

Committee on Criminal Rules Regarding Victims

State Courts Building, Phoenix

Meeting Minutes: March 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: Delaney Krauss, and by telephone: Theresa Rassas, Rebecca Jones, Kyra Goddard

AOC Staff: Mark Meltzer, Angela Pennington

1. Call to order; approval of meeting minutes; preliminary remarks by the Chair. The Chair called the third 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 February 19, 2021 meeting. At page 3, a member requested to change “overweight” to “overweigh” (in a sentence that says Rule 1.2 “might overweight victims’ rights relative to the rights of criminal defendants ...” Members had no other corrections to the draft.

Motion: A member moved to approve the draft February 19, 2021 meeting minutes with the above correction. The motion received a second and it passed unanimously. **CRV-002.**

The Chair then informed members that today’s meeting would include a review of the AVCV’s proposed changes to Rules 7, 8, and 15. He noted that members might also consider two new rules: AVCV’s proposed Rule 1.10 and staff’s draft Rule 1.3. Any agreement members reach on these rules today will be documented in a report that members will discuss at the April meeting. Members will also discuss any remaining rules at the April meeting. If members do not reach consensus today or next month, it might be necessary to set a fifth meeting in May.

The Chair announced that today will be his final meeting as committee chair. He is retiring from the Court on March 31, and the Chief Justice will appoint a new chair. The Chair emphasized the Court’s continued support for victims’ rights.

Today’s meeting materials included the Attorney General’s data on violations, and a table prepared by Ms. Rassas and Mr. Twist (the “Rassas/Twist table”) correlating the AVCV’s proposed rule amendments with constitutional and statutory authorities, both of which the committee requested during presentations by Ms. Rassas and Mr. Twist at the February 19 meeting. Materials also included rules proposed by the AVCV (i.e., the

appendix to R-20-0031) with staff's annotations concerning restyling issues presented by the proposed rule amendments. The annotated version contained references to the Court's Order in R-20-0005, which affects the AVCV's proposed amendments to Rule 17.1 on telephonic pleas; and pending Rule petition R-21-0022, which bears on the AVCV's proposed amendments to Rule 7 on the defendant's release. The meeting materials also included staff's draft Rule 1.3 and a two-page explanatory memo concerning this draft rule. The chaptered version of SB 1256 (Laws 2021), which amends A.R.S. § 13-4434, was also included in the materials.

The AVCV's appendix indicated additional text by underline and deleted text by strikethrough, and this formatting is shown in the excerpts from this appendix that are shown below.

2. Rule 7 ("release").

Rule 7.6(c). The Chair began with AVCV's proposed provision in Rule 7.6 ("transfer and disposition of bond"), section (c) ("forfeiture procedure"), subpart 2 ("hearing and notice"). The AVCV proposed this amendment:

The court must notify the parties and, if requested, the victim, and any surety of the hearing in writing or electronically.

Members discussed whether a victim has a right to be present at a bond forfeiture hearing. Members agreed that the hearing is civil in nature, although some counties conduct the hearing under the assigned criminal case number. Members also agreed that a defendant does not have a right to appointed counsel at a bond forfeiture hearing. It is often the surety or a family member, and not the defendant, who has a financial interest in the outcome of the hearing. On the other hand, the proceeding is governed by a criminal rather than a civil rule, and if a defendant has a right to be present at the hearing, a victim should have the same right. Moreover, a victim might have an interest in the outcome of a forfeiture hearing because the funds could be a source for restitution. Some prosecutors already provide a "courtesy notice" of the hearing to victims. However, the Chair observed that the proposed amendment would be a substantive change because it would shift to the court the duty to provide notice that is currently a statutory responsibility of the prosecutor. A vote on this provision was deferred.

Rule 7.2(b). The AVCV proposed this amendment to Rule 7.2(b)(4), a provision that is titled "bail eligibility hearing." The proposed amendment was in subpart (A) of that provision:

A victim has the right to notice of the hearing and the right to be heard regarding any conditions of release.

Members did not oppose this amendment, provided that it contain the words “upon request.”

