

**Committee on Criminal Rules Regarding Victims**

**State Courts Building, Phoenix**

**Meeting Minutes: July 20, 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 (by telephone), Cathryn Whalen by her proxy Kevin Heade

**Guests:** Theresa Rassas, Elise Kulik

**AOC Staff:** Mark Meltzer, Angela Pennington

**1. Call to order; approval of meeting minutes.** The Chair called the seventh meeting of the Committee on Criminal Rules Regarding Victims (“CRV”) to order at 10:07 a.m. At today’s meeting, the CRV will continue its review of each of the rule amendments proposed by the Arizona Voice for Crime Victims (“AVCV”) in rule petition number R-20-0031. First, however, the Chair requested members to review draft minutes of the June 18, 2021 meeting. Members had no corrections to the draft.

**Motion:** A member moved to approve the draft June 18, 2021 meeting minutes. The motion received a second and it passed unanimously. **CRV-007.**

**2. Continuing review of proposed rule amendments.** Members began with a review of staff’s recent revisions to Rules 1.2, 4.1, 6.3, 6.7, 7.2, 7.3, 7.4, 7.5, and 7.6—revisions that were directed by members at the June 18 meeting—to assure those revisions were shown in today’s materials as the members had intended. Members concurred with those revisions, with the following caveats:

- (a)** In Rule 6.3 (“duties of counsel; withdrawal”), section (c) (withdrawal’), members agreed to change the title of subpart (c)(1) from “before granting a motion to withdraw” to “victims’ rights.”
- (b)** In Rule 7 (“release”), members discussed the historical reasons that provisions concerning a bail eligibility hearing appear in both Rules 7.2 (“right to release”) and 7.4 (“procedure”). Consequently, similar victims’ right provisions concerning the right to notice and to be heard at that hearing appear in Rule 7.2(b)(4) as well as Rule 7.4(b)(2). Members saw no need to eliminate the redundancy of those provisions.

Members had concern, however, with a provision proposed by the AVCV in Rule 7.4(b)(2) that provides, “A victim has the right to confer with the State about any decision regarding the preconviction release of the defendant.”

Prosecutors often confer with the victim about release, and a victim has the right under A.R.S. § 13-3419 to confer with the prosecutor before trial and before disposition. However, neither the Arizona Constitution nor statutes enumerate a specific right of a victim to confer with the prosecutor regarding release, as provided in the AVCV's proposed provision. The AVCV agreed with this analysis. Accordingly, the proposed new provision was deleted from Rule 7.4(b)(2).

- (c) Staff requested members to disregard staff's notes in Rule 7, which are now moot in light of discussions at the June 18 meeting.

Members then continued with their review, beginning with Rule 8.1.

**Rule 8.1 ("priorities in scheduling criminal cases").** Rule 8.1(e) allows a party, based on extraordinary circumstances, to move for a suspension of Rule 8. The AVCV's proposed amendment to this section would permit the victim to be heard on the motion and require the court to consider the victim's right to a speedy trial. Members agreed with the proposed amendment, although to be consistent with previous revisions, they changed "speedy trial" to "speedy disposition."

**Rule 8.2 ("time limits").** Rule 8.2(e) ("specific date for trial") requires the superior court, either at the arraignment or at a pretrial conference, to set a specific trial date. The AVCV's proposed amendment would add a new sentence that says, "In setting the trial 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." At the March 19 CRV meeting, when members initially discussed this provision, they noted that some counties, including Maricopa, determine the initial trial date by using a computer program, as authorized by a local administrative order, and without consulting the parties. This computer-generated date is within the "last day" allowed by Rule 8, so the selected date does not implicate a speedy trial issue. The computer-selected date might present a conflict for the victim, but then the date is a matter of preference or convenience rather than an issue concerning a victim's right. Members accordingly declined to adopt the proposed amendment to Rule 8.2.

**Rule 8.5 ("continuing a trial date").** While Rule 8.2 involves the initial scheduling of a trial date, Rule 8.5 addresses a motion to continue the scheduled trial date. As such, Rule 8.5 is subject to a controlling statute, A.R.S. § 13-4435. Section (F) of the statute provides, "Before ruling on a motion for a continuance, the court shall consider the victim's views and the victim's right to a speedy trial."

