

Committee on Criminal Rules Regarding Victims

State Courts Building, Phoenix

Meeting Minutes: February 19, 2021

Members attending: Hon. Andrew Gould (Chair), Hon. Ronald Reinstein (Vice Chair), Tim Agan, Colleen Clase, Hon. Maria Elena Cruz, Ryan Green, Hon. Kellie Johnson, Hon. Patti Starr, Rick Unklesbay, Hon. Maria Del Mar Verdin, Cathryn Whalen (all members present)

Guests: Prof. Paul Cassell, Theresa Rassas, Prof. Meg Garvin, Mikel Steinfeld, Steve Twist, David Euchner

AOC Staff: Mark Meltzer, Angela Pennington

1. **Call to order; approval of meeting minutes.** The Chair called the second meeting of the Committee on Criminal Rules Regarding Victims (“CRV”) to order at 10:00 a.m. He then requested members to review draft minutes of the January 26, 2021 meeting. Members had no corrections to the draft.

Motion: A member moved to approve the draft January 26, 2021 meeting minutes. The motion received a second and it passed unanimously. **CRV-001.**

Today’s agenda featured Zoom presentations by five learned individuals on the subject of victims’ rights. The Chair invited each of these individuals to address the committee and express their views on R-20-0031.

2. **Presentation by Professor Paul Cassell.** Paul Cassell is a professor at the University of Utah School of Law. He was formerly a federal prosecutor and a federal district court judge. He has been active in victims’ rights advocacy for 3 decades. Professor Cassell said that Arizona has a national reputation of being “one of the gems” for crime victim advocacy, and he offered his strong support for R-20-0031.

Professor Cassell noted that in the early 1990’s, Congress enacted statutory provisions concerning victims’ rights. However, these statutes have proven to be inadequate in protecting victims’ rights in federal criminal cases. Despite attempts at implementing the statutes by court rules, including his own efforts in 2006 that proposed a comprehensive set of victims’ rights amendments to the Federal Rules of Criminal Procedure, Congress never adopted a robust set of rule amendments. Rather, in 2008, Congress approved a single, short rule, Rule 60, which he believes has been unsuccessful in fulfilling its intended purpose. He mentioned two federal cases that exemplify how the rule is deficient.

Professor Cassell concluded that other states look to Arizona as a leader in operationalizing victims' rights in its procedural rules. He believes that R-20-0031 is a necessary next step. He believes that the petition's proposed amendments are detailed and cogent. He said that the amendments do not expand the rights Arizona crime victims already have, but rather the amendments integrate those rights with the other criminal rules that practitioners and judges use routinely. [Staff note: These minutes refer to the concept of relocating victims' rights to multiple criminal rules as "integration."] Professor Cassell believes that even victims with no legal training will find, read, and comprehend the integrated rule amendments, that this will help victims understand their rights at specific court proceedings, and it will facilitate participation by victims in the criminal process, as anticipated by the Arizona constitution. The Chair then asked members if they had questions for Professor Cassell.

A member asked why a judge would be more inclined to look at a specific rule for a victim's right rather than the more inclusive Rule 39. Professor Cassell said that the judge will be dealing with a proceeding governed by a specific rule, such as a defense counsel's motion to withdraw, which could implicate victims' rights, and the judge will intuitively look at Rule 6.3 rather than Rule 39. The member followed up by asking if the pertinent rules could simply contain cross-references to Rule 39. Professor Cassell believes that R-20-0031 has done a good job of integrating those rights into other rules, which he thinks is preferable to merely cross-referencing Rule 39. In his example, the victim's right would be explicitly contained in Rule 6.3(c) ("withdrawal"), which would avoid the need to review Rule 39 when the issue arose. In response to another question, Professor Cassell explained that attorneys and judges use the criminal rules as their playbook for courtroom proceedings. By adopting the proposed amendments, victims' rights provisions will be fully and comprehensively integrated into the rules so that no rights will be overlooked in the course of any proceeding. Professor Cassell believes that if victims' rights are integrated into the criminal rules, stakeholder compliance with those rights should be close to 100 per cent.