Rule 7.2(c). Rule 7.2(c) concerns a defendant’s right to release “after conviction.” The AVCV’s proposed amendment to subpart (1)(B), which concerns the right to release after a sentence involving imprisonment is imposed by the superior court, would provide:

If a defendant is convicted of a felony offense and is sentenced to prison, the court may not release the defendant on bail or on the defendant’s own recognizance pending appeal unless the court, after considering the views of the victim, finds the defendant is in such physical condition that continued confinement would endanger the defendant’s life.

The Rassas/Twist table modified this proposed language. In lieu of the underlined language above, their table version would say, “after considering any view presented by any victim...”) Members were divided on these proposed amendments. One view was that the victim has a right to be heard at any post-arrest release of a defendant, including a post-conviction release. The other view was that the proposed amendments would allow the victim to comment on the defendant’s physical condition, which should be strictly a medical determination. Members did not reach consensus on this amendment.

Rule 7.3(a). The title of Rule 7.3 is “conditions of release.” In section (a) (“mandatory conditions”), AVCV’s proposed amendment would add a new subpart (4) that says,

the defendant must not contact the victim, unless the court clearly finds good cause to conclude the victim’s safety would be protected without a no-contact order.

In conjunction with that addition, the AVCV’s amendment would delete from section (c) (“additional conditions”) a sentence that 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 Vice Chair noted that the modifier “clearly” before the phrase “finds good cause” in new subpart (4) is extraneous. A member added that some victims are members of the defendant’s family and would prefer not to have a presumptive no-contact order, as provided in the proposed amendment to section (a). The current provision in section (c), which would be stricken, does not presumptively require no-contact, so the change would be substantive. See further A.R.S. § 13-3967, which mandates a no-contact condition of release for specified offenses, but otherwise makes the condition discretionary.

Rule 7.4(b). This is a section concerning a bail eligibility hearing. Subpart (2) is a provision concerning victims. The AVCV’s proposed change is:

Victims. ~~Notwithstanding the time limits of Rule 39(g)(1), a victim must be afforded the rights provided in Rule 39(g).~~ A victim has the right to confer with the State about any decision regarding the preconviction release of the defendant. A victim must be given notice of a bail eligibility hearing and the victim has the right to be present and be heard by the court before the court modifies release conditions. If a victim objects to being called as a witness in a bail eligibility hearing, the court must require the party wishing to present the victim's testimony to make an offer of proof and the court may require a victim to testify only if the court finds that the evidence in the offer of proof would likely impact the court's decision on the matters under consideration at the hearing. If the opposing party stipulates to the information in the offer of proof, the victim will not be required to testify.

The Rassas/Twist table proposed a modified version. In the second underlined sentence above, it would add after the word "victim" the words "upon request pursuant to 13-4406 and 13-4409 [sic]." It would also delete the text of the last two underlined sentences, beginning with the words, "if a victim objects ..."

Rule 7.4(c). The Rassas/Twist table also proposed modifications to Rule 7.4(c) ("later review of conditions"), subpart (2). The version as proposed by the AVCV provides:

(2) *Motion Requirements and Hearing.* The court may modify the conditions of release only after giving the parties an opportunity to respond to the proposed modification. ~~A motion to reexamine the conditions of release must comply with victims' rights requirements provided in Rule 39.~~ A victim has the right to notice of and the right to be heard at any hearing regarding any motion to modify release conditions.

The Rassas/Twist table would modify the sentence shown with underline by adding, after the words "a victim," the words "upon request pursuant to 13-4406 and 13-4409 [sic] ..."

As to both Rule 7.4(b) and 7.4(c), the Chair suggested that at their April meeting, members should determine whether they will consider the rules proposed by AVCV in R-20-0031, or the rules as modified by the Rassas/Twist table. The members could vote on a proposed rule amendment once there is clarity about which of these proposals is going forward. The Chair expressed concern that the charge to the committee was to review the amendments proposed by R-20-0031. However, the amendments proposed by the Rassas/Twist table, notwithstanding AVCV's verbal agreement to what is shown in the

table, modifies the text in the R-20-0031 appendix. The Chair then suggested that the AVCV submit an amended proposal that clarifies its requested rule amendments.

