

Committee on Criminal Rules Regarding Victims

State Courts Building, Phoenix

Meeting Minutes: April 16, 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, Hon. Patti Starr, Rick Unklesbay, Hon. Maria Del Mar Verdin, Cathryn Whalen (all members present)

Guests: Theresa Rassas (by telephone)

AOC Staff: Mark Meltzer, Angela Pennington

1. Call to order; remarks by the new Chair; approval of meeting minutes.

The Chair called the fourth meeting of the Committee on Criminal Rules Regarding Victims (“CRV”) to order at 10:03 a.m. Following introductions, the new Chair noted that he is looking forward to working with committee members to bring this project to conclusion. He described his preparations for this meeting, which included speaking with the former chair, the vice chair, and staff, and reviewing materials from the first three committee meetings. He stated his understanding that although members reviewed the amendments to Rules 7, 8, and 15 that were proposed by the Arizona Voice for Crime Victims (“AVCV”) petition number R-20-0031, members did not vote on any of those proposed amendments, nor did members review or discuss staff’s draft Rule 1.3.

Based on a review of the materials and the conversations noted above, the Chair believes individual members have two distinct positions on integration. One position opposes integrating Rule 39, as proposed by R-20-0031. Those members believe that Rule 39 in its current form is a useful resource and training tool, and there is no systemic problem with the use or application of Rule 39 that requires it to be integrated with other rules. Consistently with Bryan Garner’s restyling principles, Rule 39 consolidates victims’ rights provisions in a single location, rather than dispersing them throughout the rules, as the rule petition proposes. Moreover, this view holds that integration could lead to duplication of, and conflicts between, various provisions, which would increase litigation concerning victims’ rights. There also is a possibility that integration could expand victims’ rights beyond what the law already provides. Proponents of integration, on the other hand, believe that integration would help assure that victims’ rights aren’t overlooked at court hearings. With full integration, when participants would review a rule concerning a hearing in which they are about to participate, victims’ rights would appear in that rule. The Chair observed that both positions are principled and meritorious, however, the members’ differing positions have not yet been reconciled.

The Chair then observed that Administrative Order No. 2020-183, which established this committee, requires that members determine which provisions of Rule 39 might be logically relocated to other rules, and whether relocating those provisions would help safeguard victims' rights. Addressing these requirements probably will be difficult and time-consuming work, but members should not decline the undertaking for those reasons. Even if a majority of members currently disfavor integration, the committee should still review each of the proposed amendments and determine if any amendment meets the two criteria specified in A.O. No. 2020-183. The review should consider ways to improve individual rules and assure that the proposed amendments conform to the Court's rule restyling conventions. The Chair believes the committee should determine whether it would recommend full or partial integration only after fully revising and vetting the proposed amendments, and that members should engage in this process even if the committee ultimately declines to recommend integration. The Chair added that engaging in this process also might lead to discovering common ground and agreement on alternatives, such as draft Rule 1.3.

Members then responded to the Chair's remarks. Members generally agreed with the Chair's plan of reviewing each of AVCV's proposed rule amendments, although they expressed concerns. Some members were uncertain whether Rule 39 would continue to exist and believed that it should. Others asked whether the proposed rules would actually achieve full integration, and whether full integration would create redundancy. They also asked how the elimination of Rule 39 might affect training and education on victims' rights. Would draft Rule 1.3, possibly with the additional guideposts, be equally effective as R-20-0031? How would the amendments in the Rassas/Twist table affect a review of the rules proposed by R-20-0031? Following further discussion of these issues, a member made the following motion:

Motion: To proceed with a rule-by-rule review of the proposed amendments as those amendments appear in the Rassas/Twist table. (See page 2 of the March 19 minutes for a description of the Rassas/Twist table.) The motion received a second, there was no objection, and it passed unanimously. **CRV-003.**

Before proceeding with that review, the Chair requested members to review draft minutes of the March 19, 2021 meeting.

Motion: A member moved to approve the draft March 19, 2021 meeting minutes. The motion received a second and it passed unanimously. **CRV-004.**

2. Review of proposed rule amendments. Although members agreed to review the proposed rule amendments contained in the 90-page Rassas/Twist table, staff observed that members might need to continue to refer to the proposed amendments as those amendments appear in the R-20-0031 appendix. Staff noted that the Rassas/Twist

table standing alone does not show the organization of the proposed rule amendments, i.e., it does not clearly show the context of each amendment and the relationship of an amendment to other provisions of a rule. The narrow columns in Rassas/Twist table also do not display appropriate formatting of the rules under consideration. With those caveats, members proceed to the first proposed rule amendment.

