

Restitution Enforcement per ARS 13-810

- I. Probation Financial Compliance screens delinquent probationer's accounts and then prepares a list. My Clerk prepares Order To Show Causes; Assigned APO gives the OTSC to the probationer a monthly meeting and directs them to attend hearing.
- II. Enforcement Hearing
 - a. Amount of the Arrears (calculated by Financial Compliance)
 - b. Ability and/or Willingness to pay
- III. Consequences
 - a. Incarcerate Probationer set a purge amount (civil contempt)
 - b. Make a finding of Contempt and continue hearing with a payment plan to resolve arrears.
 - c. Continue hearing and implement a voluntary payment plan or a plan to get Probationer employed and paying.
 - d. Tax intercepts (state).

A.R.S. § 13-810

Title 13. Criminal Code ([Refs & Annos](#))

■§ 13-810. **Consequences of nonpayment of fines, fees, restitution or incarceration costs**

A. In addition to any other remedy provided by law, including a writ of execution or other civil enforcement, if a defendant who is sentenced to pay a fine, a fee or incarceration costs defaults in the payment of the fine, fee or incarceration costs or of any installment as ordered, the clerk of the court imposing the fine, fee or incarceration costs shall notify the prosecutor and the sentencing court. The court, on motion of the prosecuting attorney or on its own motion, shall require the defendant to show cause why the defendant's default should not be treated as contempt and may issue a summons or a warrant of arrest for the defendant's appearance.

B. In addition to any other remedy provided by law, including a writ of execution or other civil enforcement, if a defendant who is ordered to pay restitution defaults in the payment of the restitution or of any installment as ordered, the clerk of the court that imposed the restitution shall notify the prosecutor and the sentencing court on a monthly basis. The court, on motion of the prosecuting attorney, on petition of any person entitled to restitution pursuant to a court order or on its own motion, shall require the defendant to show cause why the defendant's default should not be treated as contempt and may issue a summons or a warrant of arrest for the defendant's appearance.

C. At any hearing on the order to show cause the court, the prosecuting attorney or a person entitled to restitution may examine the defendant under oath concerning the defendant's financial condition, employment and assets or on any other matter relating to the defendant's ability to pay restitution.

D. If the court finds that the defendant has wilfully failed to pay a fine, a fee, restitution or incarceration costs or *finds that the defendant has intentionally refused to make a good faith effort to obtain the monies required for the payment*, the court shall find that the default constitutes contempt and may do one of the following:

1. Order the defendant incarcerated in the county jail until the fine, fee, restitution or incarceration costs, or a specified part of the fine, fee, restitution or incarceration costs, is paid.

2. Revoke the defendant's probation, parole or community supervision and sentence the defendant to prison pursuant to law.

3. Enter an order pursuant to [§ 13-812](#). The levy or execution for the collection of a fine, a fee, restitution or incarceration costs does not discharge a defendant who is incarcerated for nonpayment of the fine, fee, restitution or incarceration costs until the amount of the fine, fee,

restitution or incarceration costs is collected.

E. If the court finds that the default is not wilful and that the defendant cannot pay despite sufficient good faith efforts to obtain the monies, the court may take any lawful action including:

1. Modify the manner in which the restitution, fine, fee or incarceration costs are to be paid.
2. Enter any reasonable order that would assure compliance with the order to pay.
3. Enter an order pursuant to [§ 13-812](#). The levy or execution for the collection of a fine, a fee, restitution or incarceration costs does not discharge a defendant incarcerated for nonpayment of the fine, fee, restitution or incarceration costs until the amount of the fine, fee, restitution or incarceration costs is collected.

F. If a fine, a fee, restitution or incarceration costs are imposed on an enterprise it is the duty of the person or persons authorized to make disbursement from the assets of the enterprise to pay them from those assets, and their failure to do so shall be held a contempt unless they make the showing required in subsection A or B of this section.

Proposed Rule Changes re Access to Public Records

Rules of the Supreme Court of Arizona

[Added text is shown underlined, deleted text is shown with ~~strikethrough~~]

Rules of the Supreme Court of Arizona

Rule 123. ~~Public~~ Access to the Judicial Records of the State of Arizona

* * *

(b) Definitions.

(1) *Bulk Data.* As used in this rule “Bulk Data” means all, or a significant subset, of the non-confidential case information maintained in a court case management system, either with or without modification or customized compilation.

~~(2)~~ (2) *Closed or Confidential (Records).* "Closed" or "Confidential", when used in this rule in reference to records, means that members of the public may not inspect, obtain copies of, or otherwise have access to such records unless authorized by law.

~~(3)~~ (3) *Commercial Purpose.* As used in this rule "Commercial Purpose" means the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or the obtaining of names and addresses from such public records for the purpose of solicitation or the sale of such names and addresses to another for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from direct or indirect use of such public records. "Commercial Purpose" does not mean the use of a public record as evidence or as research for evidence in an action in a judicial or quasi-judicial body of this state or a political subdivision of this state.

~~(4)~~ (4) *Court.* "Court" means the Supreme Court, the Court of Appeals, Superior Court, Justice Courts, Municipal Courts and all judges of those courts.

~~(5)~~ (5) *Court Administrator or Clerk of the Court.* "Court Administrator" or "Clerk of the Court" means a person employed, appointed or elected for the purpose of administering the operations of any court or court system.

~~(6)~~ (6) *Criminal History Record Information (CHRI).* "Criminal History Record Information" means only those records of arrests, convictions, sentences, dismissals and other dispositions of charges against individuals that have been provided to the court by the National Crime Information Center (NCIC), Arizona Crime Information Center

(ACIC), or any other criminal justice agency for use in juvenile and adult criminal justice cases, employment, licensing or other authorized investigations.

~~(6)~~ (7) Custodian. "Custodian" is the person responsible for the safekeeping of any records held by any court, administrative office, clerk of court's office or that person's designee who also shall be responsible for processing public requests for access to records.

(8) Custodian of Bulk Data. "Custodian of Bulk Data" means, depending on local practice, in a superior court or appellate court the custodian may be either the clerk of court or the presiding judge. In a justice of the peace or municipal court, the custodian is the presiding judge of the court.

~~(7)~~ (9) Information. "Information" is any recognizable alpha/numerical data which constitute a record or any part thereof.

~~(8)~~ (10) Judge. "Judge" means any justice, judge, judicial officer, referee, commissioner, court-appointed arbitrator or other person exercising adjudicatory powers in the judicial branch.

~~(9)~~ (11) Law. "Law" means statute, rule, administrative order, court order or case law.

~~(10)~~ (12) Presiding Judge. "Presiding Judge" means the presiding judge of the superior court for each county, or the chief judge for each division of the court of appeals or the chief justice of the supreme court. For municipal and justice courts "Presiding Judge" means the presiding judge of the superior court.

~~(11)~~ (13) Public. "Public" means ~~those persons who are not judges, clerks, administrators, professionals or other staff employed by or working under the supervision of the court, or employees of other public agencies who are authorized by state or federal rule or law to inspect and copy closed court records~~ all users of court records, including Arizona judicial officers and employees, employees of government agencies and private organizations.

~~(12)~~ (14) Record. "Record" means all existing documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of any official business by the court, and preserved or appropriate for preservation by the court as evidence of the organization, functions, policies, decision, procedures, operations or other governmental activities.

(A) Administrative Record. "Administrative record" means any record pertaining to the administration of the courts, court systems or any non-adjudicatory records.

~~(B) Case Record. "Case record" means any record pertaining to a particular case or controversy.~~

(B) Case Record. "Case Record" means:

(1) any record that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding; and

(2) any order, judgment, or minute entry that is related to a judicial proceeding; and

(3) any index, calendar, docket, or register of actions associated with a case or in connection with a judicial proceeding.

(15) Sensitive Data. "Sensitive Data" means social security number, bank account number, credit card number, other financial account number, a juvenile victim's name, and a victim's address and telephone number or other locating information.

(c) General Provisions.

* * *

(5) Judicial Officers and Employees. Arizona judicial officers, clerks, administrators, professionals or other staff employed by or working under the supervision of the court shall have such access as needed to carry out their assigned duties and as directed by their supervisor.

(6) Employees Of Government Agencies and Private Organizations. Employees of federal, state, tribal, and local government agencies and political subdivisions, and private organizations, in order to serve a public purpose, such as criminal justice, child welfare, licensing, mental health treatment, or research for scholarly, journalistic, political, or governmental purposes may be granted such access to court records as required to serve that purpose according to this rule or as provided by any supplemental supreme court policies or court order.

(7) Access to Bulk Data. Persons who execute a dissemination contract and disclaimer containing provisions specified by the supreme court may have such access as permitted by subsection (j) of this rule.

(d) Access to Case Records.

All case records are open to the public except as may be closed by law, or as provided in this rule. Upon closing any record the court shall state the reason for the action, including a reference to any statute, case, rule or administrative order relied upon.

(1) Juvenile Delinquency Proceedings Records.

(A) Records of all juvenile delinquency and incorrigibility proceedings are open to the public to the extent provided for in the Rules of Procedure for the Juvenile Court or by law.

(B) Records of all juvenile adoption, dependency, severance and other related proceedings are closed to the public as provided by law unless opened by court order.

(C) All information and records obtained in the course of evaluation, examination or treatment of juveniles who have been referred to a treatment program funded by the juvenile probation fund (pursuant to ~~ARS § 8-230.01, or renumbered as ARS § 8-321, effective June 30, 1998~~) or the family counseling fund (ARS § 8-261 et seq.) are confidential and shall not be released unless authorized by rule or court order. These records include, but are not limited to, clinical records, medical reports, laboratory statements and reports, or any report relating to diagnostic findings and treatment of juveniles, or any information by which the juvenile or his family may be identified, wherever such records are maintained by the court.

* * *

(e) Access to Administrative Records.

All administrative records are open to the public except as provided herein:

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(7) ~~Library Patron Records.~~ Records maintained in any court law library, clerk's office or court which link a patron's name with materials requested or borrowed by the patron, or which link a patron's name with a specific subject about which the patron has requested information or materials are closed. This provision shall not preclude a library, clerk's office or court from requiring that the request specify any commercial use intended for the records as provided in section (f) of this rule.

* * *

(12) ~~Judicial Branch Training Materials and Records.~~ Evaluation materials and records generated by participants in judicial education programs such as test scores, educational assessments, practical exercise worksheets, and similar materials are closed.

(13) ~~Certification Records.~~ Proprietary materials required to be submitted to the supreme court by applicants for certification or licensing are closed. Applicants for certification or licensure shall be responsible for clearly identifying any material they consider to be proprietary at the time the material is submitted.

(f) Access to Records in Paper Medium.

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(5) *Review of Denials to Access Records.*

(A) Any applicant who is denied the right to inspect, receive copies or access any record, bulk data, or compiled data pursuant to the authority of this rule, shall be entitled to an administrative review of that decision by the presiding judge. The request for review must be filed in writing with the custodian who denied the request within 10 business days of a denial made under Paragraph (f)(4) above. The custodian shall forward the request for review, a statement of the reason for denial and all relevant documentation to the presiding judge or a designee within 3 business days of the request for review. The presiding judge shall issue a decision as soon as practicable considering the nature of the request and the needs of the applicant, but not more than 10 business days from the date the written request for review was received.

(B) Any party aggrieved by the decision of the presiding judge may seek review by filing a special action in the Court of Appeals pursuant to the Rules of Procedure for Special Actions.

(g) Remote Electronic Access to Case Records.

(1) A court may provide remote electronic access to case records as follows:

(A) Parties, Attorneys, and Arbitrators. Parties, attorneys, and arbitrators may be provided remote electronic access, upon registering, to case records which are not sealed in all case types in which the person is an attorney of record, arbitrator, or named party, including an individual, partnership, corporation, association, or public or private organization. An attorney of record on the staff of a public or private law firm may extend access to any other attorney or person working for or on behalf of that public or private law firm, upon the other attorney's or person's registration.

(B) General Public, Registered Users.

(i) Members of the public who hold an Arizona driver license or nonoperating identification license may be provided remote electronic access, upon registering and paying any established fee, to all of the following categories of case records unless sealed or otherwise made confidential by rule or law:

(a) Civil case records in any action brought to enforce, redress, or protect a private or civil right but not:

- Juvenile dependency and delinquency or other matters brought under ARS Title 8;
- Family law, paternity, or other matters arising out of ARS Title 25;

- Orders of protection, injunctions against harassment and all proceedings, judgments or decrees related to the establishment, modification or enforcement of such orders, including contempt; or
- Probate proceedings brought under ARS Titles 14 and 32.

(b) Civil traffic case records in any action brought as such under ARS Titles 28 or 41 or a matter expressly designated as a civil traffic violation by a traffic ordinance of a city or town and any boating violation punishable by a civil sanction under ARS Title 5, chapter 3, articles 1 through 11, or expressly designated a civil violation or a boating ordinance by a city or town.

(c) Criminal case records in any action instituted by the government to punish offenses classified as a misdemeanor or felony brought pursuant to ARS Titles 4, 13, 28, or local ordinance.

(ii) The following documents shall not be accessible by remote electronic access to users registered under subsection (g)(1)(b) due to the inability to protect sensitive data that is likely to be contained within these documents:

- (a) Booking-related documents;
- (b) Warrants, including search warrants, confidential wiretaps, pen registers, handwriting exemplars, trap and trace, and bench warrants;
- (c) Charging documents, including criminal and civil traffic charging documents;
- (d) Pre-sentence reports;
- (e) Defendant's financial statement;
- (f) Disposition report;
- (g) Transcripts
- (h) The complete case record in criminal cases in which a juvenile is alleged to be the victim of sexual assault, including ARS §§ 13-1403, 13-3201, and 13-3552. The prosecuting agency, upon filing a charging document, shall advise the clerk that the case is subject to this provision.

Upon motion by a party, by any person, or upon the court's own motion, and for good cause shown, the court in which such action is pending, may issue an order to allow remote electronic access to members of the public, as provided in this section, to any case in which a juvenile is alleged to be the victim under (B)(ii)(h). The order may include any appropriate provision required to protect the juvenile from embarrassment or oppression. The burden of showing good cause for an order shall remain with the person seeking remote electronic access to the case record. Irrespective of an order limiting electronic access under this subsection, the clerk shall provide non-registered users remote electronic access as set

forth in section (C)(ii) herein when the court generally provides such non-registered access in other cases.

(iii) any federal, state, or local governmental entity may be provided remote electronic access at no charge, upon registering, and without producing an Arizona driver license or nonoperating identification license, to the same case records as may be provided to members of the public under section (g)(1)(B), in order to carry out a particular governmental responsibility as identified by the governmental agency and as authorized by the court or clerk.

(C) *General Public, Non-Registered Users.* Unless otherwise provided by rule or law, members of the public may be provided remote electronic access, without registering, to:

(i) The following data elements in closed cases, juvenile delinquency; mental health; probate and criminal cases in which a juvenile is alleged to be the victim, as identified in section (g)(1)(B)(ii)(h) above:

- Party names,
- Case number,
- Judicial assignment; and
- Attorneys' names

(ii) Individual case information in all civil, criminal, and civil traffic cases identified in subsection (g)(1)(b)(i)(a) through (c), and family law cases extracted from a case management system, such as a list of documents filed, events, dates, calendars, party names, month and year of birth, residential city, state and zip code, case number, judicial assignment, attorneys, charges filed or claims made, interim rulings, and case outcomes, including sentence, fines, payment history, minute entries, and notices.

(iii) court of appeals and supreme court opinions and decisions in all case types, except that any appendix in criminal cases in which a juvenile is alleged to be the victim, as identified in subsection (g)(1)(B)(ii)(h), above, shall not be provided by remote electronic access.

(2) Registration and fees. The registration process and fees for remote electronic access to case records shall be established by the supreme court and shall not exceed the cost of the service provided. All information provided by a potential user for registration purposes shall be closed.

(3) Courts and clerks of court shall not display case records online except as provided herein, as provided by ARS § 12-283(i), or as ordered by the court in a particular case. Any remote electronic access shall be conditioned upon the user's agreement to access the information only as instructed by the court, to not attempt any unauthorized access, and to consent to monitoring by the court of all use of the system. The court will also notify

users that it will not be liable for inaccurate or untimely information, or for misinterpretation or misuse of the data. Such agreement and notices shall be provided to the users in any manner the court deems appropriate. The court may deny access to users for failure to comply with such requirements. The court or clerk of court that establishes remote electronic access to case records may also establish limitations on remote electronic access based on the needs of the court, limitations on technology and equipment, staff resources and funding.

(4) Courts and clerks of court must clearly and prominently display current charge dispositions for any case which the court or clerk of court makes publicly available online.

(5) Removing case records from online access.

(A) Courts or clerks of court may remove case management system data and case records from online display once the applicable records retention schedule period is met.

(B) For cases scheduled to be retained more than twenty-five years, courts or clerks of court may remove case management system data and case records from online display after twenty-five years, if the data and records are then retained through an electronically preserved method. In place of the records, the court or clerk of court shall display a notice online which directs the viewer to contact the court or clerk for access to the case record.

(6) The clerk of the court, court, court agency, or their employees shall be immune from suit for any conduct relating to the electronic posting of case documents in accordance with this rule.

(7) Data or information which would disclose that a user of a remote electronic access system has accessed a particular court record is closed. Record access information shall be accessible by the public only on a showing of good cause pursuant to the process set forth in subsection (f) of this rule.

(8) This section shall not limit the public's right of access to records at a courthouse, whether in paper or electronic format.

~~(g)~~ **(h) Access to Audiotape, Videotape, Microfilm, Computer or Electronic Based Records.**

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~~(5) Remote Electronic Access to Records and Cost.~~

~~(A) Pursuant to the provisions of this paragraph, every presiding judge may authorize on-line, remote electronic access to both case and administrative records in their respective courts. Fees may be charged for the value added and custom~~

~~remote electronic access service as authorized by ARS §§ 12-119.02, 12-120.31, 22-281.01, 22-404.01 and 12-284.02. The fees shall be based on the recovery of costs incurred in the provision of remote electronic access, including the cost of providing a general public access information system, but shall not exceed the applicable statutory limits. For the supreme court, court of appeals and superior court records, the fees shall be paid to the clerk of each respective court. For justice and municipal court records, the fees shall be paid to an appropriate official designated by the court. The presiding judge of the superior court will consult with the local funding authority before any municipal court fee is imposed.~~

~~(B) Prior to establishing value-added remote electronic access for which fees are charged, each court shall establish a remote electronic access information system that, subject to available funding, will be available to the general public without additional court fees. At a minimum, both the public remote electronic access system and the value-added remote electronic access shall permit access to information by case number, party name and counsel name, if maintained electronically. Both systems shall contain the same case data elements. Any difference between the two systems shall be limited to providing enhanced services in the value-added remote electronic access, such as guaranteed response times and service levels, search and reporting tools, help desk services, etc. Courts are encouraged to make data elements available to both systems at the same time. If a court chooses to make additional data elements available in the value-added remote electronic access system first, the same data elements must be made available in the public remote electronic access system within six months.~~

~~(C) Additional policies and procedures for remote electronic access to court records shall be adopted when necessary by the supreme court through subsequent rules or separate administrative orders after considering applicable comments and recommendations, including those of the court's Commission on Technology and the Arizona Judicial Council.~~

~~(D) Any on-line electronic access shall be conditioned upon the user's agreement to access the information only as instructed by the court, to not attempt any unauthorized access, and to consent to monitoring by the court of all use of the system. The court will also notify users that it will not be liable for inaccurate or untimely information, or for misinterpretation or misuse of the data. Such agreement and notices shall be provided to the users in any manner the court deems appropriate. The court may deny access to users for failure to comply with such requirements.~~

~~(E) For value-added or custom remote electronic access, each court will utilize a published standard fee schedule or written contracts with each subscriber. The fee schedule or contract shall set forth the services and service levels to be provided, the fee structure, manner of billing, payment requirements, and grounds for~~

~~termination of the service. The state of Arizona, its county and municipal governments and agencies shall be exempt from such fees.~~

~~(F) The presiding judge of each court may establish limitations on remote electronic access based on the needs of the court, limitations on technology and equipment, staff resources and funding.~~

~~(G) All courts and clerks of court shall employ appropriate security measures, procedures, devices and software to protect assets and records and to prevent unauthorized access.~~

~~(J) Communication protocols shall be adopted that are consistent with standards adopted for the Arizona Judicial Information Network (AJIN) as reflected in Supreme Court Administrative Order 95-37. Free public remote electronic access shall, at a minimum, be available by means of standard telnet or an industry-standard hypertext mark up language (HTML) browser. By December 31, 1999, a single non-proprietary, open systems communications protocol for value-added and custom remote electronic access shall be determined by the Commission on Technology. By January 30, 2004, all courts shall comply with and use the communication protocols and standards adopted for remote electronic access by the Commission on Technology.~~

(5) Correcting Data Errors; Administrative Review.

