

Committee on Criminal Rules Regarding Victims

State Courts Building, Phoenix

Meeting Minutes: August 19, 2021

Members attending: Hon. John R. Lopez IV (Chair), Hon. Ronald Reinstein (Vice Chair), Tim Agan, Colleen Clase, Hon. Maria Elena Cruz, Ryan Green (by telephone), 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; approval of meeting minutes; consideration of SB 1412. The Chair called the eighth meeting of the Committee on Criminal Rules Regarding Victims ("CRV") to order at 10:05 a.m. As the first order of business, the Chair requested members to review draft minutes of the July 20, 2021 meeting. Members had no corrections to the draft.

Motion: A member moved to approve the draft July 20, 2021 meeting minutes. The motion received a second and it passed unanimously. **CRV-008.**

Today's meeting packet included SB 1412 (Laws 2021, Chapter 273). This legislation included amendments to A.R.S. § 13-901(E) that permit the victim before termination of the defendant's probation to request an injunction against harassment. After consideration of SB 1412, members concluded that a rule amendment that implemented this statutory change was outside the CRV's purview, as detailed in A.O. no. 2020-183, and they accordingly declined to propose a corresponding rule amendment.

2. Continuing review of the AVCV's proposed rule amendments. Members then continued with their review of the rule amendments proposed by the Arizona Voice for Crime Victims ("AVCV"), beginning with Rule 15.3, which they had not completed at the July 20 meeting.

Rule 15.3 ("depositions; victims' right to refuse"). The members had determined at the July meeting that the AVCV's proposed amendment to section (a) ("availability") was awkwardly worded. At today's meeting, and after considering clarifying language previously suggested by Judge Johnson, members revised the first portion of section (a) simply by relocating the words "by oral deposition," as follows:

A party or a witness may file a motion requesting the court to order the examination of any person by oral deposition, 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: ...

Members then focused on Rule 15.3(g) (“interviews, depositions, and other discovery requests of a victim”). This is new section that contained four subparts relocated from current Rule 39(b)(12). Each of the four subparts has a new title: “communication,” “right to refuse,” “right to assistance and to set conditions,” and “jury instruction if a victim’s refusal is commented on at trial.” Members today discussed only the first subpart and continued a discussion that began at the July meeting. Rule 39(b)(12)(A) expressly requires the defendant to communicate requests to interview a victim “to the prosecutor, not the victim.” This provision derives from statute; as noted in the July meeting minutes, 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 proposed amendment, by comparison, would allow the defendant to communicate the request “to the prosecutor or to the victim’s attorney if the victim is represented.” This would be a substantive change. A member suggested that the revision would be minimal if the word “or” was changed to “and,” but even a minimal substantive change would be contrary to the statutory requirement and the directions of A.O. 2020-183. Members accordingly declined to make it. The committee’s report might nonetheless note the desirability of making this change.

Rule 15.6 (“continuing duty to disclose; final disclosure deadline; extensions”). The AVCV recommended one change to this rule, in section (e) (“extension of time for completing testing”), subpart 3 (“extending time”). The AVCV’s proposed amendment would add a new sentence: “In determining the new deadlines under this rule, the court must consider the victim’s and the defendant’s right to a speedy trial.” Members had no objection to this addition, but for consistency, they changed the word “trial” to “disposition.”

Rule 16.3 (“pretrial conference”). The appendix to R-20-0031 included an amendment to section (d) (“scope of proceeding”), but the Rassas/Twist table struck the proposed language without substituting new language. Accordingly, there are no changes the current rule warranting discussion.

Rule 16.4 (“dismissal of prosecution”). As with Rule 16.3(d), R-20-0031 proposed amendments to Rule 16.4(a) (“on the state’s motion”) and 16.4(d) (“effect of dismissal”) but the Rassas/Twist table struck the proposed amendments and there are no changes to those sections. R-20-0031 also proposed a new Rule 16.4, section (f) (untitled), derived from Rule 39(b)(6)(B), which provided, “Upon request of the victim, the victim must have an opportunity to confer with the prosecutor about the disposition or dismissal.”

Members found issues with this provision and its location. First, the right to confer regarding dismissal should refer to dismissal on the prosecutor's initiative. Accordingly, members relocated that portion to section (a) ("on the state's motion"). Second, the victim has a right to confer before, rather than after, dismissal; members therefore added the word "pending" before "dismissal." Third, the reference to a conference about disposition does not fit within the scope of Rule 16.4, and that portion should be relocated elsewhere, to be determined. Members agreed that a victim has no right to confer with the prosecutor about the dismissal of a complaint that is superseded by an indictment, because while the complaint might be dismissed, the charge is not. However, they agreed that the rule does not need to address that scenario.