The Vice Chair related that while he was on the bench, he used a checklist of victims' rights that included items from the constitution, statutes, and Rule 39. He also mentioned that the Criminal Rules Task Force, which included a cross-section of stakeholders, previously considered a proposal similar to R-20-0031 and declined to adopt most of the proposed amendments. The Vice Chair suggested that having all the victims' rights provisions in a central location has proven to be workable, but judges will inevitably make mistakes and cause glitches. Professor Cassell responded that "glitches" means that victims have been denied their rights. He emphasized that full integration will result in fewer cases where victims are deprived of their rights. Professor Cassell added that new judges and prosecutors, i.e., those with no prior experience in criminal law, might find full integration particularly valuable. The Chair asked if there had been

any efforts to expand federal Rule 60. Professor Cassell noted that Senator Jon Kyl and others had proposed such legislation, but their bill never became law, and as shown by the examples he had cited, victims' rights continue to be overlooked, even in recent high-profile cases.

3. Presentation from Ms. Theresa Rassas. Ms. Rassas was formerly a Maricopa County prosecutor, where she had been paired with an experienced victims' advocate, and later she became a federal prosecutor. She is now in the Office of the Arizona Attorney General, and for a time was in victims' services, which has duties under A.R.S. § 41-191.06 to monitor compliance with crime victims' rights. The Attorney General's office has supported R-20-0031 on the belief that integration would promote compliance with these requirements. Ms. Rassas has reviewed the more than 50 rule changes proposed by R-20-0031. [Staff note: There are 41 primary Criminal Rules, but the majority of rules have numbers to the right of a decimal point that divide the primary rule into secondary rules dealing with the same subject matter, e.g., Rules 4.1, 4.2, 4.3, etc. Ms. Rassas' reference to 50-plus rules is to the secondary rules.] Ms. Rassas believes the proposed amendments are sensible, and serendipitously, they would serve judges in a manner similar to an updated bench book.

However, Ms. Rassas expressed a few concerns. The first was regarding the proposed amendment to Rule 1.2 ("purpose and construction"), which as drafted might overweigh victims' rights relative to the rights of criminal defendants, or possibly lead to conflicts between the respective rights. Her other concerns resulted from her preparation of a table designed to show the derivation of each of the proposed amendments from the pertinent constitutional or statutory provision. Although she reviewed only a third of the proposed amendments, she found two issues. Rule 4.1 ("procedure upon arrest"), section (b) ("on arrest without a warrant") would be amended by a sentence that says, "the victim must be notified of any release." Ms. Rassas explained that under the constitution and by statute, the duty to notify under this rule only arises after a request for notification. She brought this to Ms. Clase's attention, who intends to correct the proposed amendment. Ms. Rassas also had an initial concern regarding an amendment to newly proposed Rule 1.10(e) ("court enforcement of victim notice requirements"), but her concern dissipated when she located an analogous provision in existing Rule 39(g)(1) ("court enforcement of victim notice requirements/court's duty to inquire.") Ms. Rassas added that preparing a derivation table for all the proposed amendments is time-consuming, and although she had done only a portion of her table and intended to go no further, she recommended that someone complete such a table. She then invited questions.

A member asked if the Attorney General maintains data on victims' rights violations. Ms. Rassas began her answer by distinguishing alleged violations that have

no basis from those that do. If the complaint has a basis, the primary goal of her office is to assure that the named judge has additional training, because the objective is that the judge learns from the error and will be compliant in the future. Accordingly, the letters her office sends to judges are instructional rather than punitive. More to the point, she can provide statistics on the number of alleged violations her office receives and the number of actual cases; each actual case is documented by a letter to the involved judge. Ms. Rassas' office has no jurisdiction of complaints against defense counsel, but she receives complaints concerning acts or omissions of prosecutors and law enforcement officers, as well as judges. She submits complaints involving judges to Judge Reinstein for review, because many of the complaints implicate a need for further training, which he can address. Judge Reinstein added that there seems to be more complaints against limited jurisdiction court judges, especially those who are not law trained, than there are against superior court judges. He and Ms. Rassas agreed that most judicial violations are not intentional. Ms. Rassas advised that bench book updates are essential for assuring that judges comply with victims' rights, but she added that prosecutors and law enforcement officers don't have access to the bench books.

Ms. Rassas concluded by reiterating her concerns with the proposed amendments to Rule 1.2. She believes that although the ease of reading a single rule, i.e., Rule 39, seems appealing, integration would ultimately assist prosecutors and law enforcement officers, as well as judges and victims, in locating and understanding victims' rights.