(A) An individual seeking to correct a data error or omission in an electronic court record shall be entitled to apply for relief with the court in which the original record was filed. If the record was filed in a superior court, the request should be made with the clerk of the superior court. If the record was filed in a justice court, the request should be made with the justice of the peace. If the record was filed in a municipal court, the request should be made to the presiding municipal court judge.

(B) If the request is denied, the individual may then apply for administrative review of that decision by the presiding superior court judge. The request for administrative review must be filed in writing with the custodian who denied the request within ten business days of a denial. The custodian shall forward the request for review, a statement of the reason for denial and all relevant documentation to the presiding superior court judge or a designee within three business days of the request for review. The presiding superior court judge shall issue a decision as soon as practicable considering the nature of the request and the needs of the applicant, but not more than ten business days from the date the written request for review was received.

(C) Any party aggrieved by the decision of the presiding judge may seek review by filing a special action in the court of appeals pursuant to the rules of procedure for special actions.

~~(h)~~ **(i) Inspection and Photocopying.**

* * *

(j) Bulk or Compiled Data Dissemination in Bulk.

(1) Requests for Bulk or Compiled Court Data

(A) Before releasing bulk data, a custodian shall require the recipient to execute a dissemination contract and disclaimer containing provisions specified by the supreme court.

(B) A custodian of bulk data may contract with a private company or public organization for the provision of bulk data and specialized reports of compiled data under this policy.

(2) Denying Requests for Bulk Data. The custodian may deny a request for bulk data in compliance with supreme court rule 123(c)(1), (f)(4), or (h)(4)(A).

(3) Personal Identifiers Available in Bulk Court Data. The custodian of bulk data may release data that contains the following personal identifying information about a petitioner, plaintiff, respondent, or defendant other than a petitioner seeking an order of protection:

(A) Address

(B) Month and year of birth

(C) Last four digits of the social security or driver license number.

(4) Bulk or compiled data dissemination in bulk is not permitted except as provided in this rule or as permitted by court order.

Arizona Rules of Criminal Procedure

Rule 2.3. Content of complaint

(A) A complaint is a written statement of the essential facts constituting a public offense, that is either signed by a prosecutor, or made upon oath before a magistrate, or made in accordance with ARS § 13-3903.

(B) Upon filing a charging document in a criminal cases in which a juvenile is alleged to be the victim of sexual assault, such as ARS §§ 13-1403, 13-3201, and 13-3552, the prosecuting agency shall advise the clerk that the case is subject to the provisions of Rules of the Supreme Court of Arizona, Rule 123(g)(2)(B)(ii)(h).

Arizona Rules of Civil Procedure

Rule 5. Service and filing of pleadings and other papers

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5(f) Sensitive Data

A. In all civil cases, a filer shall refrain from including the following sensitive data from all pleadings or other documents filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court or as otherwise provided by law:

1. Social Security Numbers. If an individual's social security number must be included in a pleading or other document, only the last four digits of that number shall be used.
2. Financial Account Numbers. If financial account records are relevant or set forth in a pleading or other document, only the last four digits of these numbers shall be used.
3. Juvenile Victim's Name. If a juvenile victim must be identified in a pleading or other document, only the initials of the juvenile victim shall be used. In the alternative, the filer may refer to the juvenile victim in a manner that shields the identity of the juvenile victim in the context of the proceeding, for example, by symbol, such as child a, child b, or as doe 1, doe 2, or by the child's status, such as victim.

4. Victim's Address And Telephone Number Or Other Locating Information. If a victim's address is relevant, only the city and state shall be used.
- B. The responsibility for redacting sensitive data shall rest solely with counsel, the parties, or any other filer. The clerk of the court or the court is not required to review documents for compliance with this rule, seal documents that contain sensitive data on the clerk's own initiative, or redact pleadings or other documents. However, subject to Rule 123(h)(5), Rules of the Supreme Court of Arizona, each court shall develop procedures for correcting data errors, redacting sensitive data, and sealing case records in a civil case that is subject to availability by remote electronic access when such errors, sensitive data, and sealing are brought before the court.
- C. For violation of this rule, the court may impose sanctions against counsel or the parties to ensure future compliance with this rule.

Commission on Victims in the Courts
DRAFT MINUTES
Friday, November 14, 2008
10:00 am to 2:00 pm
State Courts Building
1501 W. Washington Street
Phoenix, AZ 85007
Conference Room 345A/B

Members Present:

Ms. Patricia Bigwood
Ms. Sarah Vasquez for Mr. Michael Branham
Dr. Kathryn Coffman
Mr. Paul Ahler for Mr. Edwin Cook
Ms. JoAnn Del Colle (Telephonically)
Ms. Karen Duffy
Cpt. Larry Farnsworth
Ms. Daisy Flores (Telephonically)
Ms. Leslie James
Mr. Dan Levey
Hon. Anna Montoya-Paez
Hon. William O'Neil
Mr. Paul Prato
Hon. Ronald Reinstein (Chair)
Hon. Antonio Riojas, Jr.
Hon. Richard Weiss

Members Absent:

Attorney General's Office Representative
Hon. Lex Anderson
Mr. James J Belanger
Ms. Sydney Davis
Hon. Carter Olson
Mr. Doug Pilcher
Ms. Karen Sullivan
Mr. Steve Twist
Ms. Kathy Waters

Presenters/Guests:

Hon. Anna Baca
Ms. Libby Bissa
Ms. Stephanie Bradley
Ms. Jennifer Greene
Mr. Bob James
Ms. Kim Knox
Mr. Bill Owsley
MCAO staff

Staff:

Ms. Carol Mitchell
Ms. Kimberly Reid

I. Regular Business

A. Welcome and Opening Remarks

The November 14th meeting of the Commission on Victims in the Courts was called to order by Chair, Honorable Ronald Reinstein, at 10:10 am. The Chair announced that Sydney Davis is not at the meeting today because she is involved in a theatrical production.

B. Approval of September 12, 2008 Minutes

Minutes for the March 28, 2008 Commission on Victims in the Courts meeting were presented for approval.

MOTION: To approve the March 28, 2008 Commission on Victims in the Courts minutes as presented. *Motion seconded and passed unanimously.*

Announcement: Reappointments will be taking place shortly. For those whose terms are expiring, please inform Carol Mitchell if you would like to be reappointed.

II. Business Items / Potential Action Items

A. Criminal Rule 10.5 Petition

Hon. Anna Baca spoke on the petition. She noted that the data cited in this rule petition is from 2005. This rule states that once a case has been placed into case transfer, if it is not scheduled to be heard in the next 24 hours, there must be 5 business days notice of the later scheduled date. Currently almost all cases are removed from case transfer within 2 days. Judge Baca presented a statistical overview for the number of days cases were waiting in case transfer: 2006= up to 40 days; 2007=up to 20 days and in 2008 the average time is less than 2 days. The Court's position is that this rule change would add a significant waiting time.

Discussion:

- Dan Levey brought up concerns about the amount of notification time needed for victims to make new arrangements for childcare and work. Judge Baca responded that because the trials are only being delayed by such a short amount of time this shouldn't be an issue.
- Leslie James hypothesizes that perhaps this rule is proposed to continue the new case transfer methodology though formal administrative changes.
- Bob James says that this rule guarantees delays that the current system is able to overcome.
- The petition was filed in September of this year, so some people apparently the petitioners still think this is a problem.

MOTION: To postpone a vote on this rule until the next meeting when Mr. Twist and members from the Maricopa County Attorney's Office are available for comment and the vote can fall within the comment period. *Motion seconded and passed unanimously.*

Action Item: Ensure that a representative from the Maricopa County Attorney's Office and Mr. Steve Twist is available at the next meeting for comment/questions.

B. Restitution Research/Rule Conflict

Ms. Jennifer Greene presented information regarding the updated rule changes. She found two federal district court opinions on the stay of disbursement of restitution pending appeal. In both cases the government had to reimburse the defendants whose appeals were successful. A process to address this potential problem should be created before the situation comes up.

Discussion

- Mr. Paul Prato thinks that this proposed rule conflicts with 13-804(D), limiting the discretion to hold or disburse payments. By allowing the courts to hold the payments until the appeal has been decided, a balance has been reached. Additionally, he this could open the victim up to further problems if the appeal is successful and victims have to repay the defendant or possibly face a civil lawsuit. Finally, a balance should be found between defendant's due process rights and victims' constitutional rights.
- Hon. Riojas thinks that this rule could have massive implications on the limited jurisdiction courts. Currently judges are staying restitution orders upon appeal so the defendants aren't paying into the system until the appeal is decided on.
- Hon. O'Neil: This rule opens the door for more people to file a rule 32 stay of the restitution order. The rule needs to recognize the two different world of the court; limited and general jurisdiction.
- Mr. Levey: when a case is reversed we are always open to litigation whether there is restitution or not.

Motion: To approve the rule petition and request that it is forwarded through the rule process. *Motion seconded.*

Motion to Amend: Only amend Rule 31.6 and Rule 103 and exclude the references to Superior Court Rules of Appellate Procedure and limited jurisdiction courts. *Motion to amend seconded and passed unanimously.*

Original motion with the amendment passed with 14 aye and 2 nay votes.

Action Item: Carol and Jennifer will make the necessary changes to the rule petition to include it in the AJC mailing that will occur on Monday 11/17/08.

C. Child in the Court Rule Petition Proposal

Dr. Kathy Coffman and Bill Owsley presented the proposal. The proposal is based on the ABA standards for child representation. The biggest struggle in the process was determining whether to follow the GAL or the attorney model in the rule petition. The basic overview of the rule is to set up standards by which attorneys and GALs representing children must follow, so that child victims/clients receive the improved representation.

Discussion

- Judge O'Neil applauds this proposal because it has vision. He thinks that discovery and flexibility are extremely important.
 - The Attorney and the GAL should never be the same person.
 - The words "abuse and neglect cases" should be removed from the title. None of these standards should be limited to certain cases. It should be all cases in which they are representing the child.
 - These rules should be part of a Code of Judicial Administration.
- Judge O'Neil recommended the following changes :
 - Part I, Item B-1 (1) - "without cost" should be added.
 - Page 2, footnote 2 should be added as a rule instead of a comment.
 - Page 3, C-1. The last sentence should read, "The attorney and guardian ad litem may use trained and qualified staff to conduct visits with the child following *any hearing*"
 - Page 5, Item D-5. Remove "dependency proceeding" from the sentence, "...the child who is the subject of a dependency proceeding shall be present."
 - Page 5, Item D-5. Remove "of the child" from the sentence, "Upon motion of the child, the court may enter a written order..."
 - Page 8, Item G. Remove "dependency" because these rules apply to more than just dependency cases.

MOTION: To forward on and to be considered by the Arizona Judicial Council for the amendment to the rule and for consideration as part of the Administrative Judicial Code (including the changes discussed today). *Motion seconded and passed unanimously.*

Announcement: Mr. Owsley will be representing this item at AJC as Judge Reinstein and Dr. Coffman will be out of town.

D. Proposed 2009 Meeting Dates

MOTION: To approve 2009 meeting dates: February 6th; May 8th; September 11th and November 6th. *Motion seconded and passed unanimously.*

E. Fatality Review Presentation

Libby Bissa conducted a presentation as part of the City of Phoenix Domestic Violence Fatality Review Team. The presentation included information about the team, their most recent fatality review and how it impacts the courts. She also passed around a Fatality Review Sheet.

III. Business

A. Next Meeting:

February 6, 2009
State Courts Building
Phoenix, AZ 85007

B. Call to the Public

None.

C. Adjournment

Quorum was lost during the last presentation, effectively ending the meeting without adjournment.

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2 MARICOPA COUNTY ATTORNEY
3 (FIRM STATE BAR No. 0003200)
4 PHILIP J. MACDONNELL
5 (STATE BAR NUMBER 003813)
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19 IN THE SUPREME COURT OF THE STATE OF ARIZONA

20 In the Matter of
21
22 PETITION TO AMEND RULE 10.5,
23 ARIZONA RULES OF CRIMINAL
24 PROCEDURE

Supreme Court
No. R- _____
PETITION TO AMEND RULE 10.5 OF
THE ARIZONA RULES OF CRIMINAL
PROCEDURE

25 The Maricopa County Attorney and Arizona Voice for Crime Victims hereby move, pursuant to
26 Rule 28 of the Arizona Rules of the Supreme Court, to amend Rule 10.5 of the Arizona Rules of

27 ///
28 ///
///
///
///

1 Criminal Procedure by creating a new paragraph "C", which addresses the transfer of cases already set
2 for trial due to the unavailability of the trial judge.

3 Respectfully submitted this 3 day of September, 2008.

4
5
6 BY: 
7 STEVE TWIST
8 PRESIDENT, ARIZONA VOICE FOR CRIME
9 VICTIMS

10 ANDREW P. THOMAS
11 MARICOPA COUNTY ATTORNEY

12 BY: 
13 PHILIP J. MACDONNELL
14 CHIEF DEPUTY

15 JEFFREY TRUDGIAN
16 DEPUTY COUNTY ATTORNEY

17 REBECCA BAKER
18 DEPUTY COUNTY ATTORNEY

1 **I. SUMMARY OF PROPOSED CHANGE**

2 In Maricopa County, the case transfer system was created by the Superior Court to address the
3 problem of having multiple criminal cases set for trial at the same time before the same judge. In this
4 system, if an assigned trial judge is not available on the day of the scheduled trial, the case is systematically
5 placed onto a list of cases awaiting trial. As judges become available for trial, they contact court
6 administration to accept a case from the case transfer list. A trial can be delayed for a day to weeks at a
7 time, waiting for a Superior Court judge to become available. This system leaves the parties, as well as
8 crime victims and witnesses, in limbo for an indefinite period of time. This can create enormous notice
9 problems for attorneys, witnesses and victims who suddenly find themselves in trial after being in a
10 “holding pattern” for weeks. The trial may then commence the day it is assigned to a new judge.

11
12 The proposed amendment to Rule 10.5 addresses problems which arise when a criminal case is
13 transferred from one trial judge to another, based upon the unavailability of the assigned trial judge. If the
14 trial does not begin by the business day following the scheduled trial date, the amendment requires the
15 newly-assigned trial judge to provide the parties with at least five business days notice of when the trial
16 will actually commence. The purpose of the proposed rule change is to address the systematic problems
17 that occur when a trial judge has multiple cases ready for trial at one time, requiring a delay in the trial as
18 the matter is awaiting transfer to a new judge.

19
20
21 The amendment is being jointly proposed by the Maricopa County Attorney’s Office and
22 Arizona Voice for Crimes Victims. The Maricopa County Attorney’s Office is responsible for the
23 prosecution of more than 40,000 felony criminal cases each year.

24
25 Arizona Voice for Crime Victims is an organization dedicated to ensuring that crime victims
26 receive their rights to justice, due process and dignified treatment throughout the criminal justice
27 process. The vision of Arizona Voice for Crime Victims is to establish a compassionate justice
28

1 system in which crime victims are informed of their rights, fully understand those rights, know how
2 to assert their rights, have a meaningful way to enforce those rights, and know how to seek
3 immediate crisis intervention when they become victims of crime.

4 **II. PRACTICAL EFFECTS OF THE CURRENT SYSTEM**

5
6 The case transfer system in Maricopa County leads to predictable miscarriages of justice as
7 attorneys are routinely forced to put their case together in as little as a day's notice of a new judge being
8 assigned to the case. This includes requiring attorneys to notify, and perhaps even re-subpoena, victims
9 and witnesses upon receiving notice that they have been assigned to a new judge for trial. This can be
10 especially difficult for victims or witnesses from lower socio-economic backgrounds, who are
11 unfortunately commonly involved in criminal prosecutions due to the locations and circumstances which
12 tend to produce crime. Often, these individuals do not have a phone number by which they can be easily
13 reached. That makes it very likely that the victim or witness will not find out that trial has been delayed
14 until they have actually appeared for trial at the scheduled time and location. Once the case is in the case
15 transfer system, if an attorney has less than a day's notice of a trial beginning before a new judge, ensuring
16 that the victim and witnesses are aware of when and where they will next be required to appear will be
17 difficult and time consuming. In-person contact may be necessary based on a number of variables outside
18 the control of the parties.
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21 The parties and witnesses must also make allowances in their daily schedules for whatever trial
22 schedule the newly-assigned judge intends to follow. This can be particularly demanding as some judges
23 only conduct trials on certain days of the week, and others may only conduct trial in the afternoons.
24 Victims and witnesses who have already had to made accommodations to their work and daily schedules
25 are then forced to make last minute changes which could result in having to take additional time off from
26 work or cancel important personal matters. Thus, they may have no choice but to use additional vacation
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28

1 time or take additional time off from work without pay. This can cause victims and witnesses to have to
2 reschedule or cancel vacations and personal appointments or find last minute daycare.

3 Additionally, a last minute change in the judge often results in a change in the location of the trial
4 which may present transportation issues for the parties, victims and witnesses. In Maricopa County the
5 two courthouses which handle criminal matters are approximately 20 miles apart, directly in the flow of
6 commuter traffic. Moreover, counsel (generally the prosecutor) often is forced to present his or her
7 witnesses out of order when a case in case transfer is suddenly set for trial. This results in a jury receiving
8 the evidence in an illogical or unorganized manner. Giving the parties at least five business days notice of
9 a new trial date will provide the parties with sufficient time to address all of these issues once a case has
10 been assigned to a new trial judge.
11

12 A longer-term problem is that witnesses and victims conclude that the criminal justice system is
13 incompetent and arbitrary. An unfortunate yet foreseeable result is that they become reluctant to re-
14 involve themselves in the criminal justice system due to their prior negative experience. The case transfer
15 system in Maricopa County too often treats the participants as fungible pieces of evidence rather than those
16 who are doing a civic duty while sacrificing personal time and other priorities.
17
18

19 **III. VICTIM'S RIGHTS**

20 The proposed amendment to Rule 10.5 is needed as the case transfer system currently does not
21 provide adequate notice to victims of sudden changes in trial date and location. The Victims' Bill of
22 Rights guarantees victims rights under the Arizona State Constitution to preserve and protect their rights
23 to justice and due process. Arizona Revised Statute § 13-4418 specifies that the victims' rights statutes
24 "shall be liberally construed to preserve and protect the rights to which victims are entitled."
25
26

27 The Victims' Bill of Rights provides victims the rights to "justice and due process," to be treated
28

1 with fairness,” and a “speedy trial or disposition and prompt and final conclusion of the case after the
2 conviction and sentence.” Ariz. Const. Art. II, § 2.1(A) (1), (10); These rights are further implemented
3 through both Statutes and Rules. See, e.g. A.R.S. §13-4409 (implementing the right the notice of all
4 criminal proceedings), Ariz. R. Crim. P., Rule 39(b)(15). Pursuant to Rule 39(b)(3)&(4) of the Arizona
5 Rules of Criminal Procedure, a victim has the “right to be given *reasonable notice* of the date, time and
6 place of any criminal proceeding” and “to be present at all criminal proceedings.” (emphasis added.)
7

8 Further, A.R.S. § 13-4409 specifically requires the prosecution to “give notice to the victim in a
9 timely manner of scheduled proceedings and any changes in that schedule.” To facilitate this, A.R.S. §
10 13-4409 provides that “the court shall provide notice of criminal proceedings ... to the prosecutor's
11 office at least *five days before* a scheduled proceeding to allow the prosecutor's office to provide notice
12 to the victim.” (emphasis added.) The statute requires the court to create a record on those occasions
13 when the court finds it is not reasonable to provide five days notice. Clearly, the case transfer system,
14 on its face, ignores victims’ rights and frequently violates the Constitutional rights of victims.
15

16 17 **IV. EXAMPLE**

18 There have been many cases which have shown the problems inherent in the Maricopa County
19 case transfer system. One example that exemplifies many of these problems is *State v. Ronnie James*
20 *Taft*, CR 2005-111795-001 DT . This case involved multiple delays resulting in a dismissal with
21 prejudice by the trial court. Ultimately, this dismissal was appealed and reversed by the Arizona Court
22 of Appeals, Division I.
23

24 The defendant was charged with Burglary in the Second Degree, a class three felony, pursuant to
25 A.R.S. § 13-1507. Thus, the case had Victims’ Rights implications. The defendant’s original “last day”
26 pursuant to Rule 8 of the Arizona Rules of Criminal Procedure was calculated to be September 25,
27
28

1 2005. Trial was initially set for July 25, 2005, two full months prior to the expiration of the defendant's
2 speedy trial rights.

