

Justice John R. Lopez IV, Chair
Committee on Criminal Rules Regarding Victims
1501 W. Washington St.
Phoenix, AZ 85007

IN THE SUPREME COURT

STATE OF ARIZONA

IN THE MATTER OF:) No. R-20-0031
)
PETITION TO AMEND THE) **Report of the Committee on Criminal**
ARIZONA RULES OF) **Rules Regarding Victims**
CRIMINAL PROCEDURE)
)
_____)

I. Introduction. The Committee on Criminal Rules Regarding Victims by its undersigned Chair submits this report pursuant to Administrative Order No. 2020-183.¹ The committee previously recommended that the Arizona Supreme Court decline to adopt the amendments to the Arizona Rules of Criminal Procedure proposed by rule petition no. R-20-0031 that would integrate victims’ rights provisions currently found in Rule 39 into other criminal rules. Although a majority of the committee continues to believe that a standalone Rule 39 is a simpler approach

¹The Court subsequently extended the deadline set by A.O. No. 2020-183 for the committee to file this report. A.O. No. 2021-182 specifies a July 1, 2022, deadline.

that better serves the interests of crime victims, the committee recognizes the concerns underlying the contrary position, and it therefore agreed to provide an alternative recommendation that preserves Rule 39 while also incorporating many of its provisions into other criminal rules. This alternative recommendation proposes to insert a new section (v) into 40 criminal rules, as shown in Appendix A. Appendix B contains an explanation of each amendment.

II. Background. The impetus for this committee was rule petition number R-20-0031, which was filed by the Arizona Voice for Crime Victims (“AVCV”). The AVCV’s petition sought to integrate the provisions of Rule 39, which is titled “Victims’ Rights,” within the other Arizona Rules of Criminal Procedure.² To achieve integration, an appendix to R-20-0031 proposed amendments to 51 criminal rules.³ The Supreme Court considered R-20-0031 at its August 2020 rules agenda.

The Supreme Court thereafter entered [Administrative Order No. 2020-183](#) and established this Committee on Criminal Rules Regarding Victims. The Order directed the committee to:

² “Integration” as used in this report means relocating victims’ rights from Rule 39 to other criminal rules.

³ There are actually 41 criminal rules, but the majority of rules have numbers to the right of a decimal point, which divide the primary rule into secondary rules dealing with the same subject matter, e.g., Rules 4.1, 4.2, 4.3, etc. This numbering scheme results in more than 100 individual rules. With the exclusion of Rule 39, there are currently 64 criminal rule provisions that include a reference to “victim,” and to that extent, the rules are already partially integrated.

... review the amendments proposed by rule petition no. R-20-0031. The Committee shall determine which provisions of Rule 39 might be logically relocated, as proposed by that petition, and whether relocating a provision would help safeguard victims' rights. The Committee may accept or reject any amendments that were proposed in rule petition no. R-20-0031. The Committee may also modify or restyle any provision regarding victims that was proposed by that petition, and it may recommend adding provisions other than those the petition proposed, but it cannot make substantive changes to the current victims' rules.

The Order also appointed the committee's 11 members, who include prosecutors, defense counsel, victim advocates, superior court judges, and a judge on the Court of Appeals.⁴ The Court appointed a Supreme Court justice as committee chair.⁵

III. Early comments and presentations. Victims' rights are well-established in Arizona law, as provided by the Arizona Constitution, Article 2, § 2.1 (also known as the Victims' Bill of Rights, or "VBOR"), and Arizona Revised Statutes §§ 13-4401, *et seq.* Criminal Rule 39 is a complementary rule of procedure that implements these rights in court proceedings.

During a roundtable discussion at the first meeting, a committee member who serves as AVCV's chief counsel acknowledged that in recent years, the AVCV had filed two similar rule petitions that were not adopted. Counsel said, however, that R-20-0031 was different from the previous petitions because it addressed

⁴The last page of this report includes a list of committee members.

⁵ Justice Andrew Gould served as Chair for the first three committee meetings. Justice John R. Lopez IV became Chair upon Justice Gould's retirement from the Supreme Court.

concerns raised by stakeholders in their comments to the earlier filings.⁶ R-20-0031 also contained anecdotal examples of victims' rights abuses. The rule petition included a citation to the VBOR, Section 2.1(A)(11), which provides that "a victim of a crime has a right: ...

(11) To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.