The AVCV proposed this amendment to Rule 8.5(b) ("grounds"): "A court may continue trial only after considering a victim's and the defendant's right to a speedy trial and ..." However, the AVCV draft omitted a sentence in the current rule that provides,

*Committee on Criminal Rules Regarding Victims*  
*Minutes 07.20.2021*

“The court must consider the rights of the defendant and any victim to a speedy disposition of the case.” Accordingly, members concluded that the AVCV’s proposed provision was unnecessary and they declined to adopt it. Although a victim has no right to be heard when the trial date is set under Rule 8.2, Rule 8.5 allows a victim to be heard on a continuance of the trial date, even when the proposed new trial date is within the Rule 8 time limit. The current rule does not embody the statutory requirement of considering the victim’s views on a continuance, which imposes an affirmative duty (“shall consider”) on the trial judge. After further discussion, members agreed to amend the language of the current rule as follows: “In deciding the motion, the ~~The~~ court must consider the victim’s views and the rights of the defendant and any victim to a speedy disposition of the case.”

**Rule 10.2 (“change of judge as a matter of right”).** The AVCV’s proposed amendment to section (c) (“timing”) would require a party who files a notice of change of judge after the reassignment of a case to provide “appropriate actual notice to the other party or parties and any counsel for the victim no later than ... “ Staff noted that this amendment might be redundant because an amendment to Rule 1.7(c) regarding service of filed documents already requires service of those documents on any victim’s attorney. A judge member observed, however, that a notice filed under the circumstances described in Rule 10.2(c) must be promptly communicated. Members agreed with that observation and concurred with the proposed amendment.

**Rule 10.3 (“changing the place of trial”).** The AVCV originally proposed an amendment to section (c) (“procedure”) that would have added the following sentence: “The court must consider the victim’s right to be present and consider alternatives to moving the trial that will protect the defendant’s right to a fair trial while reasonably allowing the victim to exercise the right to be present.” The Rassas/Twist table struck that sentence and substituted the following: “The victim has the right to be heard on the matter.” Members noted that parties rarely file motions under Rule 10.3. Ms. Rassas, after reviewing controlling authorities, advised that neither the Constitution, statutes, nor current Rule 39 enumerates a victim’s right to be heard on a motion to change the place of trial; accordingly, the court has no duty to consider the victim’s views on a Rule 10.3 motion. Members discussed potential alternatives, such as using the words “should consider” rather than “must consider,” but they declined all such suggestions and agreed that Rule 10.3 should not be amended.

**Rule 15.1 (“the State’s disclosures”).** The AVCV proposed an amendment to section (f) (“scope of the State’s disclosure obligation”) that would (a) modify the section title by removing the word “obligation;” (b) reorganize the current subparts as a new subpart titled “obligation;” and (c) relocate to this reorganized subpart the provisions of Rule 39(b)(11). The AVCV’s proposed amendment was unconventionally formatted.

*Committee on Criminal Rules Regarding Victims  
Minutes 07.20.2021*

After discussion, members agreed to renumber the subparts as (f)(1) (“obligation”), (f)(2) (“limitations”), and (f)(3), (“redactions”).

Members also considered the impact of Senate Bill 1256 (Laws 2021, Chapter 40) on the proposed amendment. The new law amends A.R.S. § 13-4434(B) as shown by the following underlined text:

A victim's identifying and locating information that is obtained, compiled or reported by a law enforcement agency or prosecution agency shall be redacted by the originating agency and prosecution agencies from records pertaining to the criminal case involving the victim, including discovery disclosed to the defendant, the defendant's attorney or any of the attorney's staff.

The corresponding rule (now, Rule 39(b)(11) and as proposed, Rule 15.1(f)(2)), provides,

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.

A member observed that the rule sets out a procedure after the court has decided that the State’s disclosure of the victim’s identifying or locating information is necessary to protect a defendant’s constitutional rights, that is, the disclosure has been court authorized. Another member noted that a victim’s identifying information might be necessary for public defender agencies to run conflicts checks at the inception of a case. In some counties, including Pima, the prosecutor assists in running those checks, which mitigates the need for disclosing the victim’s information to defense counsel. Otherwise, members concluded that the statutory amendment should not impact current practices.