3 On August 17, 2005, the trial was continued for the first time, to September 26, 2005, due to
4 scheduling conflicts for both counsel and defense counsel's need to complete two additional pre-trial
5 interviews. On September 26, 2005, a second defense motion to continue the trial was granted with a
6 Rule 8 time waiver. According to the pleading, defense counsel had just completed a trial on Friday,
7 September 23, 2005, and needed more time to prepare for this trial. The trial was continued for week to
8 October 3, 2005 and a new "last day" was set for November 4, 2005. State's counsel appeared to be
9 ready for trial on September 26, 2005, but did not object to the motion to continue out of professional
10 courtesy.
11

12 On October 3, 2005, the original trial judge Douglas Rayes was unavailable to proceed due to his
13 own scheduling conflicts. For this reason, he placed the case into the case transfer system. On October
14 6, the State filed a motion to continue because the trial did not start as scheduled and the prosecutor had
15 a long-planned vacation from October 11th to October 16th, 2005. She filed the motion because it was
16 not clear if the case would be picked up by a new judge while she was unavailable to try to the case.
17 Judge Rayes retained the case in his Division thereafter and reset the trial date to October 17, 2005,
18 indicating that the case would be placed back in case transfer on that date.
19

20 Sometime after October 17, 2005 (no Minute Entry was filed), the case was taken out of case
21 transfer by Judge Gerald Porter. The prosecutor recalls that only a few days had passed before the case
22 was taken out of case transfer by Judge Porter. However, his Division was understaffed for the trial and
23 so the case languished further. During this interim period, a necessary witness for the State clarified
24 that he was unavailable from October 26th through November 11th, 2005, due to a pre-planned trip to
25 Michigan.
26
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1 Given this new information, the State filed a motion to continue on October 25th, 2005. The
2 motion stated that “the trial date was originally scheduled for August 17th and then September 26th; both
3 trial dates were continued by the defense without objection by the State. The parties originally entered
4 into case transfer on October 3, 2005 and then again on October 17, 2005. Both parties are prepared to
5 begin trial [after November 11th, 2005].” The motion also proposed, as an alternative, that a jury be
6 picked on October 27th and be brought back for the two-day trial in mid-November.
7

8 The State subsequently learned that Judge Porter was not inclined to continue the trial. Thus,
9 given the witness issue, the State filed a motion to dismiss without prejudice and avowed that it was not
10 made for the purpose of avoiding Rule 8. On October 28, 2005, Judge Porter heard arguments on the
11 motion to continue and the motion to dismiss without prejudice. At this hearing, he not only denied the
12 motion to continue, but found there was no good cause to dismiss the case without prejudice.
13 Accordingly, he dismissed the case *with* prejudice. The Court noted that it was a victim case, but added
14 that “at the end of the day, we have specific rules in place that are for the benefit of the defendant...”
15 Transcript of hearing, 10/28/08. The defendant received this case dispositive ruling despite having six
16 prior felony convictions against him as alleged by the State in its pleadings. Moreover, the dismissal
17 occurred one week prior to the defendant’s “last day,” which in turn fell only one week prior to the
18 availability of the State’s main witness for trial. The State appealed this decision.
19
20

21 On February 1, 2007, the Arizona Court of Appeals overturned the trial court’s dismissal with
22 prejudice in a Memorandum Decision, 1 CA-CR 1183¹. The Court took the opportunity to comment on
23 the practical effects of the Maricopa County case transfer system. The Court analyzed the series of
24 events in this particular case as follows:
25

26
27 ¹ This memorandum decision is not being cited as precedent for any particular legal finding. Rather, the case is cited as a
28 factual analysis of the Maricopa County case transfer system as applied to an actual criminal case. 17A A.R.S. Sup.Ct.Rules,
Rule 111.

1 The State was forced to move for a dismissal of the case because the
2 Superior Court was unable to procure a trial judge during the time that
3 the case was in case transfer. As a result of that delay, a necessary
4 witness became unavailable. Consequently, the State found itself in a
5 position of not being able to go forward with the case on October 28,
2005 because of Maricopa County's case transfer system and the lack of
any judicial officer available to try the case during the time that the case
was in case transfer.

6 *Id.* at 8-9. The Court found that a dismissal with prejudice was inappropriate because the defendant
7 failed to show actual prejudice. It also found that the various delays were caused by the "inefficiency
8 and ineffectiveness" of Maricopa County's case transfer system. *Id.* at 9.

9 The Court of Appeals did not do a strict "victims' rights" analysis in coming to its conclusion.
10 Clearly, however, the Court was able to conclude that Maricopa County's case transfer system is flawed.
11 As a result of the delays, the case could not be tried and was dismissed. Even if the dismissal had been
12 without prejudice, as would have been appropriate, the defendant would have been released absent the
13 immediate re-filing of the case. That issue has implications on not only the victim involved in the case
14 that is dismissed, but also potential victims.

15 Upon the apprehension of the defendant on multiple new offenses², the victim was re-contacted
16 by the prosecutor who handled the case. The victim expressed that he was still extremely frustrated
17 with the entire process he had been through. When he learned that the defendant was in prison on new
18 offenses, the victim indicated that he did not want to go through the process again. Given the passage of
19 time, there may have been other witness issues with the case as well.

20 ² Ronnie Taft is presently in the Arizona Department of Corrections. The Court of Appeals was unable to correct the trial
21 court's decision until its opinion was published on February 1, 2007. The State was, of course, unable to refile the Burglary
22 case in the interim period due to the prejudice attached to the dismissal. He had been in jail pending trial in this case and was
23 released upon its dismissal. The defendant was arrested again multiple times after his release and ultimately charged in four
24 separate complaints. He was charged with crimes occurring on March 19, 2006 (CR 2006-114890-001 DT); June 14, 2006
25 (CR 2006-011459-002 DT); August 21, 2006 (CR 2006-011396-001 DT); and September 6, 2006 (CR 2006-155174-001
26 DT). The defendant ultimately pled guilty to Burglary in the Third Degree, Possession of Narcotic Drugs for Sale, and
27 Armed Robbery - each committed on a separate occasion. The fourth complaint was dismissed in conjunction with the plea
28 agreement. The defendant was imprisoned for ten years (having received concurrent terms) only due to committing these new
crimes involving new victims.

1 *State v. Ronnie Taft* is but one example of the problems inherent in the Maricopa County case
2 transfer system. Constant uncertainty in the availability of a trial judge is especially prejudicial to the
3 State because the entire burden of proof rests on its shoulders. With this burden comes the necessity of
4 having most or all of the witnesses lined up and available for trial. It is simply unrealistic to expect all
5 of the State's witnesses to be available on short notice over an extended period of time given the hectic
6 daily schedules of attorneys, witnesses and victims who are people from all walks of life. The result of
7 this is predictable: many cases do not hold together, resulting in dismissal or last-minute plea
8 agreements that do not reflect the severity of the charges. These many people end up justifiably feeling
9 abused by the criminal justice system because they are, in fact, taken for granted and relegated to the
10 sidelines during the process. A cursory survey will reflect that similar injustice is rampant due to
11 Maricopa County's case transfer system.³

14 **V. CONCLUSION**

15 The proposed amendment requires a court to provide the parties with at least five business days
16 notice of the date a trial will actually begin. This would ensure that the parties have sufficient time to
17 notify and schedule the victims or witnesses that will need to appear. The proposed amendment also
18 allows the court to begin trial in less than five business days in those cases in which both parties are
19 ready and consent to starting the trial sooner. Having this kind of flexibility in the Rule will ensure the
20 parties have sufficient time to notify all victims and witnesses, while taking into account that, in some
21 situations, the parties may not need or desire five business days to make those arrangements.

23 Additionally, the proposed amendment recognizes that finding a new judge to preside over the
24 trial the very same day that the trial is scheduled to begin may not be realistic. This proposed
25

27 ³The Maricopa County Attorney's Office has interviewed many attorneys regarding these issues and has found them to
28 be systemic. Due to the nuance involved in each case, only one has been specifically cited for the purpose of brevity and
because it was subject to appellate review.

1 amendment will only apply to those cases in which the delay in starting the trial is more than one
2 business day after the scheduled trial date, giving the court one business day to find another trial judge.
3 Delaying the start of a trial two or more business days after the scheduled trial date is likely to cause the
4 parties to have difficulty in rescheduling the appearance of the victim and witnesses.

5 Most importantly, in Arizona, crime victims have Constitutional rights to justice and due
6 process, to be treated with fairness, and to fair notice of hearings that involve or affect them. The
7 Maricopa County case transfer system does not adequately safeguard this right. The proposed Rule
8 change would conform Rule 10.5 of the Rules of Criminal Procedure with the Victims' Bill of Rights
9 and Arizona Revised Statutes. This new Rule would ensure that on those occasions when a scheduled
10 trial is delayed by more than one business day, adequate notice of the new date will be provided to the
11 parties so that they can make any necessary arrangements to ensure their appearance and the appearance
12 of all necessary witnesses.
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16 VI. EXPEDITED CONSIDERATION

17 Pursuant to Rule 28(G) of the Rules of the Supreme Court, the Petitioner submits this request for
18 expedited consideration by the Court, as the compelling circumstances presented in the petition render the
19 annual processing cycle inadequate to timely address this urgent matter.
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EXHIBIT A

Text of Proposed Rule Change

(Rule 10.5 (A) & (B) remain unchanged, language for a new paragraph C is capitalized.)

C. UNLESS BY CONSENT OF ALL PARTIES AND AFTER GOOD FAITH ATTEMPT BY THE PROSECUTOR TO CONSULT WITH THE VICTIM, IF A CASE IS TRANSFERRED FROM THE ASSIGNED TRIAL JUDGE TO A NEW TRIAL JUDGE FOR TRIAL AND THE TRIAL DOES NOT COMMENCE BY THE BUSINESS DAY FOLLOWING THE SCHEDULED TRIAL DATE, THE NEW TRIAL JUDGE SHALL PROVIDE THE PARTIES AND ANY ATTORNEY WHO HAS FILED A NOTICE OF APPEARANCE ON BEHALF OF A VICTIM WITH AT LEAST 5 BUSINESS DAYS NOTICE OF THE ACTUAL DATE THE TRIAL WILL COMMENCE BEFORE THE NEW JUDGE. ALL TIME BETWEEN THE DATE OF THE TRANSFER AND THE COMMENCEMENT OF THE TRIAL BEFORE THE NEW TRIAL JUDGE SHALL BE EXCLUDED FROM RULE 8.2 TIME COMPUTATION. BEFORE ANY TRANSFER OF A CASE, THE COURT SHALL CONSIDER THE IMPACT OF THE TRANSFER ON THE RIGHTS OF THE VICTIM TO JUSTICE AND DUE PROCESS, TO NOTICE OF PROCEEDINGS, AND TO A SPEEDY TRIAL.

David K. Byers, Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO ADD RULE 57.1 AND)
RULE 57.2, ARIZONA RULES OF) Supreme Court No. R-08-____
CIVIL PROCEDURE)
_____)

Pursuant to Arizona Supreme Court Rule 28, David K. Byers, Director, Administrative Office of the Courts, respectfully petitions this Court to adopt the attached proposed new Rules 57.1 and 57.2 of the Arizona Rules of Civil Procedure to govern actions filed pursuant to A.R.S. sections 12-771 and 12-772.

I. Background and Purpose of the Proposed New Rules. House Bill 2321 was passed in the Second Regular Session of the Forty-eighth Legislature (2008). The bill's effective date is January 1, 2009. The bill added Article 17 to Title 12, Chapter Six, specifically A.R.S. sections 12-771 and 12-772.

A.R.S. section 12-771 allows a person whose personal identifying information was used by another person in the commission of a criminal offense to

obtain a declaration of their own factual innocence for that offense. An action pursuant to A.R.S. section 12-771 may be brought by an individual person, or by the prosecuting agency on behalf of that person. The bill also added a section to Title 13, A.R.S. section 13-4440, which provides a victim of the criminal offense with certain rights in an action brought under A.R.S. section 12-771.

A.R.S. section 12-772 permits a person to seek relief if, as a result of that person's personal identifying information being taken, the person's name was improperly entered in a civil action or judgment. The statute refers to this situation as a "factual improper party status".

The relief provided under either section 12-771 or section 12-772 is rendered by the Superior Court.

II. Contents of the Proposed New Rules. The proposed new rules are sequenced after Rule 57, the general rule for declaratory relief. The proposed new rules provide a procedural mechanism for seeking a declaration of factual innocence or factual improper party status. The proposed rules include directions for filing and service of the petition; permit discovery upon stipulation or by court order; affirm the evidentiary standard of "clear and convincing"; and describe the process for obtaining an order.

III. Pre-petition Comments. Petitioner transmitted a draft of this petition and proposed rules electronically on October 15, 2008, to the following individuals

and entities: Committee on the Superior Court, Committee on Limited Jurisdiction Courts, Superior Court Administrators, Superior Court Clerks, Limited Jurisdiction Court Administrators Association, Arizona Prosecuting Attorneys' Advisory Council (Ed Cook), Maricopa County Attorney (through Phil MacDonnell), Arizona Public Defenders Association (Dana Hlavac and James Haas), the Arizona Attorneys for Criminal Justice (James Belanger), the Arizona Association of Chiefs of Police (John Thomas), and the State Bar of Arizona (Robert Van Wyck).

Informal comments received to date have inquired whether a filing fee will be required on a petition for a determination of factual innocence brought by a person, rather than by a prosecuting agency, under proposed Rule 57.1. Petitioner believes that a person other than a prosecuting agency will be required to pay a filing fee.

An informal comment from a clerk of the superior court specifically requested that a petition filed under either of the proposed rules include information concerning the location of the court in which any underlying action was filed. The rules were accordingly modified to require the party to include a statement in the petition of the specific court location and case number of any applicable underlying action or charge.

IV. Proposed Public Comment Period. Petitioner respectfully recommends a public comment period for the proposed rules ending May 20, 2009.

V. Effective Date of the Proposed New Rules. Petitioner requests expedited adoption of the proposed new rules under Rule 28(g) of the Rules of the Supreme Court. Because actions under HB 2321 can be filed after January 1, 2009, a procedural mechanism is required to be in place by that time, and the annual rule processing cycle would be inadequate. Petitioner respectfully requests that the proposed new rules be made effective on and after January 1, 2009.

RESPECTFULLY SUBMITTED this 3rd day of November, 2008.

By _____
David K. Byers, Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

PROPOSED RULE 57.1, ARIZONA RULES OF CIVIL PROCEDURE

Rule 57.1. Declaration of Factual Innocence

- A. Scope of rule. This rule governs the determination of factual innocence of a person who claims pursuant to A.R.S. section 12-771 that their personal identifying information was taken, and as a result their name was used by another person who was arrested, cited, or charged with a criminal offense, or entered as of record in a judgment of guilt in a criminal case.
- B. Filing. A petition brought under this rule shall be filed in the Superior Court in the county in which the other person was arrested for, or cited or charged with, a criminal offense. The petition shall be assigned a civil case number. If applicable, the petition shall state the specific court location where the underlying charge was filed, or the judgment of guilt was entered, and the case number of that prior filing. The petition shall be captioned: In re: (name of petitioner).
- C. Service. The Petitioner shall serve the petition in the manner prescribed by A.R.S. section 12-771 and by these rules.
- D. Transmission of Records. If the petition is related to a charge filed in a justice of the peace court or a municipal court, the Clerk of the Superior Court shall request the justice of the peace or presiding officer of the municipal court to transmit a copy of the file to the Clerk's office.
- E. Discovery. Discovery may be conducted upon stipulation of the parties, or by order of the court.
- F. Evidence. The Petitioner must establish factual innocence by clear and convincing evidence.
- G. Hearing and Determination.
1. The Court may hold a hearing to determine the Petitioner's factual innocence.
 2. If the Court holds a hearing, the victim of the offense identified in a judgment of guilt, or committed by the person arrested for, or cited or charged with, a criminal offense, has a right to be present and to be heard at the hearing.
 3. If the Court does not hold a hearing, an order entered pursuant to this rule may be entered upon submission of proof by affidavit.
- H. Order. On a finding of factual innocence related to an arrest, citation, or charge, the Court shall notify the following persons, if applicable: the Petitioner; the prosecuting agency

which filed the charge; the law enforcement agency which made the arrest or issued the citation; the defense attorney.

PROPOSED RULE 57.2, ARIZONA RULES OF CIVIL PROCEDURE

Rule 57.2. Declaration of Factual Improper Party Status

- A. Scope of rule. This rule governs petitions alleging factual improper party status pursuant to A.R.S. section 12-772, if as a result of a person's personal identifying information being taken, the person's name was entered as of record in a civil action or judgment.
- B. Filing. A petition brought under this rule shall be filed in the Superior Court for the county in which the Petitioner's name was entered as of record in a civil action or judgment because of alleged improper use of the Petitioner's personal identifying information. The petition shall be assigned a civil case number. The petition shall state the specific court location where the underlying action was filed, and the case number of the prior filing.
- C. Service. The Petitioner shall serve the petition in the manner prescribed by these rules on all parties in the civil action in which the Petitioner's identity was allegedly used.
- D. Transmission of Records. If the petition is related to a case filed in a justice of the peace court, the Clerk of the Superior Court shall request the justice of the peace to transmit a copy of the file to the Clerk's office.
- E. Discovery. Discovery proceedings may be conducted on a petition brought pursuant to this rule upon stipulation of the interested parties, or by order of the court.
- F. Evidence. The Petitioner must establish improper party status by clear and convincing evidence.
- G. Hearing.
 - 1. The Court may hold a hearing on the petition.
 - 2. If the Court does not hold a hearing, an order entered pursuant to this rule may be entered upon submission of proof by affidavit.
- H. Order. The Court shall provide notice of the Court's findings to the Petitioner and to all parties in the civil action in which the Petitioner's identity was allegedly used.

1 ANDREW P. THOMAS
2 MARICOPA COUNTY ATTORNEY
3 (FIRM STATE BAR No. 0003200)

4 PHILIP J. MACDONNELL
5 CHIEF DEPUTY COUNTY ATTORNEY
6 SALLY WOLFGANG WELLS
7 CHIEF ASSISTANT COUNTY ATTORNEY
8 301 WEST JEFFERSON STREET, SUITE 800
9 PHOENIX, ARIZONA 85003
10 TELEPHONE: (602) 506-3800
11 (STATE BAR NUMBERS 003813 AND 009894)

12 IN THE SUPREME COURT OF THE STATE OF ARIZONA

13 IN THE MATTER OF:

14 PETITION TO ADD NEW RULE
15 804(b)(5) ARIZONA RULES OF
16 EVIDENCE

R-

MARICOPA COUNTY ATTORNEY'S
PETITION TO ADD NEW RULE
804(b)(5) ARIZONA RULES OF
EVIDENCE

17 The Maricopa County Attorney petitions pursuant to Rule 28 of the Arizona Rules
18 of the Supreme Court to add a new rule of evidence to the list of hearsay exceptions in
19 Rule 804(b), Arizona Rules of Evidence. The proposed new rule, sometimes called
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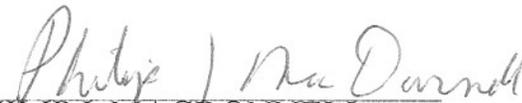
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1 “forfeiture by wrongdoing,” would become Rule 804(b)(5) and the current Rule
2 804(b)(5) would be redesignated as Rule 804(b)(6).