Rule 17.1(f) ("the defendant's plea"). The AVCV proposed amendments to section (f) ("limited jurisdiction court alternatives for entering a plea"). However, this section was substantially changed by the Court's Order in R-20-0005, and those changes were not reflected in the AVCV's proposed amendments. Members reviewed the Court's Order, specifically Rule 17.1(f)(1)(F), and made the following proposed amendments to that provision only:

(F) *Victim's Rights.* In a telephonic plea proceeding, a victim has the same rights ~~under Rule 39~~ to notice upon request and participation the right to be heard as if the defendant physically appeared in the courtroom.

Members considered adding to Rule 17.1(f) a victim's right to confer with the prosecutor concerning the plea, but that right is already established in Rule 17.4(a)(3), which applies to a plea proceeding under Rule 17.1(f).

Rule 18.1 ("trial by jury"). The AVCV proposed a new section (c) ("victim participation") that would afford a victim "an opportunity to confer with the prosecutor about trial before the trial begins." Staff suggested relocating the proposal to Rule 19 ("trial") to assure that the victim also has this right if the trial is a bench trial. Members agreed and considered as locations Rule 19.1 ("conduct of trial") or 19.5, which already contains a provision concerning a representative for an incapacitated victim. After discussion, they agreed to add it as a new subpart (3) to Rule 19.1, section (a) ("generally").

Rule 19.7 ("victim's right to use of facility dog"). Whereas current Rule 39(b)(9) contains a concise statement concerning the right to the assistance of a facility dog, including a reference to the applicable statute, A.R.S. § 13-4442, the AVCV proposed this new and lengthier rule. Members noted, among other things, that the statute also refers to a party and a witness. After discussion, members reduced the proposed new rule to a

single sentence, as follows: “The court must allow the assistance of a facility dog for a victim, witness, or party, as provided in A.R.S. § 13-4442.” They also shortened the title of this rule to “use of a facility dog.”

Rule 19.8 (“victim testimony”). This is a proposed new rule. The content was relocated from current Rule 39(b)(10). Members made two changes to the rule as proposed. First, they removed the section (a) designation from the start of the text, inasmuch as there is no section (b). Second, they changed the section title to “protection of victim’s information.”

Rule 24.3 (“modification of sentence”). Section (b) (“mitigation [of a monetary obligation imposed at sentencing]”) currently provides that “the provisions of Rule 39 apply” Because the AVCV contemplated the abrogation of Rule 39, it substituted for that reference the words “victims’ rights.” Members discussed whether the substituted phrase adequately described what rights applied. A lengthy discussion ensued, which included a review of pertinent statutes, including A.R.S. § 13-804. Members agreed to add the last sentence of § 13-804(M) to Rule 23.3(b), with modifications, as follows:

Before modifying an order pertaining to the manner in which restitution is paid, the court must give notice and an opportunity to be heard to the defendant, the state, and, on request, persons entitled to restitution pursuant to a court order.

Members recognized that the substituted language does not track Rule 39(b)(18), and that the statute and the substituted provision requires the court rather than the prosecutor to provide notice to the victim. (Members anticipate that a probation officer would provide notice.) They also utilized in this new rule provision the word “person” – which is used in the statute – rather than victim with the understanding that “victim” would be encompassed in “person.” Members agreed that the substituted language is more useful than merely referring to “victims’ rights” and will assist judges in determining what those rights are.

Rule 26.4 (“presentence report”). The AVCV’s proposed amendment relocates to section (c) (“when due”) of this rule the victims’ right to a copy of the presentence report that is currently found in Rule 39(b)(15). Members had no objection to this provision.

Rule 26.7 (“presentencing hearing; prehearing conference”). The AVCV proposed adding to subpart (b)(2) (“presenting evidence”) a victim’s right to be heard at this hearing, as currently provided in Rule 39(b)(7). Members had no objection.

Rule 26.10 (“pronouncement of judgment and sentence”). The proposed amendment to a subpart of section (b) (“sentence”), which currently provides that the

defendant has an opportunity to address the court, would add the words “and the victim.” This also derives from Rule 39(b)(7). Members again had no objection.