3. Rule 8 (“speedy trial”).

Rule 8.1(e). The title of this section is “suspension of Rule 8.” The AVCV proposes to amend the second sentence of this 4-sentence rule as follows:

No later than 5 days after the motion [to suspend Rule 8] is filed , the court must hold a hearing on the motion, permit the victim to be heard, and, after considering the victim’s right to a speedy trial, make findings of fact about whether extraordinary circumstances exist that justify the suspension of Rule 8.

Although the Chair believed the proposed amendment was uncontroversial, he added that a victim already has a right to be heard at a suspension motion under current Rule 39(b)(7). A member commented that the issue is not with the substance of the proposed amendment, but rather with relocating parts of Rule 39 to other rules, which has the effect of highlighting some current Rule 39 provisions and omitting others. The Chair responded that the committee can chose to add some but not all of the AVCV’s proposed amendments; members should consider which amendments might be helpful to a judge on the bench. Another member suggested that partial integration might indicate that provisions that had not been integrated were less important, One member recommended that the proposed amendment include the words “upon request;” otherwise, if the victim had not been notified of the suspension motion, it could require reconsideration of a motion that had already been decided. And another member suggested that the proposed amendment should also include a reference to a defendant’s right to a speedy trial.

Rule 8.2(e). Rule 8.2 is titled “time limits.” The proposed amendment to Rule 8.2(e) (“specific date for trial”) would add a new sentence as follows:

The superior court must set a specific trial date either at the arraignment or a pretrial conference, unless the court has suspended Rule 8. In setting the date, the court must consider the views of the victim, as well as the rights of both the defendant and the victim to a speedy trial.

Members observed that in the superior court in Maricopa and Pima counties, a specific trial date is initially set without input from the parties. Rather, the first trial date is set administratively, by a computer program. The programmed date is within the speedy trial limits provided by Rule 8.2. Members then proceeded to Rule 8.5.

Rule 8.5 (b). Rule 8.5 is titled “continuing a trial date.” The proposed amendment to Rule 8.5(b) (“grounds”) would amend the first sentence as follows:

A court may continue trial only after considering a victim’s and the defendant’s right to a speedy trial and on a showing that extraordinary circumstances exist and that

delay is indispensable to the interests of justice, and only for so long as is necessary to serve the interests of justice. The court must state specific reasons for continuing trial.

[Staff note: The proposed amendment did not accurately edit current Rule 8.5(b), which includes a second sentence shown in bold font below, which was omitted from the AVCV's proposed amendment.]

A court may continue trial only on a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice, and only for so long as is necessary to serve the interests of justice. **The court must consider the rights of the defendant and any victim to a speedy disposition of the case.** The court must state specific reasons for continuing trial.

Members acknowledge that trial judges can, and do, consider issues involving the victim's health, employment, travel plans, and the like when resetting a trial date.

4. Rule 15 ("disclosure").

Rule 15.1(f). Rule 15.1(f) is titled "scope of the State's disclosure obligation," but the proposed amendment would strike from the title and relocate the word "obligation." The proposed amendment would alter the existing format of the current rule, which has subparts (1), (2), and (3), and add a new subpart (1) titled "obligation." However, there would not be a subpart (2) or (3). The new text would be contained in subpart (1)(C)(i), titled "limitations."

(1) Obligation. The State's disclosure obligation extends to material and information in the possession or control of any of the following:

~~(1)~~ (A) the prosecutor, other attorneys in the prosecutor's office, and members of the prosecutor's staff;

~~(2)~~ (B) any law enforcement agency that has participated in the investigation of the case and is under the prosecutor's direction and control; and

~~(3)~~ (C) any other person who is under the prosecutor's direction or control and who participated in the investigation or evaluation of the case.

(i) Limitations. The State is not required to disclose a victim's identifying or locating information unless the court finds that disclosure is required to protect the defendant's constitutional rights. If disclosure of personal identifying or locating information is made to defense counsel, counsel must not disclose the information to any person other than counsel's staff and designated investigator, and must not provide the information to the defendant without prior court authorization and after

considering the rights and views of the victim.