3
4 Respectfully submitted this 12th day of January, 2009.

5 ANDREW P. THOMAS
6 MARICOPA COUNTY ATTORNEY

7
8 BY: 
9 PHILIP J. MACDONNELL
10 CHIEF DEPUTY COUNTY ATTORNEY
11 SALLY WOLFGANG WELLS
12 CHIEF ASSISTANT COUNTY ATTORNEY

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I. SUMMARY OF PROPOSED CHANGES

The Maricopa County Attorney’s Office (MCAO) proposes a modification of Rule 804(b) of the Arizona Rules of Evidence that would add a new hearsay exception for out-of-court statements by a declarant when the defendant has deliberately acted to make the declarant witness unavailable for trial. The federal courts and several other states have adopted such an exception, and MCAO believes that such an exception is appropriate because a defendant should not be allowed to profit from his own misconduct by deliberately acting to make a witness unavailable. This is especially true in domestic violence and gang-related cases where victims and witnesses are particularly susceptible to intimidation. Such misconduct undermines the truth-seeking purpose of the criminal justice system and should not be rewarded.

1 II. CURRENT FEDERAL RULE OF EVIDENCE 404(B)(6) PROVIDES A
2 “FORFEITURE BY WRONGDOING” HEARSAY EXCEPTION WHEN A
3 DECLARANT WITNESS IS UNAVAILABLE FOR TRIAL BECAUSE THE
4 DEFENDANT HAS DELIBERATELY ACTED TO MAKE THE WITNESS
UNAVAILABLE

5 Out-of-court statements by declarants who do not appear to testify are usually
6 inadmissible. However, the common law provided an exception from the usual hearsay
7 and Confrontation Clause rules in cases in which the defendant had wrongfully procured
8 the witness’s absence from trial. In 1878, the United States Supreme Court discussed the
9 equitable basis for the “forfeiture by wrongdoing” exception to the hearsay rule:
10
11

12 The Constitution gives the accused the right to a trial at which he should be
13 confronted with the witnesses against him; but if a witness is absent by his
14 own wrongful procurement, he cannot complain if competent evidence is
15 admitted to supply the place of that which he has kept away. The
16 Constitution does not guarantee an accused person against the legitimate
17 consequences of his own wrongful acts. It grants him the privilege of being
18 confronted with the witnesses against him; but if he voluntarily keeps the
witnesses away, he cannot insist on his privilege. If, therefore, when absent
by his procurement, their evidence is supplied in some lawful way, he is in
no condition to assert that his constitutional rights have been violated.

19 *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

20
21 Rule 804(b), Federal Rules of Evidence, deals with exceptions to the hearsay
22 rule in situations in which the declarant is unavailable to testify in court. In 1997, the
23 Federal Rule was amended to add subsection (b)(6), incorporating the common law
24 doctrine of “forfeiture by wrongdoing.” That subsection reads:
25

26 **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule
27 if the declarant is unavailable as a witness:

28 * * *

1 **(6) Forfeiture by wrongdoing.** A statement offered against a
2 party that has engaged or acquiesced in wrongdoing that was
3 intended to, and did, procure the unavailability of the declarant
4 as a witness.

5 The Comments to the amendment adding this subsection to the Federal Rules of Evidence
6 stated in part as follows:

7 **Subdivision (b)(6).** Rule 804(b)(6) has been added to provide that a party
8 forfeits the right to object on hearsay grounds to the admission of a
9 declarant’s prior statement when the party’s deliberate wrongdoing or
10 acquiescence therein procured the unavailability of the declarant as a
11 witness. This recognizes the need for a prophylactic rule to deal with
12 abhorrent behavior “which strikes at the heart of the system of justice itself.”
13 *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir.1982), *cert. denied*,
467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act.
The rule applies to all parties, including the government.

14 Noting that every federal circuit that had resolved the question had recognized the
15 principle of forfeiture by misconduct, the Comment stated that most of those courts had
16 applied a “preponderance of the evidence” standard for determining whether forfeiture
17 had occurred, although some had applied a higher “clear and convincing evidence”
18 standard. The Comment concluded, “The usual Rule 104(a) preponderance of the
19 evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks
20 to discourage.”

21
22
23 The United States Supreme Court has said:

24
25 [W]hen defendants seek to undermine the judicial process by procuring or
26 coercing silence from witnesses and victims, the Sixth Amendment does not
27 require courts to acquiesce. While defendants have no duty to assist the
28 State in proving their guilt, they *do* have the duty to refrain from acting in
ways that destroy the integrity of the criminal-trial system.

1
2 *Davis v. Washington*, 547 U.S. 813, 833 (2006) [emphasis in original].

3 “Forfeiture under Rule 804(b)(6) applies not only in the original cases for which
4 the declarant was an actual or potential witness, but also in any prosecution pertaining to
5 the wrongful procurement of the witness's unavailability.” *United States v. Johnson*, 495
6 F.3d 951, 970 (8th Cir. 2007), *citing United States v. Emery*, 186 F.3d 921 (8th Cir.1999).
7

8
9 Arizona Rule of Evidence 804(b) generally tracks the Federal Rule in setting out
10 exceptions to the hearsay rule when the declarant is unavailable, but does not now include
11 any provision dealing with “forfeiture by wrongdoing.” This Petition seeks to amend the
12 Arizona Rule by adding a new subsection (b)(5), using the same language as the Federal
13 Rule’s subsection (b)(6).
14

15 **III. CONFRONTATION CLAUSE ANALYSIS**

16
17 In determining the admissibility of out-of-court statements by unavailable
18 declarants, courts must consider two factors: first, the defendant’s Sixth Amendment right
19 to confront and cross-examine the witnesses against him, and second, the Rules of
20 Evidence concerning hearsay statements.
21

22 In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court
23 rejected the long-standing rule of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), that the
24 Confrontation Clause did not bar admission of an unavailable witness’s statement against
25 a criminal defendant if the statement bore “adequate ‘indicia of reliability,’” a test met
26 when the evidence either fell within a “firmly rooted hearsay exception” or bore
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1 “particularized guarantees of trustworthiness.” The *Crawford* Court held that the
2 Confrontation Clause required exclusion of “testimonial” statements made prior to trial by
3 declarants who were unavailable to testify at trial.¹ The Court defined “testimony” as “[a]
4 solemn declaration or affirmation made for the purpose of establishing or proving some
5 fact.” The Court explained, “An accuser who makes a formal statement to government
6 officers bears testimony in a sense that a person who makes a casual remark to an
7 acquaintance does not.” *Id.* at 51. The Confrontation Clause applied to “testimonial”
8 statements, which, at a minimum, included such things as “prior testimony at a
9 preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”
10 *Id.* at 68. The *Crawford* Court did not attempt to set forth a complete definition of
11 “testimonial.”

12
13 In *State v. Boggs*, 218 Ariz. 325, 337, ¶ 56, 185 P.3d 111, 123 (2008), this Court
14 observed that the United States Supreme Court clarified “testimonial” in *Davis v.*
15 *Washington*, 547 U.S. 813, 822 (2006):

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20 Statements are nontestimonial when made in the course of police
21 interrogation under circumstances objectively indicating that the primary
22 purpose of the interrogation is to enable police assistance to meet an
23 ongoing emergency. They are testimonial when the circumstances
24 objectively indicate that there is no such ongoing emergency, and that the
25 primary purpose of the interrogation is to establish or prove past events
26 potentially relevant to later criminal prosecution.

27 ¹The declarant/witness in *Crawford* was Crawford’s wife, the victim. She was unavailable to testify
28 at trial because of the Washington marital fact privilege, not because of any wrongdoing by
Crawford.

1 In *State v. King*, 212 Ariz. 372, 378, ¶ 28, 132 P.3d 311, 317 (App. 2006), the
2 Court of Appeals held that statements made in 9-1-1 calls must be analyzed on a case-
3 by-case basis to determine if they were testimonial or not; such calls that were
4 primarily “loud cries for help” were nontestimonial, *id.* at ¶ 29; and calls “made for
5 the primary purpose of identifying a suspect or reporting evidence of an alleged crime
6 that has already occurred will usually be testimonial.” *Id.* at ¶ 30. In *King*, the victim’s
7 responses to a police officer responding to a 9-1-1 call were testimonial because “a
8 reasonable person in the declarant’s position would anticipate his statement being
9 used against the accused in investigating and prosecuting the crime.” *Id.* at 376, ¶ 20,
10 132 P.3d at 315, quoting *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004).
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15 It is important to note that the United States Supreme Court specifically stated in
16 *Crawford* that *nontestimonial* hearsay did not implicate the Confrontation Clause, stating,
17 “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’
18 design to afford the States flexibility in their development of hearsay law.” *Crawford v.*
19 *Washington*, 541 U.S. 36, 68 (2004).
20

21 In *Giles v. California*, ___ U.S. ___, 128 S.Ct. 2678 (2008), the Supreme Court held
22 that there was no “forfeiture by wrongdoing” exemption to the Confrontation Clause rule
23 announced in *Crawford, supra*, unless the defendant had deliberately acted with the intent
24 and result that the declarant witness be unavailable to testify at trial. Giles shot and killed
25 his ex-girlfriend but claimed that he acted in self-defense. The prosecution sought to
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1 introduce statements the victim had made to a police officer responding to a domestic
2 violence call three weeks earlier. The prosecution did not dispute that these statements
3 were “testimonial” under *Crawford*, but argued that under California law, such statements
4 could be admitted, despite the Confrontation Clause, if a judge found, as the judge did in
5 Giles’s case, “that the defendant committed a wrongful act that rendered the witness
6 unavailable to testify at trial.” 128 S.Ct. at 2682.
7

8
9 The *Giles* Court noted that there was a common law exception to the Confrontation
10 Clause requirement for “forfeiture by wrongdoing,” which “permitted the introduction of
11 statements of a witness who was detained or kept away by the means or procurement of
12 the defendant.” *Id.* at 2683 [internal quotation marks omitted]. However, the Court
13 reasoned, this exception was limited to situations in which the defendant committed
14 wrongdoing that was *specifically intended to prevent the declarant from testifying at trial*
15 – that is, deliberate tampering with the witness – rather than situations in which the
16 defendant may have killed the victim for another purpose. *Id.* at 2687. The Court
17 remanded the case to the California courts to determine the defendant’s intent in killing
18 the victim.
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23 The *Giles* Court stressed that its holding applied only to *testimonial* statements,
24 saying, “Statements to friends and neighbors about abuse and intimidation, and statements
25 to physicians in the course of receiving treatment would be excluded, if at all, only by
26 hearsay rules, which are free to adopt the dissent’s version of forfeiture by wrongdoing.”
27
28

1 *Id.* at 2692-93. The Court went on to say that acts of domestic violence “are often
2 intended to dissuade a victim from resorting to outside help, and include conduct
3 designed to prevent testimony to police officers or cooperation in criminal prosecutions.”

4
5 *Id.* at 2693. In such circumstances, evidence of past abuse “may support a finding that the
6 crime expressed the intent to isolate the victim and to stop her from reporting abuse to the
7 authorities or cooperating with a criminal prosecution – rendering her prior statements
8 admissible under the forfeiture doctrine.” *Id.*

9 10 11 **III. HEARSAY ANALYSIS**

12 As noted above, the Federal Rules of Evidence have codified a hearsay exception
13 based on “forfeiture by wrongdoing.” Indiana has also adopted a “forfeiture by
14 wrongdoing” exception to the hearsay rule for nontestimonial statements, which is similar
15 to the amendment this Petition seeks. In *Roberts v. Indiana*, 894 N.E.2d 1018 (Ind. App.
16 2008), Roberts killed his girlfriend. The State sought to admit statements the victim had
17 made to co-workers and friends that Roberts had threatened to kill her. The trial court
18 allowed the State to present those statements, and Roberts was convicted of murder. On
19 appeal, Roberts argued that admitting the statements violated his Sixth Amendment right
20 to confront the witnesses against him and also was inadmissible hearsay under the Indiana
21 Evidence Rules. *Id.* at 1023.

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26 The Indiana Court first found that the victim’s statements to her co-workers and
27 friends were not testimonial, so there was no Sixth Amendment Confrontation Clause
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1 right and *Giles, supra*, was not implicated. *Id.* The Court then stated that it would “accept
2 the Supreme Court’s invitation [in *Giles*] to take a slightly broader view of the doctrine of
3 forfeiture by wrongdoing as advocated by Justice Breyer in his dissent in *Giles* as it
4 applies to non-testimonial statements under Indiana law.” *Id.* at 1024. The Indiana Court
5 then held that “a party, who has rendered a witness unavailable for cross-examination
6 through a criminal act, including homicide, may not object to the introduction of hearsay
7 statements by the witness as being inadmissible under the Indiana Rules of Evidence.” *Id.*
8 at 1025. “Roberts forfeited his right to confront [the victim] about the statements when he
9 killed her. The trial court did not abuse its discretion in admitting these statements.” *Id.* at
10 1026.
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15 Only two Arizona cases have addressed the “forfeiture by wrongdoing” issue in
16 this criminal context. *State v. Valencia*, 186 Ariz. 493, 924 P.2d 497 (App. 1996),
17 preceded both *Crawford* and *Giles*. Valencia shot S.B. in February 1993 but failed to kill
18 him. While S.B. was hospitalized, he identified Valencia as the person who shot him and
19 identified his picture from a photographic lineup. In July 1993, Valencia went to S.B.’s
20 house and shot him and his stepfather. The stepfather died immediately, but S.B. was
21 rushed to the hospital, where he told a detective that Valencia had shot him again and
22 again identified him from a photographic lineup. Three weeks later, S.B. died from his
23 wounds. Valencia was convicted of aggravated assault for the February shooting of S.B.
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1 and of two counts of murder for the July shootings. On appeal, Valencia argued that the
2 trial court erred by admitting S.B.'s out-of-court statements identifying Valencia.
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4 The Court of Appeals affirmed Valencia's convictions, stating, "If a defendant
5 silences a witness by violence or murder, the defendant cannot then assert his
6 Confrontation Clause rights in order to prevent the admission of prior testimony from that
7 witness. ... In such circumstances, a defendant is deemed to have waived both his
8 Confrontation Clause *and* his hearsay objections to the admission of the witness's
9 statements." *Id.* at 498, 924 P.2d at 402 [emphasis in original, citations omitted]. The
10 Court said that before admitting testimony under this principle, the trial court must hold a
11 hearing at which the prosecution bears the burden of showing by a preponderance of the
12 evidence that the defendant was responsible for the witness's absence. *Id.* The Court
13 concluded that the trial court did not err in admitting S.B.'s statements.
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17 After *Crawford* but before *Giles*, this Court referred to the "forfeiture by
18 wrongdoing" issue in *State v. Prasertphong*, 210 Ariz. 496, 114 P.3d 826 (2005).
19 Prasertphong and Huerstel robbed a Pizza Hut and murdered three employees. Each man
20 gave a statement to police. "Both statements contained portions that inculpated each
21 defendant and other portions that exculpated the other." *Id.* at 497, ¶ 4, 114 P.3d at 829. A
22 grand jury indicted both men in the same indictment, but the cases were severed for trial.
23 Because he was a co-defendant, Huerstel was unavailable to testify at Prasertphong's
24 trial. At Prasertphong's trial, he sought to introduce part of Huerstel's statement in which
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1 Huerstel said he shot all three victims. The State argued that presenting only those
2 portions of Huerstel’s statement would mislead the jury and that, under Evidence Rule
3 106, the jury should also receive the portions of Huerstel’s statement inculcating
4 Prasertphong. The trial court agreed and presented Huerstel’s entire statement to the jury.
5
6 Prasertphong was convicted of three counts of armed robbery and three counts of first
7 degree murder.
8

9 On appeal, Prasertphong argued that admitting Huerstel’s entire statement violated
10 his rights under the Confrontation Clause. This Court disagreed, holding that by choosing
11 to introduce part of Huerstel’s out-of-court statement, he waived his rights to object to
12 admission of the remainder of the statement under the Confrontation Clause. *Id.* at 499-
13 500, ¶ 16, 114 P.3d at 831-32. This Court reasoned that Rule 106 was similar to the rule
14 of forfeiture by wrongdoing, citing and quoting from *Crawford, supra* at 62:
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17 We conclude that Rule 106, the rule of completeness, is similar to the rule of
18 forfeiture in that it does not purport to be an alternative means of
19 determining reliability. Rather, the rule of completeness, like the rule of
20 forfeiture, “extinguishes confrontation claims essentially on equitable
21 grounds.” Rule 106 does not permit admission of the remaining portion of a
22 statement because the remaining portion is reliable but rather because it
23 would be unfair to mislead the jury by admitting the redacted version,
24 particularly when a defendant chooses to introduce the portion of the
25 statement or writing that the trial court has found to be incomplete and thus
26 misleading to the jury.

27 *Prasertphong*, 210 Ariz. 496, 502, ¶ 24, 114 P.3d 828, 502 (2005). This Court has thus
28 recognized the equitable soundness of prohibiting a defendant who deliberately makes a
declarant/witness unavailable to testify at trial from profiting from his own wrongdoing

1 by allowing the defendant to exclude the unavailable declarant/witness's out-of-court
2 statements.

3 4 III. CONCLUSION

5 The common law has long recognized the equitable foundation of the "forfeiture by
6 wrongdoing" doctrine. As the D.C. Circuit stated in *United States v. White*, 116 F.3d 903,
7 911 (D.C. Cir. 1997):

8
9 It is hard to imagine a form of misconduct more extreme than the murder of
10 a potential witness. Simple equity supports a forfeiture principle, as does a
11 common sense attention to the need for fit incentives. The defendant who
12 has removed an adverse witness is in a weak position to complain about
13 losing the chance to cross-examine him. And where a defendant has silenced
14 a witness through the use of threats, violence or murder, admission of the
15 victim's prior statements at least partially offsets the perpetrator's rewards
16 for his misconduct. We have no hesitation in finding, in league with all
17 circuits to have considered the matter, that a defendant who wrongfully
18 procures the absence of a witness or potential witness may not assert
19 confrontation rights as to that witness.

20 In *Giles*, the Court explained: "The common-law forfeiture rule was aimed at
21 removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the
22 witnesses against them – in other words, it is grounded in 'the ability of courts to protect
23 the integrity of their proceedings.'" *Giles v. California*, 128 S.Ct. 2678, 2691 (2008),
24 quoting *Davis, supra*. When a defendant has "engaged or acquiesced in wrongdoing that
25 was intended to, and did, procure the unavailability of the declarant as a witness," "[t]he
26 absence of a forfeiture rule covering this sort of conduct would create an intolerable
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1 incentive for defendants to bribe, intimidate, or even kill witnesses against them.” *Giles*,
2 *id.* at 2686.

3
4 Therefore, MCAO respectfully requests that this Court submit the proposed rule
5 change for comment and adopt the proposed change as set forth in the attached Exhibit A.

6
7 Respectfully submitted this 12th of January, 2009.

8
9 ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

10
11 BY: 
12 PHILIP J. MACDONNELL
13 CHIEF DEPUTY COUNTY ATTORNEY
14 SALLY WOLFGANG WELLS
CHIEF ASSISTANT COUNTY ATTORNEY

15 Copies of the forgoing mailed
16 this 12th day of January, 2009 to:

17 Clerk of the Court
18 Arizona Supreme Court

19 Paul Ahler, Executive Director
20 Diane Gunnels-Rowley
21 Arizona Prosecuting Attorneys' Advisory Council
22 3001 West Indian School Rd., Suite 307
23 Phoenix, Az. 85017
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1 EXHIBIT A

2 Proposed text of Amended Evidence Rule 804(b):

3
4 (b) Hearsay exceptions. The following are not excluded by the hearsay rule
5 if the declarant is unavailable as a witness:

6 (1) *Former testimony (criminal action or proceeding)*. Former
7 testimony in criminal actions or proceedings as provided in
8 Rule 19.3(c), Rules of Criminal Procedure.