Rule 1.2 (“purpose and construction”). There are multiple proposed amendments to existing Rule 1.2. The first amendment would strike the word “individual” and replace it with “accused and the victim,” i.e., “the fundamental rights of the ~~individual~~ accused and the victim ...” The proposed amendments then add a new lengthy sentence that begins with the words, “These rules must be construed to protect the constitutional rights of victims enumerated in Article II, Section 2.1(A) of the Arizona Constitution ...” Several members expressed concerns that this new sentence emphasized the victim’s rights without mentioning a litany of rights accorded to a defendant under the United States Constitution. The Chair observed that anything less than a full list of a criminal defendant’s rights in this rule would appear to deemphasize those rights. A member also noted that the new sentence was lengthy, complex, and contrary to the restyling goal of simplicity in draftsmanship. In that regard, another member noted that draft Rule 1.3 expresses the same concept with greater clarity.

The proposed amendments to Rule 1.2 include, after the text noted above, a new section (a) titled “limitation on victims’ rights.” This new section includes relocated provisions from current Rule 39(a)(3) concerning “cessation of victim status” and “legal entities.” The Rassas/Twist table added a new statutory reference, A.R.S. § 13-4433, to the provision on cessation of victim status. (See further the duplicate, proposed amendment to Rule 1.4, which also includes this additional statutory reference.) A question was posed about whether the proposed amendments would include every applicable statutory reference, or only some of them. Ms. Clase deferred to the references that had been included in the Rassas/Twist table. The AVCV also added a new subpart to Rule 1.2 titled “victims are not parties.” A member suggested moving the controversial provision in the preceding paragraph, which references Article II, Section 2.1(A), to this new section (a). Doing so would mitigate the imbalance between the rights of victims and defendants in the AVCV’s current draft. Members generally favored this approach. Staff noted that proposed Rule 1.2 has a section (a) but no section (b), which contravenes rule formatting conventions. Further reorganization of the proposed amendments to Rule 1.2 would be necessary to conform to those conventions.

A member suggested the committee consider draft Rule 1.3 as an alternative to the proposed amendments to Rule 1.2. One member disagreed with doing so and noted that Rule 1.3 is not designed to integrate rights, but rather to direct readers to other provisions.

Members proceeded to a discussion of whether full integration would preserve or eliminate Rule 39. Ms. Clase advised that although Rule 39 continues to appear in the appendix to R-20-0031, the entirety of its substance has been relocated to other rules. Ms. Rassas expressed concern whether that was indeed the case.

Some members continued to express the desirability of retaining certain provisions in Rule 39. The Chair noted that retaining some provisions in Rule 39, while integrating others, could serve as the basis for a compromise proposal. But for the time being, members agreed that a designated section (a) should appear at the beginning of Rule 1.2, rather than midway through the rule as it now appears in the proposed amendments. The Chair directed staff to reformat Rule 1.2, and to rephrase the subpart now titled “victims are not parties,” as noted in staff’s annotations to that provision.

Rule 1.3 (“computation of time”). The proposed amendment would add to subpart (5) (“additional time after service”) the following three words: “If a party or crime victim may or must act within a specified time after service ...” Ms. Clase explained that this amendment addresses a practical problem of counsel for a party moving to strike a purportedly untimely filing by a crime victim. The proposed amendment was unopposed.

Rule 1.4 (“definitions”). The AVCV proposed adding to Rule 1.4, as new sections (b) and (c), definitions of “criminal proceeding” and “identifying and locating information” that are currently in Rule 39(a)(1) and (a)(2). A member observed that if these definitions are relocated, they should be in Rule 15, where they would be more related to the subject matter. The AVCV’s proposed amendments also added to the current definition of “victim” in Rule 1.4 new subparts concerning “cessation of victim status” and “legal entities.” A member noted that these subparts duplicated provisions that AVCV had already added to Rule 1.2, and that were discussed above. Ms. Clase agreed they were duplicative. Another member suggested removing the duplicate provisions in Rule 1.4 and replacing them with a cross-reference to Rule 1.2.

Rule 1.5 (“interactive audiovisual system”). The AVCV would add text to subpart (c) (“when a defendant may appear by videoconference”), subpart (3) (“by stipulation”) specified text about the system’s functionality for victim participation. It was noted, however, that this amendment duplicates what is in existing section (b) (“requirements”), subpart (b)(3)(B). The Rassas/Twist table includes the word “applicable” before the words “victims’ rights” in the proposed amendment to subpart (c)(3), but Ms. Clase agreed that the proposed amendment was otherwise repetitive of the current provision. Another proposed amendment, to subpart (c)(4) (“change in hearing’s scope”) would require the court, on rescheduling a videoconference as an in-person court hearing, to

give notice to the victim of the rescheduled event. The Rassas/Twist table would require notice only “upon request,” thereby shifting the duty to provide notice to the prosecutor. The Rassas/Twist table also added two statutory references, A.R.S. §§ 13-4406 and 13-4409, to the AVCV’s proposed amendment.