Rule 26.17 (“victim’s right to information”). The AVCV proposed this new rule which states a victim’s rights: in section (a) to be informed of the disposition; in section (b) to be informed of the right to restitution; and in section (c) of the right to post-conviction notification. These rights are derived from Rule 39(b), subparts (7)(I), (16), and (18). The proposed provisions, like some current ones, don’t specify who has the duty to inform the victim of these rights, but the prosecutor or a victim’s advocate within the prosecutor’s office customarily does that and the proposed rule was modified to add that detail. There was some concern that the new rule was incomplete. Members concluded the discussion, however, without adding text, but they reformatted the rule by removing repetitive references to “a victim has the right to be informed of ...,” and they modified the title (now, “victim’s right to sentencing information.”)

Rule 27.3 (“modification of conditions or regulations”). The AVCV’s proposed amendment to section (b) (“by the court”), subpart (1)(C), has its origin in Rule 39(b)(7)(F), but the language is somewhat different and would require the court to “[ensure] the victim, if requested, received notice and an opportunity to be heard” at the modification proceeding. Members noted that current subpart (b)(1)(A) already includes a reference to Rule 27.10 (“victims’ rights in probation proceedings”). After discussion, members agreed to modify Rule 27.3(b)(1)(A), which permits the court to modify any condition or regulation of probation after “giving notice and an opportunity to be heard to the State, the probationer, the probation department, and a victim ~~who has the right to notice~~ under Rule 27.10; ...” Members also agreed to delete proposed new Rule 27.3(b)(1)(C)

Rule 27.4 (“early termination of probation”). A proposed amendment to section (a) (“discretionary probation termination”) proposed by R-20-0031 was deleted by the Rassas/Twist table, and accordingly, there are no changes to this rule.

Rule 27.7 (“initial appearance after arrest”). The AVCV proposed an amendment to section (c) (“procedure”) that would require the court, not the prosecutor, to give the victim notice of this proceeding. As a practical matter, providing a victim notice of a proceeding that occurs within 24 hours after a defendant’s arrest – and possibly months or years after conviction – could be challenging. Notwithstanding, members agreed to add to section (b) a new sentence: “The victim, upon request, has the right to be notified of the arrest [on a warrant issued under Rule 27.6].” A member analogized the proceeding under section (c) to one that occurs under Rule 4.1 and suggested that the victim have rights similar to those provided under that rule. Members declined that

suggestion, especially because the Court in *Wilson v Higgins* (CR-20-0254-PR, 7/23/3021) indicated that Rule 27.7 required clarification of the release issue presented in that case. Another member suggested that even if the defendant had been released at the initial appearance on a probation violation, a victim should have a right to be heard afterward regarding a modification of the release conditions. After further discussion, members deleted the AVCV's proposed amendment to section (c), which conflated the rights to notice and to be heard, and instead added separate sentences that say, "A victim, upon request, has the right to notice of the hearing. The victim has the right to be heard regarding any condition of release." (A.R.S. § 13-4415 and Rule 27.10 provide for notice only upon request.)

Rule 27.8 ("probation revocation"). A single amendment to subpart (b)(2) would provide that the victim, as well as the probationer, have a right to be present at the violation hearing. (See Rule 39(b)(4).) Members had no objection to the amendment.

Rule 27.10 (victims' rights in probation revocation proceedings). The AVCV proposed striking a reference to Rule 39 ("the court must afford a victim who has requested notice ~~under Rule 39~~ the opportunity to be present and to be heard...." The AVCV did not propose substitute language, nor did the members. Members did, however, separate the rights to notice and to be present, as they have done elsewhere, so that the rights to be present and to be heard do not depend on receiving notice.

Rule 31.3 ("suspension of these rules; suspension of an appeal; computation of time; modifying a deadline"). Section (b) ("suspension of an appeal") permits an appellate court to suspend an appeal if there is pending in the trial court a motion under Rule 24 or a petition under Rule 32. R-20-0031 proposed an amendment to section (b), but the amendment was withdrawn by the Rassas/Twist table and the section was not changed.

Rules 32.7 and 33.7 ("petition for post-conviction relief") and 32.9 and 33.9 ("response and reply; amendments"). The AVCV proposed to amend the time-extension provisions of the rules on a PCR petition as follows: "...after considering the rights of the victim, including the right to a prompt and final conclusion after conviction and sentence ..." It further proposed to amend the rules on responses and replies in a similar but slightly different manner. Members made two observations. First, although other rules refer to a prompt "disposition," members agreed with the use of "conclusion" in these rules because the term is used in a corresponding provision in the Victims' Bill of Rights. They also questioned use of the word "including," followed by additional text, because there is only one victims' right at that point in the proceeding that would be pertinent.