9 (2) *Statement under belief of impending death*. In a
10 prosecution for homicide or in a civil action or proceeding, a
11 statement made by a declarant while believing that the
12 declarant's death was imminent, concerning the cause or
13 circumstances of what the declarant believed to be the
14 declarant's impending death.

15 (3) *Statement against interest*. A statement which was at the
16 time of its making so far contrary to the declarant's pecuniary
17 or proprietary interest, or so far tended to subject the declarant
18 to civil or criminal liability, or to render invalid a claim by the
19 declarant against another, that a reasonable person in the
20 declarant's position would not have made the statement unless
21 believing it to be true. A statement tending to expose the
22 declarant to criminal liability and offered to exculpate the
23 accused is not admissible unless corroborating circumstances
24 clearly indicate the trustworthiness of the statement

25 (4) *Statement of personal or family history*. (A) A statement
26 concerning the declarant's own birth, adoption, marriage,
27 divorce, legitimacy, relationship by blood, adoption, or
28 marriage, ancestry, or other similar fact of personal or family
history, even though declarant had no means of acquiring
personal knowledge of the matter stated; or (B) a statement
concerning the foregoing matters, and death also, of another
person, if the declarant was related to the other by blood,
adoption, or marriage or was so intimately associated with the
other's family as to be likely to have accurate information
concerning the matter declared.

1
2 **(5) Forfeiture by Wrongdoing.** **A statement offered against**
3 **a party that has engaged or acquiesced in wrongdoing that**
4 **was intended to, and did, procure the unavailability of the**
5 **declarant as a witness.**

6 ~~(5)~~ (6) *Other exceptions.* A statement not specifically covered
7 by any of the foregoing exceptions but having equivalent
8 circumstantial guarantees of trustworthiness, if the court
9 determines that (A) the statement is offered as evidence of a
10 material fact; (B) the statement is more probative on the point
11 for which it is offered than any other evidence which the
12 proponent can procure through reasonable efforts, and (C) the
13 general purposes of these rules and the interests of justice will
14 best be served by admission of the statement into evidence.
15 However, a statement may not be admitted under this
16 exception unless the proponent of it makes known to the
17 adverse party sufficiently in advance of the trial or hearing to
18 provide the adverse party with a fair opportunity to prepare to
19 meet it, the proponent's intention to offer the statement and the
20 particulars of it, including the name and address of the
21 declarant.
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Commission on Victims in the Courts
DRAFT MINUTES
Friday, February 6, 2009
10:00 am to 2:00 pm
State Courts Building
1501 W. Washington Street
Phoenix, AZ 85007
Conference Room 119A/B

Members Present:

Attorney General's Office Representative
Hon. Lex Anderson
Mr. James J Belanger
Ms. Patricia Bigwood
Dr. Kathryn Coffman
Mr. Paul Ahler for Mr. Edwin Cook
Ms. Sydney Davis
Ms. JoAnn Del Colle (Telephonically)
Ms. Karen Duffy
Cpt. Larry Farnsworth
Ms. Daisy Flores
Ms. Leslie James
Mr. Dan Levey
Mr. Doug Pilcher
Mr. Paul Prato
Hon. Ronald Reinstein (Chair)
Hon. Antonio Riojas, Jr.
Ms. Kathy Waters

Members Absent:

Mr. Michael Branham
Hon. Anna Montoya-Paez
Hon. Carter Olson
Hon. William O'Neil
Ms. Karen Sullivan
Mr. Steve Twist
Hon. Richard Weiss

Presenters/Guests:

Hon. Robert Brutinel (Telephonically)
Ms. Melinda Hardman
Hon. Michael Jeanes
Ms. Caroline Lutt-Owens
Ms. Jamie Mabery
Hon. Roland Steinle

Staff:

Ms. Carol Mitchell
Ms. Kimberly Reid

I. Regular Business

A. Welcome and Opening Remarks

The February 6th meeting of the Commission on Victims in the Courts was called to order by Chair, Honorable Ronald Reinstein, at 10:07 am. Sympathies go out to Michael Branham, whose wife just passed away. Hon. William O'Neil will not be with us because his wife was recently in a horse accident.

B. Approval of November 14, 2008 Minutes

Minutes for the November 14, 2008 Commission on Victims in the Courts meeting were presented for approval.

MOTION: To approve the November 14, 2008 Commission on Victims in the Courts minutes as presented. *Motion seconded and passed unanimously.*

II. Business Items / Potential Action Items

A. Dependency Attorney Certification & Other Training Efforts

The Children in the Courts workgroup proposed a rule petition for child attorney standards to the Arizona Judicial Council in December, 2008, which was not approved. Hon. Robert Brutinel, chair of the Committee on Juvenile Courts, shared the thoughts of the committee. A "one sizes fits all" rule isn't practical for the state of Arizona. They propose that each county be allowed to come up with their own standards. To adopt the standards as is would be extremely impractical and expensive for the rural counties. It is suggested that these be adopted as a best practice standards as opposed to a rule. Judge Brutinel expressed support for the possibility of a pilot program for county standards.

Judge Brutinel has been talking about a Child Welfare Specialist as a legal specialty in the state of Arizona. This would help in setting appropriate standards of practice. The State Bar created a committee to evaluate the possibilities.

Caroline Lutt-Owens passed out a hand out that explained the AOC's training efforts. They have focused on attorney training that has been conducted in the 13 rural counties. The curriculum of the training was based on the standards put together in 2002.

Discussion:

- Jim Belanger shared his understanding that the attorneys doing the best work in the juvenile field are public officers, not private attorneys. Another related issue that needs to be addressed is the attorney contract system.
- Judge Reinstein believes that those who will apply for the specialization will be the attorneys who already do good work.
- COVIC to work with COJC re: attorney standards

B. Supreme Court Rule 123 and Data Dissemination

Michael Jeanes, Chairman of the Supreme Court Rule 123 and Data Dissemination Committee, brought forth the latest Rule 123 proposal. Because of technology changes, the public's opinion of obtaining public documents has changed. The changes to this rule have already been submitted to AJC; however, the comment period is only open through April 1, 2009. The current changes don't change access to records at the court house. The main change submitted in this rule deal with internet access to documents. They are available to attorneys and litigants within the case. Because of the convenience added, fees will be assessed to the public to help maintain the system. The recommendations limit the civil and criminal cases and the types of documents that can be accessed to help protect privacy.

One problem they have noticed is that some people don't check the records as diligently as others. To avoid this, they recommend that the courts predominantly display the outcome of the case. The committee is considering other issues, such as how long documents will be available and access to bulk data.

Discussion

- Leslie James- Victims should be included in the party classification and not part of the general public.
 - Most people would agree with this but it comes down to technical issues of determining who is a victim and how they would be recognized by the system. Currently the system is unable to do this.
- The documents will not be available until all parties are served.

MOTION: Change Juvenile to Person as it refers to sexual assault victim. Motioned by Dan Levey, seconded by Leslie James. No objections.

Action Item: Carol will send out an e-mail vote on comments crafted by Leslie James and Dan Levey for approval by the committee.

C. Restitution Court Innovations

Hon. Roland Steinle discussed his recent work with the Maricopa County Adult Probation Department. Restitution typically isn't a high priority for defendants on probation because it is easier to violate them on issues other than failing to pay restitution. According to ARS 13-810, defendants who do not pay restitution may be held under civil contempt. Judge Steinle donates half a day, once a month to the Maricopa County Adult Probation Department and handles approximately six to eight new defendants a month. If realistic plans and honest efforts to pay the restitution have not been made, defendants will be held in contempt with possibility of work release until the debt or a court-ordered portion of the debt is paid. The program started in the beginning of August and since then they have collected \$44,000 in restitution. It is a great program but it takes strict cooperation between the court and probation to hold the defendants accountable.

Discussion

- What do you do with the people that don't see jail as a deterrent?
 - There have only been two problem cases and they have been caught up to date within three months.
 - Dan Levey thinks that this is a great program. It holds the defendants accountable to the restitution.
 - Judge Steinle thinks that judges need to be more diligent when ordering restitution payments to be more realistic in being able to reach the total payment amount
 - Judge Steinle is more than willing to do presentations to other judges or groups to help further the program
 - Maricopa County Superior Court has a self-help center where victims can get the process started on their own, however they have to hire their own process server. Probation officer, County Attorney or Court on own can initiate action against a non-paying defendant.
 - It is possible that the probation officer would be willing to serve the defendant.

D. New Discussion Topics

1. DNA/Post Conviction Conference

Judge Reinstein attended the DNA/Post Conviction Conference. Arizona has a grant through the program. Judge Reinstein will be presenting in Texas next month. Texas has had 39 exonerations in the past 24 months. Judge Reinstein has been engaging in conversations about when you notify the victim that the defendant has requested DNA testing.

2. ARS 13-1415 HIV/STD Testing

There is a hole in the statute regarding how testing is done and who pays for it. Judges are more than willing to provide the court orders. The problem is with out-of-custody defendants who need to be tested. Where do you send them? Who pays for it? Correctional Health Services handles this in Maricopa County for in-custody defendants. The defendant is asked to submit a sample, if they refuse, a notice of their refusal is sent to the court.

Discussion:

- Dr. Kathy Coffman explained there are medications that prevent transmission within 72 hours of exposure. However the statute has a 10 day window. There is a simple, fairly inexpensive test that takes 20 minutes with a saliva sample, so it is non invasive. It does not test for hepatitis C, only HIV.
- Sydney Davis: most perpetrators are not arrested in 72 hours.

Action Item: Judge Reinstein will talk to Jerry Landau about whether forfeiture funds could be allocated to HIV/STD testing, as noted by Jim Belanger.

3. Child Witness/Facility Dogs

Preliminary tests have been taking place as to the effect of facility dogs on child witnesses on the stand. They are currently in practice in four other states. The results have been favorable. The dogs lower blood pressure which helps the child's recollection. Maricopa County Victim Witness is currently training Sam, a golden retriever facility dog, to aid children in the court. He is being funded 100% through donations. No one expressed concern about whether judges will allow the dog in the witness box,

however there may be need to be hearing to determine necessity. There may be issues with use of the dog prior to court as well.

Announcement: There is a petition to amend Rule 39 of the Criminal Rules of Procedure. The statute provides that grandparents and siblings are classified as victims and are allowed to be present in the courtroom; however, Rule 39 did not include the same definition.

- Jamie Mabery pointed out what she believed may be another shortcoming of this rule. In-laws of a victim were afforded victim's rights even though they were pro-defendant and testifying as witnesses on the defendants behalf.

E. Workgroup Updates

1. Restitution

Dan Levey announced that the restitution website should be up and running prior to the next meeting. Also, a senator is working on legislation regarding persons who owe restitution and prevails on a suit against the county or state for any reason. Part of the judgment will go to pay off restitution.

Announcement: Kathy Waters explained that AOC will be piloting a curriculum for all probation officers regarding restitution, leadership and victim sensitivity. They will present on March 9, 2009 and it will take place in the afternoon in room 345B of the State Courts Building.

Announcement: The Chair asked members to route names of potential future member candidates, particularly from counties other than Maricopa, to Carol for the next appointment cycle.

III. Business

A. Next Meeting:

May 8, 2009
State Courts Building
Phoenix, AZ 85007

B. Call to the Public

None.

C. Adjournment

The meeting was adjourned at 12:31

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
September 11, 2009	<input checked="" type="checkbox"/> Formal Action Request <input type="checkbox"/> Information Only <input type="checkbox"/> Other	Amendment to ACJA §1-202: Public Meetings

FROM: AOC Legal Services

PRESENTER(S): Jennifer Greene, Assistant Counsel

DISCUSSION & TIME ESTIMATE: 5-20 minutes

RECOMMENDED MOTION (IF ANY): See attached proposal cover sheet.

**Commission on Victims in the Court
Legislative Update, September 11, 2009**

Chapter 57: DOMESTIC VIOLENCE; CHILD CUSTODY

Senator Paton

Authorizes a court granting custody of a child to refrain from considering which parent is more likely to allow the child continuing contact with the other parent if the court determines that one parent is acting in good faith to protect the child from domestic violence or child abuse. Adds domestic violence to the list of relevant factors the court must consider when making a custody determination. Removes other “clear and convincing evidence” from the list of factors the court must consider when issuing a temporary order of support or order regarding custody and parenting time.

Judges must now make specific findings when there are allegations of domestic violence in a contested custody case.

Chapter 129: DOMESTIC VIOLENCE; DATING RELATIONSHIPS

Senator Paton

Expands the definition of domestic violence to include current or previous significant romantic or sexual relationships between the victim and defendant. The following criteria may be considered in order to determine that a relationship is or was serious:

- Type and length of the relationship
- Frequency of interaction
- Length of time since termination (if applicable)

The changes will require modification of the Arizona Rules of Protective Order Procedure, Supreme Court approved forms under ACJA § 5-207 and AZTEC forms module. The short title is misleading as the change has no effect on dating relationships in the statute for the Injunction Against Harassment under A.R.S. 12-1809. Reference rule petition R-09-0026

Chapter 138: FIDUCIARIES

Representative Driggs

Grants authority to the Supreme Court to oversee fiduciaries serving as a guardians, conservators, trustees, representative payees, or agents under a Power of Attorney (POA), regardless of whether the fiduciary has been court appointed to the case. Prohibits a fiduciary whose license has been suspended or revoked from serving as an agent under a POA in any capacity unless related to the principal. Changes all statutory references of fiduciary “certification” to “licensure.”

The change will require an amendment to A.C.J.A. § 7-202.

For additional information on these or other newly enacted laws, please contact:

Amy Love, Legislative Analyst
alove@courts.az.gov 602.452.3134

FINGERPRINTING; ARREST PROCEDURES
Representative JP Weiers

Statutes amended:

A.R.S. § 13-607, 13-3903, 41-1750

Requires law enforcement to obtain a "right index" fingerprint at the time of a cite and release and to provide information to the defendant where to obtain a 10 print before their court date. The defendant must provide proof to the court that they have been 10 printed. Requires the court clerk to file a complaint if a party defaults on their promise to appear for their court date. The changes will require an amendment to the Rules of Criminal Procedure. Reference rule petition R-09-0029.

DOMESTIC VIOLENCE; DATING RELATIONSHIPS
Senator Paton

Summary:

Expands the definition of domestic violence to include current or previous significant romantic or sexual relationships between the victim and defendant. The following criteria may be considered in order to determine that a relationship is or was serious:

- Type and length of the relationship
- Frequency of interaction
- Length of time since termination (if applicable)

Statutes amended:

A.R.S. § 13-3601 Relating to Domestic Violence

Modifies the definition of Domestic violence to include a romantic or sexual relationship under 13-3601 (A)(6) including the factors the court should consider in determining if the relationship currently or previously existed. The changes will require modification of the Arizona Rules of Protective Order Procedure, Supreme Court approved forms under ACJA § 5-207 and AZTEC forms module. The short title is misleading as the change has no effect on dating relationships in the statute for the Injunction Against Harassment under A.R.S. 12-1809. Reference rule petition R-09-0026.

SEX OFFENDERS; PROBATION; MONITORING
Senator L. Gray

Statutes amended:

A.R.S. §§ 13-901, 13-902

Specifically exempts monthly probation fees from surcharges in order to counter the decision in State v. Catronova, 1 CA CR 07-0829. Probation departments were notified of the provision for monitoring level 3 sex offenders by GPS in a separate email on July 16, 2009 from the Adult Probation Services Division of AOC. The change to statute does not inhibit the courts ability to require a person serving a term of probation from being ordered to be electronically monitored.

For additional information on these or other newly enacted laws, please contact:

Amy Love, Legislative Analyst
alove@courts.az.gov 602.452.3134

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
September 11, 2009	<input type="checkbox"/> Formal Action Request <input type="checkbox"/> Information Only <input type="checkbox"/> Other	

FROM: Clerk of the Superior Court in Maricopa County

PRESENTER(S): Gordon Mulleneaux

DISCUSSION & TIME ESTIMATE: 15- 20 minutes

RECOMMENDED MOTION (IF ANY):

Amend the Arizona Code of Judicial Administration Part 5, Chapter 2, Section 204, Paragraph K "Restitution Payment Processing" subsection (2) substituting thirty dollars for ten dollars in line four and line seven.

Current circumstances and present practices of paying restitution to victims

The Clerk of the Superior Court in Maricopa County has a history in the issuance of restitution checks. We issue restitution checks daily to victims when restitution amount is \$10.00 or greater. As a result, we issue over 300 checks daily. In order to process all allocated funds to restitution, we reduce the threshold annually to \$1.00 in March to ensure victims receive money allocated to them. The AOC has codified our practice in the Code of Judicial Administration. Generally, the small amounts occur because there may be numerous victims on a case or the payment amount is diminutive. For example, in July 2009, we received 4,309 payments from prisoner accounts (\$89,500.79) from the Department of Corrections for victims [See table].

July 2009 payments from the Department of Corrections to the Maricopa County Superior Court Clerk		
\$ range	Count	%
\$.01 - \$9.99	1,430	33%
\$10.00 - \$14.99	764	18%
\$15.00 - \$19.99	487	11%
\$20.00 - \$24.99	489	11%
\$25.00 - \$29.99	252	6%
\$30.00 - \$34.99	223	5%
\$35.00 - \$39.99	149	3%
\$40.00 - \$44.99	134	3%
\$45.00 - \$49.99	66	2%
\$50.00 and up	315	7%
	4,309	

We are proposing one important change to the current process. The change would be to temporarily increase the dollar threshold from \$10.00 to \$30.00. We will continue to post all amounts to all accounts and only raise the threshold amount. We will continue to lower the threshold to \$1.00 each year in March. For Maricopa County, the direct savings by increasing the threshold based upon this year's activity would be approximately \$1,296.54 a month or \$15,558.48 per year (postage savings). The estimated savings for the other counties is approximately one-half of the savings of Maricopa County, or \$7,779.24 annually.

An important note is that we have the ability to manually issue a check to a payee requesting payment regardless of the amount. This requires special manual processing. This occurs approximately two or three times annually.

What is required to make this change?

The AOC would amend the Arizona Code of Judicial Administration Part 5, Chapter 2, Section 204, Paragraph K "Restitution Payment Processing" subsection (2) substituting thirty dollars for ten dollars in line four and line seven.

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
September 11, 2009	<input type="checkbox"/> Formal Action Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Court Rules Update

FROM:

PRESENTER(S): Carol Mitchell

DISCUSSION & TIME ESTIMATE: Update to the following rule petitions addressed by COVIC:

- Rule 31.6 and Rule 103 (b) & related comment filed
- Rule 10.5 comment filed
- Rules 57.1 and 57.2 & reply filed

10 minutes

RECOMMENDED MOTION (IF ANY):

Hon. Ronald Reinstein, Ret,
on behalf of members of Rule 10.5 Workgroup
Commission on Victims in the Courts
1501 W. Washington, Phoenix, AZ 85007
602-452-3138

**IN THE SUPREME COURT
OF THE STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND RULE 10.5,)
ARIZONA RULES OF CRIMINAL)
PROCEDURE)

Supreme Court No. R-08-0022
COMMENT

Judge Ron Reinstein, Chair of the Supreme Court’s Commission on Victims in the Courts (the Commission), respectfully submits the following comment. The Commission was asked to review this petition because it proposes procedural changes that would impact crime victims in superior court matters. The full Commission unanimously supported the general concept of giving appropriate notice to victims and witnesses regarding assignment or reassignment of a case for trial; however, after a lengthy discussion and concerns expressed by some Commission members, the Commission was unable to come to a consensus and voted to establish a workgroup to recommend changes to the petition’s existing language and to motion the Court to extend the comment period to submit a comment on this petition.

Commission members who volunteered for the workgroup included the Commission chair, two superior court judges (from rural counties), a defense attorney and a victim advocate representative. Additionally, one of the petitioners, a victim rights' attorney, and the Criminal Presiding Judge from Maricopa Superior Court joined the workgroup meetings.

The Commission was not able to meet to approve any comments before the deadline for further comments on this petition. As a result, this comment is submitted by the Chair, who also served on the workgroup created by the Commission referred to above. The workgroup held telephonic meetings on two occasions between June 1st and June 8th. Over the course of the two meetings, the workgroup continued to discuss the proposal's merits and how this proposal will impact all counties throughout the state.