4. Presentation from Professor Meg Garvin. Professor Garvin is on the faculty at Lewis and Clark Law School. She teaches a course in criminal procedure with an emphasis on victims' rights. She also oversees a victims' rights litigation clinic and is active in the National Crime Victim Law Institute. Ms. Garvin supports integration. She believes integration is a more holistic approach to victims' rights, and that it facilitates the timely consideration of victim issues as opposed to remediating glitches after they occur. She explained that integration aligns with the way our brain works, that is, when someone reviews a list, a table, or in this case, a rule, it's likely that the person will also review adjacent content that contextualizes what the person is looking at. Like Professor Cassell, Professor Garvin opined that integration might result in nearly 100 percent compliance with victims' rights requirements.

In response to a question, Professor Garvin could not cite to any state that has fully integrated victims' rights into its rules of procedure. But she thought Arizona's rules, if integrated, could serve as a national model and demonstrate Arizona's leadership on this important subject.

5. Presentation from Mr. Mikel Steinfeld. Mr. Steinfeld is in the appeals unit of the Maricopa County Public Defender's Office. He was co-author of a comment to R-

20-0031 filed by the Arizona Attorneys for Criminal Justice. He explained the reasons why he does not support the petition.

The first reason concerns the education of new attorneys. He has an interest in assuring that new attorneys in his office recognize and abide by victims' rights. The aggregation of victims' rights in Rule 39 makes his instruction on this subject more focused and direct. Rule 39 has no conflict with other criminal rules. An amendment to Rule 39(a) ("definitions and limitations") proposed by R-20-0031, on the other hand, presumes that such conflicts would occur. (The draft provision provides, "If any provision of Rule 39 conflicts with a rule provision where a victim's right is addressed, the individual rule provision where the victim's right has been integrated shall prevail over Rule 39.") Not only does the amendment raise the possibility of conflicting provisions, but it also implies that users might have to look at Rule 39 as well as another rule to find the answer to an issue. A single rule such as Rule 39 offers clarity, whereas integration into multiple rules will increase the difficulty of understanding victims' rights. Mr. Steinfeld thought that given a choice, even victims would prefer the clarity of a single rule.

The second reason, which is a corollary to the first, concerns litigation. Mr. Steinfeld acknowledged that as an appellate litigator, he reviews the record for tenable issues. The potential conflict of provisions that he described, and the associated lack of clarity, invite more litigation about victims' rights. There is already a body of Arizona case law concerning victims' rights, and he believes the proposed amendments could result in even more litigation.

For his third reason, Mr. Steinfeld referred to his service on Court committees involved with rule restyling, and the lessons those committees learned from Bryan Garner's Guidelines for Drafting Court Rules. One of Garner's principles is to organize related subjects collectively. The victims' rights in Rule 39 appear together, as Garner might suggest. The proposed amendments in R-20-0031, by comparison, split the subject matter. The amendments would require judges to look at Rule 39 and another rule on the same subject. As he previously mentioned, the proposed amendments presuppose that victims' rights provisions might conflict, causing uncertainty in their application. Mr. Steinfeld also noted that court rules are occasionally amended. If any of the integrated rules are amended in the future, the drafters would be required to take special care to assure that the amendment did not alter the meaning of the victims' rights described in that rule. This is not a concern with current Rule 39 because Rule 39 addresses only victims' rights and no other subjects.

Mr. Steinfeld concluded with the observation that the status quo is working. Arizona now has relatively good compliance with victims' rights requirements. But he cautioned that adoption of the integrated rules could create confusion, reduce

compliance, and increase litigation. In response to a question that proposed full integration and the elimination of Rule 39, Mr. Steinfeld said abrogating Rule 39 would remove the primary and central source of information on this subject. He also noted that a significant number of criminal cases don't involve victims, and the rules that apply in those cases shouldn't require stakeholders to consider provisions that contain victims' rights. Another question asked about the impact of integration on appellate practice. Mr. Steinfeld thought that imprecise drafting of the proposed amendments could lead to litigation. He expressed his concern with proposed Rule 1.2. And if victims' rights were removed from Rule 39 and integrated into other rules, research under the newly amended rules might overlook case law developed under Rule 39.

6. Presentation from Mr. Steve Twist. Mr. Twist is recognized in Arizona and nationally for his decades of work on behalf of crime victims. He began his presentation by focusing on the Arizona constitution, article 2, § 2.1. He described this section as a promise to crime victims of their rights to justice, fairness, and due process. He emphasized that the criminal rules should further this constitutional promise. This constitutional amendment was not a provision that was belatedly bolted on to article 2, but rather, it is an integral part of how the criminal justice system is supposed to function in practice.