Rule 1.7 (“filing and service of documents”). The AVCV proposed three amendments to section (c) (“service of all documents required; manner of service”). In the introduction to section (c), the proposed amendment is, “Every person filing a document with any court must serve a copy of the document on all parties and to [sic] any victim’s attorney as follows: ...” An amendment to subpart (c)(1) (“serving an attorney”) would add “if a party or victim is represented by an attorney ...” Finally, an amendment to subpart (c)(3) (“certificate of service”) would add the name and address of the victim’s attorney to the certificate. The ensuing discussion revisited an issue that members had previously discussed: is there a duty to serve an unrepresented victim with copies of court filings? Members noted that statutes (e.g., A.R.S. § 13-4437) and court rules refer to service on a victim’s attorney, but not on a victim without counsel, and that unrepresented victims constitute the great majority of victims. Members then discussed options for providing unrepresented victims with copies of court filings.

One option would require defense counsel to serve the prosecutor with two copies of a court filing, with the further requirement that the prosecutor forward one copy of the filing to the unrepresented victim. A prosecutor noted an existing, informal practice of sending copies of pertinent filings to a victim, but this is done voluntarily and without a statutory directive or rule. This practice, however, does not involve sending copies of all filings, but only some. A member opined that numerous victims have no interest in receiving court filings, so sending copies would be pointless in many instances. Another option would allow an unrepresented victim to opt-in to receiving court filings, that is, establish a rule that the prosecutor must provide copies to a victim upon the victim’s request. That, however, would be a substantive change to current victims’ rights laws, and such a recommendation might be beyond the committee’s authority. Moreover, any such recommendation could potentially require a massive volume of mailing, and the rule would need to address the prosecutor’s duties regarding a filing under seal. Members accordingly declined to add a requirement that unrepresented victims be provided copies of court filings.

Rule 1.8 (“clerk’s distribution of minute entries and other documents”). A proposed amendment to section (a) (“generally”) would require the clerk to distribute minute entries to all parties “and to any victim’s attorney.” An amendment to section (b) (“electronic distribution”) would allow the clerk to electronically distribute to a victim’s attorney the court’s minute entries, notices, and other court-generated documents. With

regard to whether a victim's attorney would enter a formal appearance in a case, thereby giving formal notice to the clerk that the victim was represented by counsel, members reviewed current Rule 39(d)(4), which indicates that a victim's attorney must file a notice of appearance. Members agreed that a victim's attorney who has appeared in a case should be included on the clerk's distribution of minute entries, and Maricopa County currently does this. Regardless of whether a statute mandates this practice, members concurred that adding this provision to the rule should provide authority for the clerks to continue to do so, or to begin doing so. Members agreed that the clerk in a small county who chooses to distribute minute entries by other than electronic means, which might be more burdensome for that clerk than electronic distribution, should not detract from the clerk's duty to provide the documents to victims' counsel.

Rule 1.9 ("motions, oral argument, and proposed orders"). There are several proposed amendments to this rule. In section (b) ("service of motion; response; reply"), the Rassas/Twist table adds a new sentence that supersedes the AVCV's proposed amendment. The table would add this sentence (the AVCV's proposed amendment is shown with strikethrough): "The victim has standing to seek an order, to bring a special action or to file a notice of appearance in a trial court or an appellate proceeding, seeking to enforce any right or to challenge an order denying any right guaranteed to victims. ~~When addressing matters that impact any victims' rights, a victim may file motions, responses, and replies that comply with these rules.~~" The table version omitted a sentence in section (b) of the current rule that provides, "If no response is filed, the court may deem the motion submitted on the record," which was included in the AVCV's version; and this will need to be added back to the rule if the members proceed with the table version. Members also noted that the table version, unlike the AVCV version, includes a specific reference to a victim bringing a special action. However, a victim's standing to do so is already included in Rule 2(a)(2) of the Rules of Procedure for Special Actions. Rather than duplicating that provision, Rule 1.9(b) might include a cross-reference to this Special Action rule. Ms. Clase suggested a combination of various portions of the AVCV and table versions. Members also considered staff's suggested language for the last sentence of Rule 1.9(b), which is a simpler version, but they did not reach consensus on these alternative suggestions.

The proposed amendments to sections (d) ("waiver of requirements") and (e) ("oral argument") would remove the phrases, "on a party's motion or on its own," thereby facilitating the victim an opportunity — like a party or a judge — to move to waive the requirements of this rule, or to request oral argument. Members expressed no objection to these amendments. Amendments to section (f) ("proposed orders") would make the provisions of that section equally applicable to a victim's attorney.

Committee on Criminal Rules Regarding Victims

Minutes: 04.16.2021

3. **Roadmap.** Members will resume their review of the rules at the next meeting, beginning with proposed Rule 1.10.

The Chair noted that the deadline for submitting recommendations to the Court, as provided in A.O. No. 2020-183, is May 28, 2021. The Chair and members agreed that the May 28 deadline would no longer be feasible if members anticipate continuing their rule-by-rule review of the proposed amendments. The committee therefore will need to request an extension of time for submitting its recommendations. The request also should ask the Court to consider the committee's recommendations at its December rules agenda, rather than the August agenda as originally anticipated. The process of reviewing the rules and reaching recommendations will probably take months. Staff will notify members concerning the next meeting date.

4. **Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 1:06 p.m.