Despite support of the concept, the majority of the Commission members participating on this workgroup believed the current proposal will not accomplish the goal of moving cases forward in a timely manner and may cause further delay at the victim's expense. Furthermore, it was acknowledged by some members of the workgroup that since most crime victims do not have an attorney, the interest of the state and defense, and not the victim, may be the priority when deciding to continue proceedings for the full five days.

In the alternative, it was suggested that incorporating the language of A.R.S. §13-4409 into the Criminal Rules might alleviate the victims' concerns raised by the requested rule change. In any event, educating the judicial community and the Bar regarding the appropriate use of Rule 39(b) of the Rules of Criminal Procedure, in conjunction with A.R.S. § 13-4409, would likely resolve the underlying concern raised by this proposal from a victims' rights perspective.

RESPECTFULLY SUBMITTED this _____ day of June, 2009.

By _____
Hon. Ron Reinstein, Ret.,
On behalf of members of Rule 10.5 Workgroup
Commission on Victims in the Courts
1501 W. Washington, Phoenix, AZ 85007
602-452-3138

Original and copies of the foregoing
Hand-delivered on the date of signing to:
CLERK'S OFFICE
ARIZONA SUPREME COURT
1501 W. Washington
Phoenix, AZ 85007-3231

Original and copies of the foregoing
Mailed on the date of signing to:

Andrew P. Thomas
Maricopa County Attorney

Philip J. MacDonnell
Chief Deputy

Jeffrey Trudigan
Deputy County Attorney
Rebecca Baker
Deputy County Attorney
301 W. Jefferson St, Suite 800
Phoenix, AZ 85003

Steve Twist
President, Arizona Voice for Crime Victims
P.O. Box 12722
Scottsdale, AZ 85267

ARIZONA CODE OF JUDICIAL ADMINISTRATION
Part 1 : Judicial Branch Administration
Chapter 2: Operations
Section 1-202: Public Meetings

A. through D. [no changes]

E. Use of Technology.

1. Attendance by electronic means. Whenever one or more public council members attends a council meeting by telephone or other electronic means, public council staff shall arrange a meeting room and the necessary electronic equipment to enable the public to attend the meeting in person.
2. Recording a public council meeting. Members of the public may record a public council meeting by audio, video, or photographic means, provided that the individual notifies public council staff of the intention to record the proceeding and the type of recording equipment to be used in advance, and the notice is received far enough in advance of the meeting to allow staff to make any necessary accommodations.

The chair may require the recording to be stopped in the event it disrupts the meeting. The chair shall inform the people attending a meeting when the meeting is being recorded.

F. Email Communications. Public council members and staff shall avoid the active exchange of email on a subject that may come before the council for action as described below:

a. Public council members:

1. Shall not use email for the purpose of circumventing the public meeting policies of this section;
2. Shall neither propose legal action to other members nor take legal action by email;
3. Shall not reply to or forward email to a quorum of members, if the email communicates facts or a member's opinion on a subject that may come before the council for action;
4. May receive email from any public council member or council staff;
5. May send email to staff requesting specific information and may copy a quorum of the council members;
6. May send email to a quorum of members and to staff requesting that a matter be placed on a future agenda;

7. May send email to anyone who is not a council member concerning a subject that may come before the council for action but may not copy a quorum of council members;
 8. May send a one-way email communication to staff and to less than a quorum of council members concerning facts or opinions on a subject that may come before the council for action.
- b. Public council staff:
1. Shall not reply to or forward an email from a member to a quorum of members that communicates an opinion of a member on a subject that may come before the council for action;
 2. May send email information to public council members including meeting announcements, agendas, meeting materials, minutes, draft proposals, and research;
 3. May receive email on any subject from any and all council members;
 4. May reply to an email that was properly sent to a quorum of the council members.

E. G. Noncompliance. [no changes]

ARIZONA CODE OF JUDICIAL ADMINISTRATION
Proposal Cover Sheet

Part 1: Judicial Branch Administration
Chapter 2: Operations
Section 1-202: Public Meetings

1. Effect of the proposal:

ACJA §1-202 establishes Open Meeting Law requirements for the judicial branch. The section governs all standing and *ad hoc* committees, task forces, commissions, boards, and councils whose members are appointed by Supreme Court Administrative Order. The code section does not apply to informal workgroups or sub-committees of standing and *ad hoc* committees, nor does it apply to boards and commissions that are governed by separate rules, such as the Attorney Disciplinary Commission and the Judicial Performance Review Commission.

The proposed amendments are intended to clarify the following:

- Facilities planning to ensure the public can attend any public council meeting involving videoconferencing or teleconferencing by members;
- How to handle a request from a member of the public to record a public meeting; and
- Proper and improper use of email by council members and staff to ensure that all council discussions and legal actions involving a quorum of members are conducted in public.

2. Significant new or changed provisions:

The standards for use of email by public council members and staff are based on Arizona Attorney General Opinion No. I05-004 (July 25, 2005) which interpreted Arizona's Open Meeting Law.

3. Committee actions and comments:

[To be collected]

4. Controversial issues:

None known

5. Recommendation:

Recommend approval

Hon. Ronald Reinstein, Ret.
Chair, Supreme Court Commission
on Victims in the Courts (COVIC)
1501 W. Washington, Phoenix, AZ 85007
602-452-3138

**IN THE SUPREME COURT
OF THE STATE OF ARIZONA**

In the Matter of:

PETITION TO ADD RULE 57.1 AND)	Supreme Court No. R-08-0027
RULE 57.2, ARIZONA RULES)	COMMENT ON PETITION
<u>CIVIL PROCEDURE</u>)	

On behalf of the Supreme Court’s Commission on Victims in the Courts, Chair, Judge Ron Reinstein respectfully submits this comment on the above-referenced petition to add Rules 57.1 and 57.2, to the Arizona Rules of Civil Procedure.

The Commission reviewed the petition’s potential impact on crime victims at its quarterly meeting on May 8, 2009. The Commission voted unanimously to support the amendments to Rule 57.2 as proposed. The Commission also voted unanimously to support the proposed changes to Rule 57.1 with the proviso that language be added to 57.1(G)(4) to allow the criminal court to enter a determination of a victim’s factual innocence without a hearing or submission of proof at the time of the defendant’s change of plea or guilty verdict. The Commission’s suggested new language would read as follows:

Rule 57.1. Declaration of Factual Innocence

* * *

G. Hearing and Determination.

1. The Court may hold a hearing to determine the Petitioner's factual innocence.
2. If the Court holds a hearing, the victim of the offense identified in a judgment of guilt, or committed by the person arrested for, or cited or charged with, a criminal offense, has a right to be present and to be heard at the hearing.
3. If the Court does not hold a hearing, an order entered pursuant to this rule may be entered upon submission of proof by affidavit.
4. Upon a determination of the defendant's guilt in the criminal matter, the criminal court may contemporaneously enter a determination of a victim's factual innocence without a hearing or submission of proof by affidavit. A determination of the defendant's guilt is deemed entered upon the defendant's change of plea or guilty verdict.

RESPECTFULLY SUBMITTED this 20th day of May, 2009.

By Carol Mitchell (staff) for
Hon. Ron Reinstein, Chair,
Commission on Victims in the Courts
1501 W. Washington, Phoenix, AZ 85007
602-452-3138

Copies of the foregoing
have been electronically filed
this 20th day of May, 2009 with:

Arizona Supreme Court

David K. Byers, Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO ADD RULE 57.1 AND)	
RULE 57.2, ARIZONA RULES OF)	Supreme Court No. R-08-0027
CIVIL PROCEDURE)	Petitioner's Reply
_____)	

Pursuant to Arizona Supreme Court Rule 28(D)(2), David K. Byers, Director, Administrative Office of the Courts, respectfully submits this reply to comments that were filed regarding Petition No. R-08-0027.

The subjects of this petition are Rules 57.1 and 57.2 of the Arizona Rules of Civil Procedure. Rule 57.1 governs actions filed pursuant to A.R.S. §12-771 (determinations of factual innocence). Rule 57.2 applies to actions filed pursuant to A.R.S. §12-772 (determinations of improper party status). These rules were adopted at the December 9, 2008, Rules Agenda on an emergency basis, effective January 1, 2009. These rules as adopted will be referred to as the “existing rules”.

I. Reply to the Comment of the State Bar of Arizona. The State Bar has made a number of suggestions concerning these rules. Some of its suggestions are well-taken. Other suggestions would probably provide no improvement to the existing rules.

A. Proposals concerning Rule 57.1, Declarations of Factual Innocence.

The following proposals by the State Bar would probably not improve the existing rule.

1. Proposal to clarify that “either an aggrieved person or a prosecuting agency” may file a petition. (See the State Bar’s comment at pages 3-4.) A.R.S. §12-771(A) provides that “a person, or a prosecuting agency on behalf of the person”, may file a petition for a declaration of factual innocence. Therefore, directions about who may file a petition are already in the statute.

The language of the statute confirms that if a petition is filed by a prosecuting agency, then the agency would be filing on behalf of the victim of identity theft. The agency would not be a party, per se. The real party in interest, regardless of whether the petition is filed by the person or by the agency, would still remain the victim of identity theft, i.e., the “person” specified in the existing rule.

Petitioner also believes that carrying the proposed language of “an aggrieved person or a prosecuting agency on behalf of that person” throughout

Rule 57.1, as suggested by the State Bar, would confound the rule and would make it more cumbersome rather than clarifying it. Use of the simple word “person” in the existing rule is sufficiently descriptive.

2. Proposal to require service under Rule 4.1, A.R.C.P. (See the State Bar’s comment at pages 4-5.) The State Bar proposes a requirement that service of a petition be made pursuant to Rule 4.1. This compares to the Petitioner’s proposed language that service be made “in the manner prescribed by A.R.S. §12-771 and by these rules.”

A.R.S. §12-771 uses different nomenclature throughout its text on the manner of notice. If no criminal charge was filed, the statute requires that the petition shall be “served” on the arresting or citing law enforcement agency. See A.R.S. §12-771(D). If a criminal charge was filed, the statute requires that the petition shall be “served” on the prosecuting agency, and a copy shall be “provided” to the defense attorney. See A.R.S. §12-771(E)(1). If the prosecuting agency files the petition, it is required to “provide notice” to the victims. See A.R.S. §12-771(E)(2).

A uniform requirement of service under Rule 4.1, as proposed by the State Bar, would contravene the more relaxed notice requirements established under A.R.S. §12-771.

3. Proposal to require that the limited jurisdiction clerk provide records to the judge assigned to the case. (See the State Bar’s comment at pages 5-6.) Routine practice is that a clerk of one court transmits records to a clerk of another court, rather than directly to a judge of the other court. This practice permits the transmitted records to be properly docketed and filed by the receiving court. The State Bar’s proposal to by-pass this practice is not warranted.

4. Proposals regarding a hearing. (See the State Bar’s comment at pages 7-8.)

a) The State Bar has posed that the existing Rule 57.2(G)(2) “appears to require notice of a hearing to a victim of a criminal offense even if criminal charges were not filed, which is inconsistent with the statute.” (See page 7 of the State Bar’s comment, at lines 16-18.) The undersigned believes that the existing language is not only justified by A.R.S. §13-4440, but it is actually mandated.¹

b) The proposal to include language that in lieu of an affidavit, a declaration may be filed pursuant to Rule 80(i) of the civil rules is unnecessary. The process is ...

¹ A.R.S. §13-4440(A) provides: “A. The victim has the right to be present and be heard at any proceeding in which a person’s factual innocence is being considered pursuant to section 12-771.” This statute makes no distinction between hearings on factual innocence petitions for cases where a criminal charge had been filed and hearings in cases where no criminal charge was filed.

already allowed under Rule 80(i).²

c) Finally, the State Bar proposes that a notice of a ruling on a petition for a determination of factual innocence be provided not only when the petition is granted (which the State Bar acknowledges is the requirement of the statute), but also when a petition is denied. The legislation correctly presumed that a law enforcement agency or victim would need notice only upon the granting of a petition. A denial of a petition changes nothing. Although notice of a denial may be given by the court, notice of a denial should not be required.

The following suggestions by the State Bar would improve these rules, and these should be adopted. See Appendix 1.

5. Names and addresses. The State Bar has proposed that the names and addresses of parties entitled to notice be included in the content of a petition for a determination of factual innocence. This suggestion has been incorporated into the attached revised version of Rule 57.1, paragraph (B), as shown in Appendix 1.

6. Limitation on disclosures. The State Bar has also proposed that the limitation on discovery in the existing rule be extended to disclosures otherwise required under Rule 26.1. This suggestion has also been incorporated into the

² Rule 80(i), Ariz. R. Civ. P., provides in part: “Wherever, under any of these rules...any matter is required or permitted to be supported...by the ...affidavit of the person making the same..., such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn written declaration...subscribed by such person as true under penalty of perjury....”

attached revised versions of Rule 57.1 and Rule 57.2, as shown in their respective paragraphs (F).

7. Filings under seal and/or redacted filings. The State Bar’s suggestion to allow redacted filings and/or filings under seal has been incorporated within the attached revised version as a new paragraph (D). As shown in Appendix 1, this additional paragraph was included in Rule 57.1 as well as in Rule 57.2.

8. Denial of a petition without first holding a hearing. The State Bar has suggested that the court should be precluded from denying a petition without first holding a hearing. Such a provision might contradict the court’s inherent authority to summarily dispose of its cases. However, the undersigned acknowledges that paragraph (H) of existing Rule 57.1 and paragraph (H) of existing Rule 57.2 would be better presented if the option of the court entering an order upon submission of proof by affidavit was listed before, rather than after, the alternative of holding a hearing. Appropriate changes are shown in the attached versions of Rules 57.1 and 57.2.

B. Proposals regarding Rule 57.2, Declarations of Improper Party Status

The State Bar’s proposals regarding Rule 57.2 “largely track” the proposals for Rule 57.1. (State Bar’s comment, at page 8.) To that extent, Petitioner’s above-stated reply regarding Rule 57.1 is also applicable to Rule 57.2, except in the following respect.

The State Bar has correctly noted that a form of caption for a Rule 57.1 petition [“in re: (name of petitioner)”] has not been carried over in the existing Rule 57.2. This omission has been addressed in the version of Rule 57.2 set out in Appendix 1 by adding a form of caption in the text of paragraph (B).

II. Reply to Comments filed by the Arizona Prosecuting Attorneys’ Advisory Council, the Maricopa County Attorney, and the Commission on Victims in the Courts. These three comments all recommend a similar proposal to amend Rule 57.1.

The comments propose that a judicial officer in a criminal case be permitted to make a determination of factual innocence upon the entry of a guilty plea by a defendant, or upon a finding of guilt. New language for Rule 57.1(G)(4) proffered by the Maricopa County Attorney would permit a criminal court, “upon a determination of the defendant’s guilt in the criminal matter” to “contemporaneously enter a determination of a victim’s factual innocence without a hearing or submission of proof by affidavit.”

Petitioner believes that a proposal to allow a determination of factual innocence without proof contravenes the requirement in A.R.S. § 12-771(G) that a court must have “clear and convincing evidence.” Furthermore, sufficient facts to support a declaration of factual innocence may not be revealed in the course of determining a defendant’s guilt, so there is no assurance that the judge in the

criminal case would know enough about the identity issue to determine factual innocence without an evidentiary hearing. In most cases, the victim of the offense charged in the criminal case will not be the same person as the victim of an identity theft.³ Apparently in recognition of this difference, APAAC’s comment would include a provision to allow a judicial officer in a criminal case to make a finding of factual innocence after a defendant has pled guilty or has been found guilty of “an identity theft crime”. (APAAC comment, at page 1.) APAAC’s proposal would have only narrow impact because in the majority of cases, the victim of the crime charged in the criminal case and the identity theft victim who files a petition for a declaration of factual innocence will not be the same person.

Notwithstanding this concern, the suggestion that a factual innocence determination be made by the judge who presides over a related criminal case does have merit, since it could provide expedited relief to the victim of the identity theft. However, a judicial decision on a civil petition entered in the context of a criminal proceeding would require the unusual step of joining a civil matter with a criminal matter, which is likely to present logistical challenges from a case administration perspective, particularly in higher-volume courts where judicial assignments are limited to either criminal or civil calendars, but not both.

³ For example, D, using A’s identity, commits the crime of theft from XYZ Department Store. D is charged with theft. The “victim” of the theft is XYZ Department Store. Although A’s identity was used to commit the theft, A is not a victim of the charged offense.

Accordingly, should the Court wish to adopt such a procedure, Petitioner recommends that in lieu of revising the process set forth in civil Rule 57.1, an amendment to the Arizona Rules of Criminal Procedure would be appropriate. Petitioner suggests the following addition to the criminal rules, specifically, a new Rule 39.1, be adopted to authorize the judge to enter a finding of factual innocence:

Rule 39.1. Determination of Factual Innocence

If a petition for a determination of factual innocence is pending in the superior court at the time guilt is determined or sentence is pronounced in a criminal case, and the petition alleges that the defendant in the criminal case used the petitioner's personal identifying information in the commission of the offense charged in the criminal case, at the time of determination of guilt or pronouncement of sentence, the court may consider the merits of the petition, and the court may enter appropriate orders as provided in Rule 57.1 of the Rules of Civil Procedure.

III. Conclusion. Petitioner requests that Rule 57.1 and Rule 57.2 be amended as shown in Appendix 1.

RESPECTFULLY SUBMITTED this 25th day of June, 2009.

By _____
David K. Byers, Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

Electronic copy filed with the
Clerk of the Supreme Court
this 25th day of June, 2009.

Appendix 1

Rule 57.1. Declaration of Factual Innocence

A. Scope of rule. This rule governs the determination of factual innocence of a person who claims pursuant to A.R.S. ~~section~~ §12-771 that the person's personal identifying information was taken, and as a result the person's name was used by another person who was arrested, cited, or charged with a criminal offense, or entered as of record in a judgment of guilt in a criminal case.

B. Filing. A petition brought under this rule shall be filed in the Superior Court in the county in which the other person was arrested for, or cited or charged with, a criminal offense. The petition shall be assigned a civil case number. If applicable, the petition shall state the specific court location where the underlying charge was filed, or the judgment of guilt was entered, and the case number of that prior filing. The petition shall identify, as applicable, the names and mailing addresses of all persons and entities entitled under A.R.S. §12-771(H) to notice of a finding of factual innocence. The petition shall be captioned: In re: (name of petitioner).

C. Service. The Petitioner shall serve the petition in the manner prescribed by A.R.S. ~~section~~ §12-771 and by these rules.

D. Redacted Filings and Filings Under Seal. A person may request, and a court may order, that a filing containing potentially sensitive identifying information such as a person's birth date, social security number, or financial account numbers, be filed or retained in redacted form or under seal.

~~D~~ E. Transmission of Records. If the petition is related to a charge filed in a justice of the peace court or a municipal court, the Clerk of the Superior Court shall request the justice of the peace or presiding officer of the municipal court to transmit a copy of the file to the Clerk's office.

~~E~~ F. Discovery and Disclosure. Discovery may be conducted and disclosures under Rule 26.1 may be required only upon stipulation of the parties, or by order of the court.

~~F~~ G. Evidence. The Petitioner must establish factual innocence by clear and convincing evidence.

~~G~~ H. Hearing and Determination.

1. An order entered pursuant to this rule may be entered upon submission of proof by affidavit.

~~2.~~ 2. The Court may hold a hearing to determine the Petitioner's factual innocence.

~~3.~~ 3. If the Court holds a hearing, the victim of the offense identified in a judgment of guilt, or committed by the person arrested for, or cited or charged with, a criminal offense, has a right to be present and to be heard at the hearing.

~~3. If the Court does not hold a hearing, an order entered pursuant to this rule may be entered upon submission of proof by affidavit.~~

~~H I.~~ I. Order. On a finding of factual innocence related to an arrest, citation, or charge, the Court shall notify the following persons, if applicable: the Petitioner; the prosecuting agency which filed the charge; the law enforcement agency which made the arrest or issued the citation; the defense attorney.