(ii) Redactions. Rule 15.5(e) applies to information withheld under this rule.

The text of this subpart derives from, but is not identical to, current Rule 39(b)(11). One member thought the relocation of this text would serve as a useful reminder. Another member suggested if a part of the proposed text was retained, it should only be the first sentence of subpart (C)(i). And another member observed that the current Rule 39 provision is clearer and more directive than the proposed amendment.

Rule 15.1(g). This section is titled “disclosure by court order.” The proposed amendment to subpart (g)(1) provides in pertinent part:

Disclosure Order. On the defendant’s motion, a court may order any person other than the victim to make available to the defendant material or information not included in this rule if the court finds: ...

A member believed this amendment might provide further protection of a victim’s work product, such as a diary. Another member thought it might protect against disclosure of a victim’s medical records. However, the Chair expressed caution concerning this amendment because case law has addressed what is protected; a pending Supreme Court opinion also might be pertinent.

Rule 15.2(h). Members reviewed, but did not comment on, a proposed amendment to Rule 15.2(h)(1)(B) that would allow the court to extend the time for the defendant’s initial disclosure in a capital case “only after considering the victim’s right to a speedy trial.”

Rule 15.3(a). Rule 15.3 is currently titled “depositions.” The AVCV would add the words “victims’ right to refuse” to the title. It would then edit section (a) (“availability”) as follows:

A party or a witness may file a motion requesting the court to order the examination of any person, except the defendant or a victim that a defendant or someone working on their behalf seeks to examine ~~those excluded by Rule 39(b),~~ by oral deposition under the following circumstances: ...

Staff’s annotations noted this language was awkward, and a member commented that the existing provision in Rule 39(b) is less wordy than the proposed amendment. Although not cross-referenced in this rule, a member noted that A.R.S. § 13-4433 is pertinent to the rule and to Rule 15.3(g).

Rule 15.3(g). Rule 15.3(g), titled “interviews, depositions, and other discovery requests of a crime victim,” is entirely new. It has these titled subparts: (1)

“communication;” (2) “right to refuse;” (3) “right to assistance and to set conditions;” and (4) “jury instruction if a victim’s refusal is commented on at trial.” The proposed provisions are derived from current provisions in Rule 39(b). One member concluded that relocating this provision would be helpful to a judge while on the bench, and that this is a rational location for the provision. Another member commented that an issue under this rule would more likely arise in a written motion. Accordingly, the issue would not require an immediate ruling from the bench, and the current location of these provisions in Rule 39 was appropriate. Members did not reconcile these different views.

Rule 15.6(e). Rule 15.6(e) is titled “extension of time for completion of testing.” The proposed amendment to subpart (e)(3) (“extending time”) would add a new second sentence as follows:

If the court grants a motion under (e)(2) [‘order’], the court may extend other disclosure deadlines as necessary. In determining new deadlines under this rule, the court must consider the victim’s and defendant’s right to a speedy trial.

The court might give extensions on these grounds, for example, for DNA testing. The deadlines should be reasonable. One member supported the amendment because it would require the court to explain to the victim and the defendant the basis of the extension. However, other members believed the proposed provision, which requires the court’s consideration of the victim’s and the defendant’s rights to a speedy trial, is already and adequately covered in Rule 8, as discussed above.

5. Members discussion of other rules; roadmap. After the discussion of Rules 7, 8, and 15, the Chair contemplated a review of amendments to other rules proposed by AVCV’s petition, including the amendments to Rules 1.2 and 1.10. A discussion ensued about the AVCV’s intent concerning Rule 39. A member noted that if proposed Rule 1.10 was intended as a replacement for Rule 39, the committee should consider excluding one of these rules rather than retaining both. The Chair also anticipated a discussion of staff’s draft Rule 1.3. The Vice Chair noted that draft Rule 1.3 would place victims’ rights in a prominent location at the beginning of the criminal rules, and that it would serve as a guide or directory for victims’ rights. The review and discussion of these rules will be deferred to the next meeting, which is set for April 16, 2021.

6. Call to the public; adjourn. There was no response to a call to the public. The meeting adjourned at 11:39 a.m.