Mr. Twist characterized the criminal rules as the mileposts in a criminal case. Each rule describes what's required at the milepost, and the responsibilities of the court and counsel at each point. He believes that combining those responsibilities into a single rule detracts from the promise to construe the rules to protect victims at each of the steps specified by the constitution and statute. He noted that while the rules concerning victims are currently in a single location, there are dozens of rules that implicate victims' rights. For example, under the constitution, a victim has a right to a speedy disposition. However, current Rule 8 ("speedy trial") includes only a single reference to "victim," in Rule 8.5 ("continuing a trial date"). R-20-0031 would add victim references in Rule 8.1(c) ("suspension of Rule 8") and Rule 8.2 ("specific date set for trial"). The petition would also modify the existing provision in Rule 8.5. Mr. Twist asserted that integration of victims' rights would promote uniformity in court proceedings and reduce the likelihood of mistakes.

Mr. Twist also believes that case law already clarifies that victims are not parties, but they are recognized as participants and they have legal rights as participants. He agreed that the rules themselves are the best tools for educating new judges and attorneys. However, if the rules omit participant rights, they will not serve as good learning tools. He believes that references to "victim" in the current rules are random and haphazard, and this too diminishes the rules' role of educating stakeholders.

Mr. Twist also submitted that the Criminal Rules Task Force did not reject the idea of integrating victims' rights into the rules. Rather, he believed that task force concluded that doing so was beyond the scope of its charge. [Staff note: See the January 26, 2021 CRV meeting packet, which includes excerpts from the CRTF minutes. One excerpt is this remark the CRTF chair addressed to a workgroup on 11/18/2016: "The chair suggested that when doing its review [of Rule 39] that the workgroup defer changes to the rule when the comments raise broad policy issues."] Mr. Twist did not believe that R-20-0031 proposed any new victims' right. Mr. Twist did not believe that the proposed amendments to Rule 1.2 elevated victims' rights over a defendant's rights. He acknowledged Ms. Rassas' comment that the words "upon request" had been inappropriately omitted from the proposed amendment to Rule 4. While he appreciates the concerns some stakeholders have raised, he supports adoption of the rule amendments proposed by R-20-0031.

In response to a question about potential conflicts between the proposed amendments and Rule 39, Mr. Twist offered the possibility of eliminating Rule 39. But even if Rule 39 is retained, careful draftsmanship should reduce the potential for conflicts. A member inquired about a disparity that requires counsel for the parties to provide the victim with copies of court filings, but only when the victim has counsel. Although that might be the current law and practice, the member believes that an unrepresented victim, like an unrepresented defendant, should receive copies. On another point, Mr. Twist noted that the Attorney General's data might show the number of violations reported to that office, but he submitted that the number of actual violations, i.e., a number that includes unreported violations, would substantially exceed the number of violations that are reported. The Chair asked Mr. Twist if he would be able to prepare a table similar to the one Ms. Rassas had started, or if he could complete her table. Mr. Twist responded affirmatively. He already has a document that includes the authority for each proposed rule amendment, but he will need to add to that document the actual text from each corresponding constitutional or statutory provision. He will endeavor to follow the format of Ms. Rassas' table.

7. **Members discussion of presentations; roadmap.** The Chair thanked every presenter following each presentation. After the final presentation, the Chair invited members to share their thoughts on the committee's next step. He added that by the next meeting, which is scheduled for March 19, members should have the benefit of additional materials, as noted in these minutes, from Ms. Rassas and Mr. Twist. The Chair also reminded members of the Court's interest in having the committee do a thoughtful review of R-20-0031. Some members accordingly suggested that the committee review each of the proposed rule amendments. If the members favor full integration, they should also consider whether to retain or eliminate Rule 39. The Chair noted that full integration

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would require members to give careful attention to the specific text of each proposed rule amendment.

The changes proposed by Rule 1.10 are extensive and could affect the decision to retain Rule 39. In addition, the Court has pending cases that raise issues concerning a victim's rights in a post-conviction proceeding under Rules 32 and 33. Accordingly, the Chair suggested that members defer their review of those rules, and that members at the March 19 meeting begin their review with the proposed amendments to Rules 7, 8, and 15. Members concurred with that suggestion.

8. **Call to the public; adjourn.** In response to a call to the public, David Euchner provided a note thanking members for their work on this committee. The meeting adjourned at 12:27 p.m.