Rule 57.2. Declaration of Factual Improper Party Status

A. Scope of rule. This rule governs petitions alleging factual improper party status pursuant to A.R.S. ~~section~~ §12-772, if as a result of a person's personal identifying information being taken, the person's name was entered as of record in a civil action or judgment.

B. Filing. A petition brought under this rule shall be filed in the Superior Court for the county in which the Petitioner's name was entered as of record in a civil action or judgment because of alleged improper use of the Petitioner's personal identifying information. The petition shall be assigned a civil case number. The petition shall state the specific court location where the underlying action was filed, and the case number of the prior filing. The petition shall be captioned: In re: (name of petitioner).

C. Service. The Petitioner shall serve the petition in the manner prescribed by these rules on all parties in the civil action in which the Petitioner's identity was allegedly used.

D. Redacted Filings and Filings Under Seal. A person may request, and a court may order, that a filing containing potentially sensitive identifying information such as a person's birth date, social security number, or financial account numbers, be filed or retained in redacted form or under seal.

~~D-E.~~ E. Transmission of Records. If the petition is related to a case filed in a justice of the peace court, the Clerk of the Superior Court shall request the justice of the peace to transmit a copy of the file to the Clerk's office.

~~E F.~~ F. Discovery. Discovery proceedings may be conducted and disclosures under Rule 26.1 may be required only on a petition brought pursuant to this rule upon stipulation of the interested parties, or by order of the court.

~~F G.~~ G. Evidence. The Petitioner must establish improper party status by clear and convincing evidence.

~~G H.~~ H. Hearing.

1. An order entered pursuant to this rule may be entered upon submission of proof by affidavit.

~~1. 2.~~ 2. The Court may hold a hearing on the petition.

~~2. If the Court does not hold a hearing, an order entered pursuant to this rule may be entered upon submission of proof by affidavit.~~

~~H I.~~ I. Order. The Court shall provide notice of the Court's findings to the Petitioner and to all parties in the civil action in which the Petitioner's identity was allegedly used.

Commission on Victims in the Courts
DRAFT MINUTES
Friday, May 8, 2009
10:00 am to 2:00 pm
State Courts Building
1501 W. Washington Street
Phoenix, AZ 85007
Conference Room 119A/B

Members Present:

Mr. Paul Ahler
Hon. Lex Anderson
Mr. James J. Belanger
Ms. Patricia Bigwood
Dr. Kathryn Coffman
Ms. Sydney Davis
Ms. JoAnn Del Colle (Proxy: Terri)
Ms. Karen Duffy
Cpt. Larry Farnsworth
Ms. Daisy Flores
Hon. Andrew Gould
Mr. Dan Levey
Hon. Anna Montoya-Paez
Hon. William O'Neil
Mr. Doug Pilcher
Hon. Ronald Reinstein (Chair)
Hon. Antonio Riojas, Jr.
Hon. Richard Weiss

Members Absent:

Mr. Michael Branham
Ms. Leslie James
Ms. Hilary Peele
Mr. Paul Prato
Mr. David Sanders

Presenters/Guests:

Hon. Gary Donahoe
Mr. Bob James
Ms. Kim Knox
Ms. Keli Luther
Ms. Jamie Mabery
Mr. Phil MacDonnell
Mr. Bill Owsley
Mr. Steve Twist

Staff:

Ms. Carol Mitchell
Ms. Kimberly Reid

I. Regular Business

A. Welcome and Opening Remarks

The May 8th meeting of the Commission on Victims in the Courts was called to order by Chair, Honorable Ronald Reinstein, at 10:08 am. Newly appointed members, Judge Gould and Paul Ahler, introduced themselves to the committee. Judge Reinstein offered his sincere appreciation to Steve Twist, who recently resigned from the commission, for his support and years of service to this commission. Judge Reinstein acknowledged that the Attorney General's Office held its annual recognition meeting in observance of National Crime Victims Rights week in which Chief Justice McGregor and Dan Levey were recognized. Finally, Jamie Mabery introduced Sam, Maricopa County Attorney's Office victim therapy dog and his handlers.

B. Approval of February 6, 2009 Minutes

Minutes from the February 6, 2009 Commission on Victims in the Courts meeting were presented for approval.

MOTION: To approve the February 6, 2009 Commission on Victims in the Courts minutes as presented. *Motion seconded and passed unanimously.*

II. Business Items / Potential Action Items

A. Rule 10.5

Judge Reinstein welcomed the following individuals who will address the commission in the following order: Phil MacDonnell, Maricopa County Attorney's Office; Steve Twist of Arizona Voice for Victims, Honorable Gary Donahoe and Bob James with Maricopa County Superior Court.

Phil MacDonnell, Chief Deputy County Attorney, discussed the reasoning behind the creation of this petition with Steve Twist of Arizona Voice for Crime Victims. This petition set out to address problems with transferred criminal cases in Maricopa Superior Court related to the volume of cases and the previous calendaring system.

Since the filing of the petition, the Court has instituted a new master calendar system which seems to be working well; however, a concern still exists that criminal cases will be lost in the system, and will considerably impact crime victims. This rule is proposed as a preventative measure to ensure the system continues to function as desired.

The proposed rule states that if a case is reassigned and cannot be heard within 48 hours of the originally scheduled date, it must be rescheduled at least five days out. This mirrors statutory language and would allow time to notify victims so they may make necessary arrangements to facilitate their attendance.

Steve Twist urged the group to favorably support the rule proposal. He believes this rule will help ensure victims' constitutional right to be present at all court proceedings.

Criminal Presiding Judge Gary Donahoe addressed the commission on behalf of the Maricopa Superior Court. He explained this rule will have no effect on their court because of the specific language used in the petition, such as “assigned judge” and “case transfer system”, which no longer exists due to the new master calendar. The new calendaring method sets a firm trial date and the case is heard within the time frame set with this petition; therefore making it unnecessary. He firmly asserted that Maricopa Superior Court is committed to honoring firm trial dates and has alternate back up plans in place for each case that may be re-scheduled to avoid a delay longer than one to two days.

Discussion:

A summary of some comments are listed below:

- Judge Reinstein expressed concern that this rule will add further delay and it also takes away any judicial discretion with the one party objection provision.
- Judge O’Neil asked why Maricopa is opposed to this rule if it will not even affect them and this should be considered because it would have a positive impact for victims in all courts across the state if implemented by rule.
- Judges O’Neil and Weiss expressed that case delays occur in other counties because of a lack of resources to set firm trial dates.
- Sydney Davis inquired as to why a rule is needed when the statute already declares that a victim must be given five days notice.
- Multiple members agree that the idea behind the rule is good but they are concerned that it doesn’t fix the problem.

After a lengthy discussion, the chair confirmed the petitioners were willing to working with members of COVIC to attempt to resolve the differences of the various positions as to the petition.

ACTION ITEM: Carol will file a petition to receive a time extension on the comment period. A small work group, comprised of COVIC members, Judge Weiss, Judge O’Neil, Paul Ahler and Jim Belanger, will coordinate with Phil and Keli Luther to formulate the commission’s formal comment.

MOTION: A subcommittee is formed, including a representative from Maricopa, to re-craft the proposed rule. The commission agrees with the general concept of giving appropriate notice to the victims when it comes to assignment or reassignment of a case for trial. *Motioned and seconded. Approved with no objections.*

MOTION: The commission endorses an extension of time for the comment period. *Motioned and seconded. Approved with no objections.*

B. Rule 804 (b) (5)

Phil MacDonnell explained his office submitted this rule petition to admit a hear-say statement when it can be proven that the defendant has caused the witness to be unavailable. It mimics a similar rule that exists in the federal rules of procedure. The question arose whether this would apply in all cases, and it

was believed it would apply in all cases in which the rules of evidence apply; however, some family court cases, the rules of evidence are suspended.

MOTION: The Commission will file a comment supporting the adoption of Arizona Rule 804 (b) (5).
Motioned and seconded. Approved with no objections.

ACTION ITEM: Staff will file a comment in support of this rule.

C. Rule 57.1 & 57.2

The Arizona Supreme Court's AOC filed this petition to conform to legislation, HB 2321, that went into effect January 1, 2009. This rule deals with identify theft in the commission of a crime. An individual may file a declaration to show that they were innocent.

Discussion

- Judge O'Neil suggests the addition of subsection 4 that would read as follows.
Upon a determination of the defendant's guilt in a criminal matter, the criminal court may contemporaneously enter a determination of the victim's factual innocence without hearing or submission of proof by affidavit. A determination of the defendant's guilt is deemed entered upon the defendant's change of plea or guilty verdict.

MOTION: For the committee to file a comment in support of changes with the addition of subsection 4 as above mentioned. *Motioned and seconded. Approved with no objections.*

D. 2010 Strategic Agenda Plans

Carol Mitchell offered a brief overview of the new collaboration tool available for the Supreme Court's upcoming five year Strategic Agenda. As Vice Chief Justice Berch transitions into the role of Chief Justice, she and members of the planning committee are seeking input from all Supreme Court Committee/Commission members for important issues that should be considered for inclusion in the new strategic agenda. Members will need to sign up and register on the site, www.sp2010.courts.az.gov, which is structured similarly to the Court's Rules Forum. Once registered, members are asked to submit any recommendations or suggestions by August 2009.

ACTION ITEM: Due to the limited time remaining for this presentation staff will email a copy of the presentation and instructions for COVIC members to sign up on the Strategic Plan 2010 collaboration website.

E. Workgroup Updates

1. Restitution

Dan Levey shared that the restitution webpage continues to be updated and reviewed. It is expected to be posted online within the next few months. He also explained the workgroup will be considering some restitution-related questions related to the post-sentence jurisdiction.

The workgroup has received a couple questions come up about who retains jurisdiction over restitution.

2. Children in the Court

Bill Owsley discussed the attorney standards proposed by the workgroup along with Dr. Kathy Coffman. It was suggested that in lieu of statewide standards implemented by rule, each county could adopt their own version, which may be more feasible for the Committee on Juvenile Courts to accept.

Bill will redraft the standards and return to the Committee on Juvenile Courts. Judge O'Neil suggested the standards may be drafted or implemented through a judicial code of administration, versus rule.

MOTION: The Commission reaffirms its prior support of the attorney standards idea. *Motioned and seconded. Approved with no objections.*

III. Business

A. Next Meeting:

September 11, 2009
State Courts Building
Phoenix, AZ 85007

B. Call to the Public

None.

Judge Reinstein introduced Keli Luther, with the Crime Victim Enforcement Project, whom he plans to nominate as a candidate to replace Steve Twist. Additionally, the chair asked for recommendations from members for individuals, particularly outside Maricopa County, who may be candidates for future reappointment cycles.

C. Adjournment

The meeting was adjourned at 12:31p.m.

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
November 6, 2009	<input checked="" type="checkbox"/> Formal Action Request <input type="checkbox"/> Information Only <input type="checkbox"/> Other	2010 COVIC meeting dates

FROM: Commission on Victims in the Courts

PRESENTER(S): Hon. Ron Reinstein, Chair

DISCUSSION & TIME ESTIMATE:

Commission members will review the proposed meeting dates for 2010 and advise the Chair of any conflicts.

Friday, February 5, 2010

Conference room 345

Friday, May 14, 2010

Conference room 345

Friday, October 1, 2010

Conference room 119

RECOMMENDED MOTION (IF ANY):

Motion to approve the proposed 2010 COVIC meeting dates

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
November 6, 2009	<input checked="" type="checkbox"/> Formal Action Request <input type="checkbox"/> Information Only <input type="checkbox"/> Other	AMENDMENT TO ACJA §5-204 (ADMINISTRATION OF VICTIMS' RIGHTS), SECTION (K) RE: RESTITUTION PAYMENT PROCESSING

FROM: Clerk of the Superior Court in Maricopa County

PRESENTER(S): Gordon Mulleneaux

DISCUSSION & TIME ESTIMATE: 15 minutes

This proposal is to amend the Arizona Code of Judicial Administration, Part 5, Chapter 2, Section 204, Paragraph K, "Restitution Payment Processing", to raise the disbursement threshold from ten to thirty dollars and clarify the use of business versus calendar days in the payment process. The current Code sets a mandatory threshold of ten dollars for the release of payments. We, in Maricopa County, would like to increase the threshold to thirty dollars.

This change was discussed with the Clerks of the Superior Court in their September meeting. The Clerks unanimously supported increasing the threshold amount to thirty dollars. The Clerks supported this position because it does not require any change to current practices but would allow a change if the policy maker (an elected Clerk) favored a change. The current practice by the Clerks of the Superior Court in the fifteen counties is varied. Some follow the ten dollar threshold and others send out all restitution monies no matter the amount. The proposed language change does not require any change by any Clerk or any court but is permissive.

The motivation for this change is a budget/resource issue. Due to the large volume of payments mailed to victims by the Maricopa County Clerk's Office –

postage savings of over one thousand dollars per month could be realized if the threshold was increased. (See attached chart for monthly payment allocations). The restitution payment system used by the Maricopa County Clerk's Office has the manual ability to send out checks of less than ten dollars if requested. In the past years, we have received and honored all requests to do so. (The number of requests has been very small.) We plan to continue this practice.

At the request of the COVIC Committee, we support and have proposed new language in the code requiring prior notification of changing the threshold amount to parties receiving restitution.

RECOMMENDED MOTION (IF ANY): Recommend approval of the amendment to 5-204(K).

ARIZONA CODE OF JUDICIAL ADMINISTRATION
Part 5: Court Operations
Chapter 2: Programs and Standards
Section 5-204: Administration of Victims' Rights

A. through J. [no changes]

K. Restitution Payment Processing.

1. [no changes]
2. The clerk of court or other court entity responsible for receipting and disbursing restitution shall forward all restitution payments made by cash, cashiers' check, credit card or money order to victims within ten business days, unless the amount of any single disbursement is less than ~~ten~~ thirty dollars. The court, clerk of court, or other court agency responsible for receipting and disbursing restitution shall give individuals receiving restitution at least 30 days notice before increasing the agency's disbursement threshold. The court, clerk of court, or other court agency responsible for receipting and disbursing restitution shall disburse all personal check payments within 21 calendar days of receipt. Where a single disbursement is less than ~~ten~~ thirty dollars the court may develop a clearly defined business system routine to hold funds received for individual victims until the aggregate total in an account reaches a minimum of ~~ten~~ thirty dollars.
3. [no changes] Notwithstanding subsection (2) above, courts receiving restitution payments shall remit all amounts collected over one dollar to victims not less than once each calendar year. In cases where victims cannot be located, courts, clerks or other agencies responsible for restitution payments shall follow state unclaimed property provisions.
4. [no changes]

L. [no changes]

Current circumstances and present practices of paying restitution to victims

The Clerk of the Superior Court in Maricopa County has a history in the issuance of restitution checks. We issue restitution checks daily to victims when restitution amount is \$10.00 or greater. As a result, we issue over 300 checks daily. In order to process all allocated funds to restitution, we reduce the threshold annually to \$1.00 in March to ensure victims receive money allocated to them. The AOC has codified our practice in the Code of Judicial Administration. Generally, the small amounts occur because there may be numerous victims on a case or the payment amount is diminutive. For example, in July 2009, we received 4,309 payments from prisoner accounts (\$89,500.79) from the Department of Corrections for victims [See table].

July 2009 payments from the Department of Corrections to the Maricopa County Superior Court Clerk		
\$ range	Count	%
\$.01 - \$9.99	1,430	33%
\$10.00 - \$14.99	764	18%
\$15.00 - \$19.99	487	11%
\$20.00 - \$24.99	489	11%
\$25.00 - \$29.99	252	6%
\$30.00 - \$34.99	223	5%
\$35.00 - \$39.99	149	3%
\$40.00 - \$44.99	134	3%
\$45.00 - \$49.99	66	2%
\$50.00 and up	315	7%
	4,309	

We are proposing one important change to the current process. The change would be to temporarily increase the dollar threshold from \$10.00 to \$30.00. We will continue to post all amounts to all accounts and only raise the threshold amount. We will continue to lower the threshold to \$1.00 each year in March. For Maricopa County, the direct savings by increasing the threshold based upon this year's activity would be approximately \$1,296.54 a month or \$15,558.48 per year (postage savings).

An important note is that we have the ability to manually issue a check to a payee requesting payment regardless of the amount. This requires special manual processing. This occurs approximately two or three times annually.

What is required to make this change?

The AOC would amend the Arizona Code of Judicial Administration Part 5, Chapter 2, Section 204, Paragraph K "Restitution Payment Processing" subsection (2) substituting thirty dollars for ten dollars in line four and line seven.

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
November 6, 2009	<input type="checkbox"/> Formal Action Request <input type="checkbox"/> Information Only <input checked="" type="checkbox"/> Other	A.R.S. § 13-1415/HIV Testing/Victim Rights

FROM: Maricopa County Superior Court

PRESENTER(S): Honorable Gary Donahoe

DISCUSSION & TIME ESTIMATE: 15 minutes

Judge Donahoe plans to discuss potential options for enforcement or legislative action necessary to strengthen this statute to ensure proper testing and funding is available.

RECOMMENDED MOTION (IF ANY):

[13-1415. Human immunodeficiency virus and sexually transmitted disease testing; victim's rights; petition; definitions](#)

A. A defendant, including a defendant who is a minor, who is alleged to have committed a sexual offense or another offense involving significant exposure is subject to a court order that requires the defendant to submit to testing for the human immunodeficiency virus and other sexually transmitted diseases and to consent to the release of the test results to the victim.

B. Pursuant to subsection A of this section, the prosecuting attorney, if requested by the victim, or, if the victim is a minor, by the parent or guardian of the minor, shall petition the court for an order requiring that the person submit a specimen, to be determined by the submitting entity, for laboratory testing by the department of health services or another licensed laboratory for the presence of the human immunodeficiency virus and other sexually transmitted diseases.

The court, within ten days, shall determine if sufficient evidence exists to indicate that significant exposure occurred. If the court makes this finding or the act committed against the victim is a sexual offense it shall order that the testing be performed in compliance with rules adopted by the department of health services. The prosecuting attorney shall provide the victim's name and last known address of record to the department of health services for notification purposes. The victim's name and address are confidential, except that the department of health services may disclose the information to a local health department for victim notification purposes.

C. After a specimen has been tested pursuant to subsection B of this section, the laboratory that performed the test shall report the results to the submitting entity.

D. The submitting entity shall provide the results to the department of health services or a local health department. The department of health services or a local health department shall notify the victim of the results of the test conducted pursuant to subsection B of this section and shall counsel the victim regarding the health implications of the results.

E. The submitting entity or the department of health services shall notify the person tested of the results of the test conducted pursuant to subsection B of this section and shall counsel the person regarding the health implications of the results. If the submitting entity does not notify the person tested of the test results, the submitting entity shall provide both the name and last known address of record of the person tested and the test results to the department of health services or a local health department for notification purposes.

F. Notwithstanding any other law, copies of the test results shall be provided only to the victim of the crime, the person tested, the submitting entity and the department of health services.

G. For the purposes of this section:

1. "Sexual offense" means oral sexual contact, sexual contact or sexual intercourse as defined in section 13-1401.

2. "Sexually transmitted diseases" means:

(a) Chlamydia.

(b) Genital herpes.

(c) Gonorrhea.

(d) Syphilis.

(e) Trichomonas.

3. "Significant exposure" means contact of the victim's ruptured or broken skin or mucous membranes with a person's blood or body fluids, other than tears, saliva or perspiration, of a magnitude that the centers for disease control have epidemiologically demonstrated can result in transmission of the human immunodeficiency virus.

4. "Submitting entity" means one of the following:

(a) A local health department.

(b) A health unit of the state department of corrections.

(c) A health unit of any detention facility.

(d) A physician licensed pursuant to title 32, chapter 13, 17 or 29.

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
November 6, 2009	<input type="checkbox"/> Formal Action Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	ACJA Web Forum

FROM: Commission on Victims in the Courts

PRESENTER(S): Ms. Carol Mitchell

DISCUSSION & TIME ESTIMATE: 10 minutes

AOC recently developed a new electronic forum for pending Arizona Code of Judicial Administration proposals. The new ACJA Web Forum (similar to the Rules Forum) can be found at:
<http://azdnn.dnnmax.com/Default.aspx?alias=azdnn.dnnmax.com/forumacia>.