AVCV's chief counsel believed that victims' rights should be fully integrated and recommended the adoption of all of R-20-0031's proposed amendments rather than just some of them.⁷

Several committee members during the first meeting disagreed with integration. They contended that it is easier for judges to locate provisions concerning victims if the provisions are in a single location, i.e., in Rule 39. They also believed that Rule 39 better informs victims, particularly those who are not represented by counsel, that they have rights and what those rights are. These

⁶ Materials for the first committee meeting included excerpts from meeting minutes of two prior Supreme Court task forces, one on criminal rules (2016-2017) and the other on Rule 32/post-conviction relief (2018-2019). These excerpts contained discussions by members of those task forces concerning the AVCV's previously proposed amendments to criminal rules concerning victims.

⁷ The adoption of some but not all of the amendments is known as "partial integration."

members emphasized that having victims' rights comprehensively enumerated in Rule 39 facilitates attorney training because one focused criminal rule is a more effective tool than provisions dispersed throughout multiple rules.⁸

At the second committee meeting, four individuals—Paul Cassell, Meg Garvin, Mikel Steinfeld, and Steven Twist—presented their views on integrating victims' rights.

Mr. Cassell is a professor at the University of Utah School of Law and a former federal prosecutor and federal judge. He believes that victims with no legal training should be able to find, read, and comprehend rules concerning victims' rights and that integrated rules would do this and facilitate victim participation in the criminal process, as envisioned by the Arizona Constitution. He also opined that a judge would be more inclined to look for victims' rights in a specific rule rather than Rule 39 because the judge would be dealing with a proceeding governed by the specific rule. He noted that other states look to Arizona as a leader in codifying statutorily established victims' rights within court rules.

⁸ One member expressed concerns that changing the victims' rights rules could undermine existing case law or create new legal issues and have unintended consequences. Another member observed that while some judges might need additional education on complying with victims' rights provisions, that is a training issue and does not implicate a problem with the rules.

Ms. Garvin is on the faculty at Lewis and Clark Law School and supervises a victims' rights clinic. She agreed with Professor Cassell's views. She stated her opinion that integration is a more holistic approach to victims' rights and that it facilitates the timely consideration of victim issues as opposed to remediating glitches after they occur. She anticipates that integrating the rules would heighten stakeholder compliance with pertinent victims' rights provisions. Like Professor Cassell, she believes that fully integrated rules could serve as a national model.

Mr. Steinfeld is a supervisor in the appeals unit of the Maricopa County Public Defender's Office, whose duties include training new attorneys on victims' rights. Mr. Steinfeld opposed R-20-0031 and stated that the aggregation of victims' rights in Rule 39 makes training more focused and effective. He also noted that Arizona has a body of case law concerning victims' rights, and he suggested that integration could disturb that case law, create confusion, reduce compliance, and result in more litigation. He concluded that Arizona has relatively good compliance with victims' rights requirements and that the status quo is working well now.

Mr. Twist is recognized in Arizona and nationally for his decades of work on behalf of crime victims. He characterized Article 2, § 2.1 of the Arizona Constitution as an integral part of the criminal justice system and a promise to crime victims that secures their rights to justice, fairness, and due process during criminal proceedings. He believes that combining those rights into a single rule detracts from their

effectiveness. He prefers integrated criminal rules, which he believes would further the objectives of the VBOR at each separate step of the criminal justice process. He also believes that integrating the rules would reduce the likelihood of mistakes involving victims' rights and promote uniformity in court procedures.

Theresa Rassas also provided information at the second meeting. Ms. Rassas is a former county attorney and federal prosecutor who is now an assistant Arizona Attorney General. She was previously in the Attorney General's victims' services unit, which has duties under A.R.S. § 41-191.06 to monitor compliance with victims' rights. Ms. Rassas noted that most victims' rights violations appear to be unintentional, and the primary goal of Attorney General's victims' services unit is instructional, that is, to help judges learn from their errors and to ensure compliance with victims' rights mandates in the future.⁹

IV. The committee's consideration of R-20-0031. Individual committee members had differing positions on integration. One view opposed integrating Rule 39 as proposed by R-20-0031. These members believe that Rule 39 in its current form is a useful resource and training tool and that there is no systemic problem with the use or application of Rule 39 requiring integration of its

⁹ At a later meeting, Ms. Rassas provided five years of data showing the number of victims' rights violations sustained by her office. The annual number ranged from 28 violations in 2016 to 82 violations in 2020, although she noted that some sustained violations involved more than one finding.

provisions with other rules. Proponents of integration, on the other hand, believe that integration would help assure that victims' rights are not overlooked at court hearings. Participants in a court proceeding who reviewed a rule concerning a hearing in which they are about to participate would immediately see the rights of the victim spelled out in the fully integrated rule.