A judge member suggested placing a period in the second sentence of proposed Rule 15.1(f)(2), after the word “authorization,” and relocating the words “after considering the rights and views of the victim,” which now appear in the second sentence, to the first sentence, after the words “unless the court finds ....” As currently written, the provision requires counsel rather than the court to consider the victim’s views, which is inapt. Another member asked whether a statute requires the court to consider the rights and views of the victim in this circumstance, as the draft amendment proposes. Ms. Clase believes the right is implied by A.R.S. § 13-4434. Mr. Heade, however, suggested deleting the words “and views,” because neither a statute nor current Rule 39(b)(11)(A) expressly provide for a victim’s right to be heard on this issue. The AVCV agreed with that suggestion and the Chair concurred. Legal authorities,

including the recent *Vanders* opinion, require that certain victims' rights on disclosure matters must occasionally yield to a defendant's competing and substantive due process rights, and that concept is engrained in this rule.

The relocated provision refers to "counsel's staff and designated investigator." The investigator is stated separately because that individual might not be a member of counsel's staff. In Rule 39(b), the AVCV struck a reference to 39(b) and replaced it with a reference to (f)(2); staff will insert a corrected cross-reference, if necessary. [Staff note: Notwithstanding the revised formatting of section (f), the new reference to (f)(2) appears to be correct.]

**Rule 15.2 ("the defendant's disclosures").** The AVCV's only suggested revision to this rule appears in section (h) ("additional disclosure in a capital case"). The revision would allow the trial court to extend the deadline for the defendant's initial disclosure "only after considering the victim's right to a speedy trial." Members initially agreed with this amendment, with the proviso that "speedy disposition" replace "speedy trial." Staff noted that there is no corresponding requirement in Rule 15.1(i)(3)(B) for the court to consider the victim's right to a speedy disposition when the State requests an extension of time for its initial disclosure in a capital case. Members discussed adding such a requirement but concluded that a request for an extension of time for either party's initial disclosure does not necessarily require or implicate a continuance of the trial date. A victim would have a right to be heard under Rule 8.5 if a continuance of the trial date is contemplated but would not have the right to be heard on the timing of the initial disclosure if it did not affect the trial date. Members therefore agreed that the proposed amendments to Rule 15.2(h) and a corresponding amendment to Rule 15.1(i)(3)(B) were unnecessary.

**Rule 15.3 ("depositions; victims' right to review").** The AVCV proposed an amendment to the title of this rule, as shown by the foregoing underline. A proposed amendment to Rule 15.3(a) ("availability") was relocated from Rule 39(b)(12), but the proposed language is awkward. After a discussion of substitute wording, Judge Johnson offered to submit modified language after today's meeting. Members also discussed the proposed amendments to a new section (g) ("interviews, depositions, and other discovery requests of a victim"), which would consist of relocated content from current Rule 39(b), subparts (8), (12), (13), and (14). Proposed subpart (g)(1) ("communication") requires defense counsel to communicate a request to interview the victim "to the prosecutor or to the victim's attorney if the victim is represented." A.R.S. § 13-4433(B) provides in part, "The defendant, the defendant's attorney or an agent of the defendant shall only initiate contact with the victim through the prosecutor's office." The statute appears to require defense counsel to request an interview through the prosecutor, not the victim's attorney. Ms. Rassas noted that the statute uses the word "initiate," which

*Committee on Criminal Rules Regarding Victims  
Minutes 07.20.2021*

suggests that the process begins by defense counsel contacting the prosecutor. Members agreed that while defense counsel can thereafter contact victim's counsel, defense counsel should keep the prosecutor in the loop. A judge member proposed striking from the first sentence of subpart (g)(1) the words "or to the victim's attorney if the victim is represented." At that point Mr. Heade noted that a case was pending in the Ninth Circuit involving the current rule and statutory provision, and the judge's suggestion was deferred.

3. **Roadmap.** The Chair confirmed dates for future meetings. The next meeting date is Thursday, August 19, 2021, from 10 a.m. to 5 p.m. In addition to completing their rules review, the Chair anticipates that members will discuss their recommendations at that meeting. A final meeting was set for Thursday, September 2, 2021, from 10 a.m. to 2 p.m., at which members will finalize the CRV's recommendations to the Court. Both of these meetings will be in-person.

4. **Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 1:17 p.m.