To comment on any proposed code section, registration is required; however, registration is not necessary for read only/ review access.

RECOMMENDED MOTION (IF ANY): N/A

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
November 6, 2009	<input type="checkbox"/> Formal Action Request <input type="checkbox"/> Information Only <input checked="" type="checkbox"/> Other	COVIC Strategic Planning

FROM: Commission on Victims in the Courts

PRESENTER(S): Hon. Ron Reinstein, Chair

DISCUSSION & TIME ESTIMATE: 15 minutes

Commission members will review and prioritize the attached list of potential projects. Although some projects have been partially addressed (check marked), additional input is sought to prioritize the remaining projects and identify new or on-going issues for courts and victim rights.

RECOMMENDED MOTION (IF ANY):

✓ **Note: Checked items have been addressed**

Commission on Victims in the Courts
2006-9 Strategic Planning

Focus areas from AJCA Code Section 1-111:

Make recommendations regarding training and education for judges and court personnel on victims' rights and treatment of victims:

- ***General Education:***
 - ✓ Increase awareness of victim issues- add human experience and help understand why it's important for all
 - Increase frequency of victim training offerings due to rotations of judges and staff
 - Consider teleconference training on victim rights for all courts
 - Provide victim resource information (state agencies) and how they are funded (reduce surcharges)
 - Implement mandatory COJET training on victim rights
 - ✓ Add victim rights section to judicial conference

- ***Judicial Education:***
 - ✓ Review judicial education curriculum to ensure victim rights and victim sensitivity training is included and consider requesting that it be a mandated course
 - Incorporate victim organizations and their respective impact panel speakers (POMC, MADD, ACADV, etc) to provide personal perspective to impact of system on a regular basis and to others not yet on criminal bench
 - Implement victim sensitivity training as mandatory prior to assignment to criminal bench and as part of new judge orientation
 - Look to train judges on other than criminal bench-more holistic approach for children
 - Review bench book to:
 - Encourage judges to call victim cases first for regular and jury calendars
 - have consistency in what is being read to victims and increase victim understanding of initial address from the judge

- ***Court staff education:***
 - Bailiff training-Court demeanor & control to keep victims free from intimidation
 - Expand DV training to help educate court staff-CIDVIC coordination
 - Train all other court personnel on victim rights-on-going-help staff bring issues to judges attention during court proceedings
- ✓ Educate all court staff (bailiff, clerk, JA, court interpreter, court reporter)

✓ **Note: Checked items have been addressed**

■ *Caseflow Management:*

- Rotating judges –remedy to allow them to take some cases
- Reduce continuances and educate advocates on advising victims on events –telephonic appearance
- Inform victims of case calendaring- keep firm trial dates
- Submit notices in advance to avoid hearings

✓ Evaluate court recordings given on victim rights

■ *Document Development*

- Judges victims' rights separate bench book or resource book
- Best practice- court administration- dockets, staff treat victims- checklist/audit of court house

■ *Research*

✓ Santa Cruz County pilot program

- Legislation to modify fines and not surcharges
- Evaluate Oregon project- compliance

■ *Miscellaneous*

✓ Input given on courtroom design/waiting rooms for victims (Maricopa)

- Consider amending code section to provide guidelines for courtroom design or victim space issues
- Consider expand victim rights to state agency cases- i.e. medical licensing cases
- Increase advocacy support- need funding for more advocates-to give contact person to victims-courtroom advocates
- Rural county uniformity and networking and getting resources out to them
- Expand the definition of victim to include others outside of criminal Prosecution

✓ Stronger branch of GAL for children-increase education for them-funding source

Work to promote the improved collection and disbursement of restitution:

■ *Court's role:*

- Need to explore greater use of set-offs
- Ensure restitution orders are enforced for offender accountability
- Juvenile restitution collection officer- Pinal county

✓ **Note: Checked items have been addressed**

- ***Probation's Role:***
 - Need more focus through probation supervision
 - Bring in county probation/clerks to discuss collection Pima Co. has clerk at probation office
 - Notification of delinquency of restitution- Pima Co.
 - Make easy to pay, remind if late, return if non-payment
- ***Clerk's Role:***
 - Uniformity between clerk/probation-to AJC recommendations- use technology to allow real-time update of monies owed
- ***Document Development:***
 - ✓ Develop written information which is more specific, and some examples of what happens to restitution could be given to victims.
- ***Research:***
 - Focus on those parts of the system that deal with restitution and evaluate weaknesses & gain victim input at commission meeting

Liaison with other established victims' advocacy organizations while maintaining neutrality.

- Main relationship through education
- Judges could liaison by speaking to victims advocacy groups and also to defense advocacy groups by preparing some educational material which addresses both sides of the issue in a neutral fashion
- ✓ Add victim groups/input during judicial orientation (NJO) to provide presentations and at annual judicial conference
- Crime victim rights information in courthouses- during NCVRW

Make other recommendations that preserve victims' constitutional rights and administration of justice:

- Address problem of protecting victims' rights at Initial Appearances, during the appellate and post-conviction relief processes
- ✓ Address the unmet needs and rights of children who are victims of criminal abuse and neglect
- Discussion of interpretation of constitutional victims' rights from different perspectives
- Work with Board of Exec. Clemency/ ADC
- Educate PJ to ensure process is set when needed (high profile cases) and explore options for limited capacity courtrooms for victim safety issues

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
November 6, 2009	<input type="checkbox"/> Formal Action Request <input type="checkbox"/> Information Only <input checked="" type="checkbox"/> Other	Administration of Justice workgroup plan

FROM: Commission on Victims in the Courts

PRESENTER(S): Hon. William O'Neil, Chair

DISCUSSION & TIME ESTIMATE:

Commission members will review the list of project recommendations for the Administration of Justice workgroup and provide recommendations for potential workgroup members.

RECOMMENDED MOTION (IF ANY):

Administration of Justice Workgroup
Outstanding issues:

Long-term priorities previously identified by workgroup:

- **Evaluate setting of bond practices- see if variance between judges can be reduced (ex. child molesters)**
- **Promote training to change culture among judges/courts about victimization- help re-sensitize staff to victim issues (ex. calendaring victim cases and courtroom exit procedures)**
- **Review probation notification responsibilities- who handles- improve coordination**

Additional issues:

- Civil commitment orders
- Update priorities- interpreter/benchbooks/bail/sensitivity education
- Develop list of recommended standards for construction/renovation involving victim issues
- Diversion cases and impact to victim rights
- Juvenile judges assessing restitution to parents
 1. Rule changes- deadline
- Review definition of victim- (ex. 404B witness protection)
- Review impact to change of Dept. of Corrections policy to allow victims access to location and security level of inmates
- Review status of juvenile sex offender registration process
- Review policies/propose rule on the use of bailiffs to serve orders of protections in the courtroom (POST certified)
- Consider legislation to change statute to allow for 7 days to notify victims of court proceedings. Consider impact to limited jurisdiction/in-custody to re
- Promote training about victim advocates role (independence)
- Propose recommendation for Supreme Court to partner with local universities (school of architecture) to create/design courtroom of the future- (victim friendly and accessibility, parking, etc)
- Capital Case committee has been formed and handling these issues.
- Consider services to jurors in capital cases (help de-brief/provide assistance- PTSD issues)
- Investigate issues in civil arena for DV cases- protections during various proceedings

Commission on Victims in the Courts

Meeting Date:	Type of Action Required:	Subject:
November 6, 2009	<input checked="" type="checkbox"/> Formal Action Request <input type="checkbox"/> Information Only <input type="checkbox"/> Other	Restitution webpage final review

FROM: Commission on Victims in the Courts- Restitution workgroup

PRESENTER(S): Ms. Carol Mitchell for Dan Levey

DISCUSSION & TIME ESTIMATE: 10 minutes

The restitution workgroup is in the final stages of review prior to public dissemination. Please review the website and provide feedback.

RECOMMENDED MOTION (IF ANY): Approve site for posting.

Commission on Victims in the Courts
DRAFT MINUTES
Friday, September 11, 2009
10:00 a.m. to 1:00 p.m.
State Courts Building
1501 W. Washington Street
Phoenix, AZ 85007
Conference Room 119A/B

Members Present:

Hon. Lex Anderson
Mr. James J. Belanger
Mr. Michael Branham
Ms. Sydney Davis
Ms. JoAnn Del Colle (telephonically)
Ms. Karen Duffy
Cpt. Larry Farnsworth
Ms. Daisy Flores
Hon. Andrew Gould
Mr. Dan Levey
Ms. Keli Luther (Proxy: Mischa Hepner)
Hon. Anna Montoya-Paez
Hon. William O'Neil
Mr. Doug Pilcher
Mr. Paul Prato
Hon. Ronald Reinstein (Chair)
Hon. Antonio Riojas, Jr.
Mr. David Sanders
Hon. Richard Weiss (telephonically)

Members Absent:

Mr. Paul Ahler
Ms. Patricia Bigwood
Dr. Kathryn Coffman
Hon. Gary Donahoe
Ms. Leslie James
Ms. Hilary Peele

Presenters/Guests:

Chief Justice Rebecca White Berch
Ms. Jennifer Greene
Ms. Patience Huntwork
Ms. D.K. (telephonically)
Ms. Kim Knox
Mr. Ken Kung
Ms. Amy Love
Mr. Gordon Mulleneaux
Hon. Ann Scott Timmer
Ms. Julie Williams

Staff:

Ms. Carol Mitchell
Ms. Kimberly Reid

I. Regular Business

A. Welcome and Opening Remarks

The September 11th meeting of the Commission on Victims in the Courts was called to order by Chair, Honorable Ronald Reinstein, at 10:10 a.m. Judge Reinstein introduced newly appointed Chief Justice Rebecca White Berch. Chief Justice Berch expressed her gratitude to those who serve on this committee and encouraged everyone to continue their great work and ask the Court for help if needed.

Judge Ronald Reinstein introduced Chief Judge Ann Scott Timmer from Court of Appeals, Division One. He acknowledged her vital role in resolving a recent victim issue. A victim in a case that occurred in the 1970s contacted the Supreme Court. She was upset that her full name and identifying information was published in the appellate court opinion and available on the Internet. The victim was referred to COVIC staff, who sought assistance from Judge Timmer. Judge Timmer made contact with Westlaw and within a day, the victims' identifying information except first name and last initial had been redacted. Since this issue was brought to light, Judge Timmer has assembled a volunteer committee to go through old cases and identify other opinions using full names involving minors or sexual assault victims.

Dan Levey made an announcement about the National Day of Remembrance for Murder Victims on September 25. Parents of Murdered Children-Valley of the Sun Chapter will be having a commemorative event on September 26 in the Phoenix area. In Tucson, Homicide Survivors will be having an event on September 25.

Carol Mitchell announced that the AOC has taken steps to prevent the spread of infections and has placed hand sanitizer dispensers in all of the conference rooms and restrooms in the building. She also announced that COVIC will now be using an online RSVP function on our website.

B. Approval of May 8, 2009 Minutes

Minutes from the May 8, 2009 Commission on Victims in the Courts meeting were presented for approval.

MOTION: To approve the May 8, 2009 Commission on Victims in the Courts minutes as presented. *Motion seconded and passed unanimously.*

II. Business Items / Potential Action Items

A. Amendment to ACJA §1-202

Jennifer Greene introduced the proposed changes to the code section involving public meetings. The purpose of the amendments are to clarify the following: a) Facilities planning to ensure the public can attend any public meeting involving video conferencing or teleconferencing by members, b) How to handle a request from a member of the public to record a public meeting, and c) Proper and improper use of email by council members and staff to ensure that all council discussions and legal actions involving a quorum of members are conducted in public.

Discussion:

- JoAnn Del Colle explained that because open meeting rules don't apply to workgroups, they are a good way to keep work going if a quorum or meeting notifications requirements are not met.
- This also brings to light that rule comments, done by a workgroup, still need to be approved by the full committee before they can be filed on behalf of the committee.

MOTION: To forward the recommendation to AJC for passage of the proposed code amendments. *Motioned and seconded. Approved with no objections.*

B. Legislative Update

Amy Love distributed a one page summary of the following bills that were recently approved by the legislature.

Chapter 57: DOMESTIC VIOLENCE; CHILD CUSTODY -*Impact: Judges must now make specific findings when there are allegations of domestic violence in a contested custody case.*

Chapter 129: DOMESTIC VIOLENCE; DATING RELATIONSHIPS -*Impact: The changes will require modification of the Arizona Rules of Protective Order Procedure, Supreme Court approved forms under A.C.J.A. § 5-207 and AZTEC forms module, as well as, any other case management system that generates protective order forms. The short title is misleading as the change has no effect on dating relationships in the statute for the Injunction Against Harassment under A.R.S. §12-1809. Reference rule petition R-09-0026.*

Chapter 138: FIDUCIARIES-*Impact: The change will require an amendment to A.C.J.A. § 7-202.*

The following bills were discussed:

- **Cold Case Registry**- will require certain steps be taken by law enforcement for follow up with victims on cold cases.
- **Sex Offender GPS monitoring**- judges were given more authority to decide if an offender needs to be kept on GPS monitoring or if they could be removed from the monitoring.
- **Removal of life with the possibility of parole after 25 years**- was not passed. Concern was expressed that it would take a bargaining option away from the prosecutors and could have a negative impact on victims.
- **Finger Print Cards**- The Department of Corrections has been monitoring the number of people who enter the system, but are released without being fingerprinted. A piece of legislation targeted this issue.

Discussion:

- Judge Reinstein brought up two issues on behalf of Judge Gary Donahoe which may be discussed at the November meeting:
 - §41-105 was used to allow a Mexican national to transfer to Mexico to serve the remainder of a vehicular manslaughter sentence. The concern involves whether the victim and the prosecutors are being notified and the level of accountability in Mexico. Jerry Landau will be contacted to assist in researching this issue.
 - When a court orders blood testing based on the applicable statute, who pays for the testing? Currently it is not defined in the statute, leading to confusion.
 - Mischa Hepner said that in Pinal County, the Department of Health Services handles the testing and paid for the financing.
 - Daisy Flores shared that in Gila County, the Department of Health Services also handles the testing.
 - Judge Reinstein asked others to research what procedures occur in their counties for discussion at the next meeting.

C. Court Rules Update

Patience Huntwork, from the Supreme Court's Staff Attorney's Office, provided an overview of several rule petitions with criminal and/or victim-related issues:

- R-08-0019- RULE 28, RULES OF PROCEDURE FOR JUVENILE COURT et al. would allow for court orders that juveniles or adults summoned to court and who are charged with specified offenses report to the arresting agency and submit biological samples for DNA testing.
- R-08-0022-RULE 10.5, ARIZONA RULES OF CRIMINAL PROCEDURE Would create a new paragraph "c" which addresses the transfer of cases already set for trial date due to the unavailability of the trial judge- the Supreme Court continued this item and referred back to COVIC for comment.
- R-08-0037- RULE 39, ARIZONA RULES OF CRIMINAL PROCEDURE would amend the definition of "victim" in rule 39(a) to conform to statutory changes broadening the definition appearing in A.R.S. sections §3-382, §13-703.01, §13-703.03, and §13-4401-Adopted.
- R-09-0001- RULE 31.6, RULES OF CRIMINAL PROCEDURE et al. would require disbursement of restitution payments collected by the court pending an appeal unless the defendant can demonstrate to the court sufficient grounds for a stay. This proposed change was rejected.
- R-08-0039-RULE 123, RULES OF THE SUPREME COURT et al. to provide greater access to case records while being mindful of sensitive information that might be contained within the records- Adopted.

- R-09-0012- RULE 92(a)(1), RULES OF THE SUPREME COURT would require the presiding judge in each county to create a random case assignment system within each judicial division for all cases in which a judge has not previously been involved- Adopted.
- R-08-0016- RULE 1.6, ARIZONA RULES OF CRIMINAL PROCEDURE would provide for appearances by defendants via videoconferencing for initial appearances, arraignments, and some other hearings.
- R-08-0027- PROMULGATE RULE 57.1 AND 57.2, ARIZONA RULES OF CIVIL PROCEDURE would provide a procedural mechanism for a victim of identity theft to petition for declaration of factual innocence when the victim's identity has been used in the commission of a criminal offense and a declaration of improper party status in civil cases- Adopted.
- R-09-0009- PROMULGATE RULE 804(B)(5), ARIZ RULES OF EVIDENCE- would add a new hearsay exception when the defendant has deliberately acted to make the declaring witness unavailable for trial- Adopted.

D. Restitution thresholds

Mr. Gordon Mulleneaux, from the Superior Court of Maricopa County's Clerk's Office, addressed COVIC to suggest an increase in current restitution threshold disbursements. He explained his office currently collects restitution for victims and issues a check once the amount reaches \$10.00. Once a year, they lower the threshold to \$1.00 to empty out the accounts. The proposal is to raise that threshold to \$30.00, resulting in a savings of \$1,500.00 per month. Gordon provided a handout for July 2009 restitution payments from the Department of Corrections (DOC) inmates allocated by specific dollar amounts, to illustrate the proportion of payments that fall below the proposed \$30.00 threshold.

Discussion:

- Dan Levey expressed concern with the fact that it could delay payment to a victim.
 - Gordon explained that a victim could ask the court to issue them a check at any time.
 - Jim Belanger would like disbursement procedures to be included in the information that victims get when they are ordered restitution.
- Ken Kung from the AOC explained that the Minimum Accounting Standards (MAS) refers to this code section directly. If this code is amended, it will be amended in (MAS).
- The statistics that are represented on the handout are only for Department of Corrections (DOC). Judge Weiss asked for additional statistics for non-DOC payments.
 - Gordon agreed to gather statistics; however, the large majority of the payments under \$30.00 come from DOC.
- Judge William O'Neil recommended the Clerks' Association review the issue and return with a petition to amend the code.

MOTION: Table until we hear back from the Clerk's Association. *Motioned and seconded. Approved with no objections.*

E. Workgroup Updates

1. Restitution

Dan Levey announced the Attorney General's Office has put together a Victim's Committee to advise the Attorney General of victims' current issues and insights.

The restitution handout provided showed how much money has been collected from the "new restitution law" that allows DOC to take portions of monies sent to inmates owing restitution. The language DOC is requesting that judges use in the court orders, to be able to collect restitution in this manner was also included on the handout. Without this specific language, DOC believes they lack authority to collect the restitution.

Carol Mitchell displayed the new restitution website which is intended to be a "one-stop shop" of information for victims regarding restitution. It is not currently available to the public, but will be after it is reviewed by a number of groups.

2. Children in the Courts- No report provided

3. Administration of Justice

Judge Reinstein would like to get this workgroup going again and asked for a volunteer to serve as chair.

III. Business

A. Next Meeting:

November 6, 2009
10:00 a.m.
State Courts Building
Phoenix, AZ 85007
Conference Room 106

B. Call to the Public

Kim Knox addressed the Commission on the issue of Criminal Restitution Orders (CRO). She explained the process of creating CROs but also explained that sometimes they are missed. Recently two different cases were brought to light. Both defendants appealed the restitution orders because they were "not created in a timely manner." One was for \$8,000 and the judge overturned the restitution order. The other was for millions of dollars with multiple victims. The order was upheld, but the CRO had to be recreated with victims' names listed individually. Kim plans to ask the Attorney General's Office to appeal the decision in the case that was overturned. The case law created by this case could have major implications in the future.

Ms. D.K. then addressed the Commission as the victim in the case that Judge Ronald Reinstein discussed at the beginning of the meeting. She found her and her sister's personal information involving the case on multiple websites. In the past two weeks, she has observed that the system is very insensitive to

victims. She has been told that it will take too many tax dollars to redact the information. She and her sister would like to see this information removed from the various Internet sites because it has caused them severe emotional distress. Dan Levey expressed his concern and appreciation for her contacting COVIC. Judge Reinstein asked if Mischa Hepner, from Arizona Voice for Crime Victims and Dan Levey of the Attorney General's Office of Victim Services would be willing to follow up with D.K. Both agreed and Carol Mitchell will route their contact information to the victim. D.K. thanked COVIC for the opportunity to share her very personal experience.

C. Adjournment

The meeting adjourned at 12:31 p.m.

DRAFT