Members, however, made no changes to the AVCV's proposed amendments to these four rules.

Rule 39 (victims' rights)). The AVCV's only proposed amendment to this rule is a new subpart (a)(3)(C), which provides: "Conflicts Between Rule Provisions. 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." The Chair inquired if the AVCV was proposing the abrogation of Rule 39, notwithstanding the inclusion of Rule 39 in the R-20-0031 appendix, if the Court adopted the proposed amendments to other rules. The AVCV's response was "yes," and that Rule 39 was included in the appendix at the request of stakeholders.

Members then discussed whether each provision in Rule 39 had been relocated. Specific reference was made to Rule 39(b), subparts (2), (3), and (4), and to a portion of subpart (6)(C) concerning a decision not to initiate a prosecution. (These provisions are highlighted in blue at page 18 of the June 18, 2021 meeting packet.) The AVCV acknowledged that these provisions had been inadvertently omitted, and they will need to be added. See further the following discussion of Rule 1.10.

Rule 1.10 ("victims' rights: exercising the right to be heard, the right to representation; victim and court obligations"). The AVCV contemplates that the residual of Rule 39, that is, provisions that were not relocated to other rules, would be transferred verbatim to new Rule 1.10. (The exception to a verbatim relocation is Rule 1.10, section (b) ("assistance and representation"), subpart (C) ("conflicts"), where the words "for referral to a lawyer" were added to the current text of Rule 39(d)(3).) With full integration and the abrogation of Rule 39, the AVCV believes that the "conflicts between rule provisions" subpart contained in Rule 39, as shown in the R-20-0031 appendix, would be unnecessary, because there would not be conflicting provisions. The AVCV affirmed that there are no known conflicts between the remaining rule amendments. Accordingly, the AVCV prefers full integration, that is, retaining Rule 1.10 and removing Rule 39. Partial integration and the retention of Rule 39, on the other hand, would require careful review to avoid conflicting or duplicative provisions.

The inadvertently omitted provisions of Rule 39(b)(2), (3), and (4) discussed above would be relocated Rule 1.10, in a new section (a). Staff noted that Rule 39(b)(1), which had been previously relocated to Rule 1.2 but was later stricken, would need to be included in new section (a), and members agreed. The Chair directed staff to revise the consolidated appendix accordingly, and to suggest a location where the omitted text in Rule 39(b)(6)(C) could also be relocated. Also, proposed Rule 1.10(f) ("appointment of

victim's representative") was a verbatim duplication of another provision already contained in section (b), and section (f) was accordingly deleted.

3. Committee recommendations. Members then discussed potential recommendations, which included full integration, partial integration, and adoption of Rule 1.3, with or without selective integration. (A member referred to Rule 1.3 with selective integration as "Rule 1.3 Plus.")

Much of the ensuing discussion focused on Rule 1.3. Members noted, as stated in staff's March 19, 2021 memo, that Rule 1.3 would be positioned in a more prominent location than Rule 39, but it would retain the substance of Rule 39. A member added that such an arrangement would assist in stakeholder's understanding of victims' rights while also facilitating attorney training and judicial education. Another member believed that Rule 1.3 would require users to flip between that rule and other rules. That is, however, part of the intent of Rule 1.3, that Rule 1.3 would be a guidepost – an introduction, a directory, or a highlight -- that directs users to the details of other pertinent rules. One member observed this arrangement would help keep intact a rich body of victims' rights case law that has developed under the current rules. Another member opined that Rule 1.3 was inconsistent with the directive in A.O. no. 2020-183, yet another member cited language in the Order (saying that the Committee "may recommend adding provisions other than those the petition proposed"), which would allow the rule. Several members suggested that the Rule 1.3 Plus selective approach should focus on rules where adherence to victims' rights has been problematic in the past, and that appeared to be a viable suggestion. Members specifically noted Rules 7, 8, and 15 in this regard. The AVCV parenthetically added that it would be opposed to any amendment that would automatically opt a victim in on notices for post-conviction relief.

4. Roadmap. The Chair directed staff to update the rules and draft report to reflect the discussions at today's meeting. Staff will collapse the text of certain rules, as shown in an example of Rule 4.2 included in today's meeting materials, by omitting the text of various sections that contained no new or amended language. The next meeting is set for Thursday, September 2, 2021, starting at 10:00 a.m. in Room 345. [Staff note: The September 2nd meeting was thereafter changed from an in-person meeting to a virtual one.]

5. Call to the public; adjourn. There was no response to a call to the public.

The meeting adjourned at 4:42 p.m.

