, among other reasons, because a motion for appointment is not a motion to continue a trial date. The discussion of the AVCV's proposed amendment concluded when the AVCV agreed to withdraw it.

Rule 7.2 ("right to release"). The Chair noted the pendency of R-21-0022 at the onset of the discussion of Rule 7 ("release"). R-21-0022 requests changes to Rule 7 and other criminal rules. The Chair requested members to address the AVCV's proposed amendments to Rule 7 in the context of the current rule, rather than anticipating the Court's adoption of the amendments proposed by R-21-0022.

The AVCV's proposed amendment to the bail eligibility provisions of subpart (b)(4) says that "a victim, upon request, has the right to notice of the hearing and the right to be heard regarding any conditions of release." Members agreed that while a victim may request notice, a victim has a right to be heard at a proceeding regardless of whether the victim requested notice. The proposed amendment confounds these rights. Members clarified the proposed amendment by separating it into two sentences: "A victim, upon request, has the right to notice of the hearing. The victim has a right to be heard regarding any conditions of release."

Members also discussed the AVCV's proposed amendment in section (c) ("after conviction"), specifically a provision that would preclude the release of a defendant convicted of a felony "unless the court, after considering any view presented by the victim, finds the defendant is in such physical condition that continued confinement would endanger the defendant's life." The members' concern was that as written, the AVCV's amendment could be construed to allow the victim to comment on the defendant's medical condition. Members resolved the issue by deleting the proposed amendment, and by instead adding the following sentence at the end of the word "life:" "The victim has the right to be heard regarding the defendant's release."

Rule 7.3 ("conditions of release"). Current Rule 7.3(c) ("additional conditions") provides, "The court must order the defendant not to contact a victim if such an order is reasonable and necessary to protect a victim from physical harm, harassment, intimidation, or abuse." The AVCV proposed deleting that provision, and instead adding a similar albeit modified provision as a new subpart (4) in section (a) ("mandatory conditions.") A lengthy discussion ensued, which included the following points:

- Victim advocates almost always request a "no contact" provision at an initial appearance, and most release orders "automatically" include that provision.
- The statutes suggest that a no-contact provision is discretionary. Would making the order mandatory be a substantive change?
- The proposed amendment would apply in every scenario. A mandatory no-contact provision would be problematic if the victim is a member of the defendant's family, is the defendant's caretaker, or if the victim resides in the same group home or treatment setting as the defendant.

After a discussion of alternatives, members agreed to delete the AVCV's proposed subpart (a)(4). They further agreed to delete the first sentence of current section (c) quoted above. Finally, they agreed to include a new section (b), as follows:

Victim Protection. The court must order the defendant not to contact a victim if such an order is reasonable and necessary to protect a victim from physical harm, harassment, intimidation, or abuse.

Subsequent sections of Rule 7.3 will be re-lettered accordingly.

Members also discussed a provision in current section (c), in a subpart titled "monetary conditions." There are two references in separate subparts to "the victim, or to others or the community." Some members preferred to strike "others" because these people are included in "the community," while some members would strike "community" and keep "others" for a similar reason. The Vice Chair noted that statutes refer to "community." On the other hand, "others" could be construed as a family

member or friend. After further discussion, members agreed to use the phrase “victim, other person, or the community” throughout the subpart on “monetary conditions.”

Rule 7.4 (“procedure”). A proposed provision in section (b) (“bail eligibility hearing”) subpart (2) (“victims”) again confounds the rights to notice and to be heard. Members agreed to use the same remedy in this rule, of separating the provision into two sentences, which they had fashioned for Rule 7.2, as discussed above.

Rule 7.5 (“review of conditions; revocation of release”). In Rule 7.5(c) (“on victim’s petition”), the AVCV proposed adding the word “abuse” in the phrase “any harassment, threats, physical violence, abuse, or intimidation by the defendant.” A member noted that this was consistent with the constitution, and members agreed with this one-word addition. The AVCV also proposed adding to section (d) (“hearing; modification of conditions; revocation”), in two places in subpart 2 (“revocation of release on a felony offense”), the word “victim.” (I.e., in one instance, “danger to the victim, any other person, or the community;” and in the other, “assure the safety of the victim, other person, or the community.” Members had no objection to the additions.

Rule 7.6 (“transfer and disposition of bond”). The AVCV’s proposed amendment to section (c) (“procedure”), subpart (2) (“hearing and notice”), would provide, “The court must notify the parties and, if requested, the victim, and any surety of the hearing ...” Members had discussed the proposed amendment at the March 19, 2021 meeting but had taken no action. Much of today’s discussion was similar to the earlier one. Does a victim have a right to notice of a bond forfeiture hearing, and the related question, is a bond forfeiture, even one conducted under a criminal case number, a civil proceeding? Case law indicates that bond forfeiture is a civil matter; the assignment of a criminal case number is not dispositive of whether the proceeding is criminal or civil. Only rarely does defense counsel appear at a bond forfeiture hearing, and an absconded defendant would not be present. A victim might appear, but probably only when the victim has posted the bond. Although a victim might be interested in the disposition of the bond proceeds as a possible source of restitution, the victim could not direct that disposition. On the other hand, a victim might continue to have an interest in the bond proceeds if it the bond is not forfeited. Primarily because members acknowledged that the bond forfeiture proceeding is a civil matter, however, the AVCV withdrew its proposed amendment to Rule 7.6.

3. Roadmap. The Chair discussed with members dates for future meetings. He confirmed the next meeting date: Tuesday, July 20, 2021, from 10 a.m. to 1:00 p.m. This will be an in-person meeting, but if necessary, a member may appear telephonically. Members will continue to review rules at the July meeting. To assure that the review is timely completed, members agreed to meet on Thursday, August 19, 2021, from 10 a.m. to 5 p.m. This full-day meeting will also be in-person. In addition to completing their

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rules review, the Chair anticipates that members will discuss their recommendations at the August meeting. Another in-person meeting was set for Thursday, September 2, 2021, from 10 a.m. to 2 p.m. The primary goal of this meeting will be finalizing the CRV's recommendations to the Court.

4. Call to the public; adjourn. There was no response to a call to the public. The meeting adjourned at 1:20 p.m.