Committee members agreed to discuss each of the amendments proposed by R-20-0031 and to determine if any of those amendments met the criteria specified in A.O. No. 2020-183, i.e., whether any or all of the provisions of Rule 39 might be logically relocated to other rules and whether relocating those provisions would further safeguard victims' rights. Members then began an in-depth review of each proposed amendment, a process that took several months to complete. Some of the proposed rule amendments in the appendix to R-20-0031 were awkwardly phrased, incorrectly formatted, or duplicative of other provisions. Members considered ways to improve the proposed language and attempted to ensure that each proposed amendment was consistent with the Arizona Constitution or Arizona statutes.¹⁰

Rule 39 was included in the R-20-0031 appendix as a proposed rule, but it was not clear whether the AVCV sought to eliminate Rule 39 or retain it, in whole or in part. The AVCV's chief counsel explained that the petition included Rule 39 in its entirety because during pre-filing vetting, the Arizona Prosecuting Attorneys

¹⁰ Ms. Rassas was instrumental in this process.

Advisory Council (“APAAC”) favored that approach. At the August 19, 2021, committee meeting, the AVCV’s chief counsel stated the AVCV’s initial preference for abrogating Rule 39 while also noting its willingness to adopt APAAC’s recommended approach of retaining that rule.

Members met on September 2, 2021, to consider proposed recommendations to the Court. Members discussed several alternative recommendations and voted on each one. By a vote of 8 to 2, members rejected integration of the criminal rules, including their modifications to the R-20-0031 amendments. Notwithstanding a significant investment of time and effort in their review of R-20-0031, the committee recommended no changes to the criminal rules.

V. The section (v) approach. In late September 2021, the Chair and staff informed the Court that the committee had decided against recommending changes to the criminal rules. The Court acknowledged the members’ efforts and the votes at the September 2, 2021, meeting, but indicated the Court’s preference that the committee consider some type of modified approach to integrate victims’ rights into the criminal rules.

The discussion with the Court laid the foundation for committee staff’s revised draft proposing the “section (v)” amendments for the committee’s consideration. The section (v) amendments integrate victims’ rights into other rules by locating the applicable provision within a new section (v) of every criminal rule

that impacts those rights. Each section (v) has the title “victims’ rights.” The section (v) approach is perceived to be beneficial for several reasons.

- (a) ***Victims’ rights appear in a uniform location.*** The most apparent feature of the section (v) approach is that it places all applicable victims’ rights in a distinct and uniform location, i.e., section (v). Victims’ rights that apply to a proceeding under any rule can therefore be easily located. Although self-represented victims, who are the majority of victims, might rarely review the criminal rules, those that do would see their rights in a self-contained section of a rule, rather than having to search within a rule for pertinent words or phrases.
- (b) ***Victims’ rights provisions are separate from provisions that apply only to defendants.*** Not all criminal cases involve victims. The section (v) approach sets the text of victims’ rights apart, so a judge need not consider them in cases where they do not apply.
- (c) ***The section (v) provisions incorporate features of R-20-0031.*** Members acknowledged that the AVCV’s suggested text was feasible in some instances. The section (v) amendments accordingly include a number of changes that the AVCV’s draft had proposed.
- (d) ***Victims’ rights have been restyled.*** The section (v) approach also avoids stylistic pitfalls in the AVCV’s original draft. The section (v) provisions are stylized consistently with restyling conventions used in the Court’s other recent rule restyling projects. The section (v) provisions use simplified and easier to understand language. Where appropriate, the section (v) provisions are organized into subparts. The subparts frequently have titles, allowing readers to readily locate the provisions they are seeking.
- (e) ***The section (v) amendments include new provisions that safeguard victims’ rights.*** The section (v) approach includes new provisions that are not expressly contained in the current criminal rules and were not proposed by R-20-0031. An example is proposed Rule 17.8(v), which provides that a prosecutor should confer with a victim before deciding to submit a case on the record. Other such changes are more fully described in Appendix B. These suggested changes are not intended to create new substantive rights, and the

committee believes they are consistent with the letter and intent of existing law and current practice.

(f) The section (v) approach retains Rule 39. The section (v) approach retains Rule 39 (“Victims’ Rights”) without any modifications to the text of that rule, thereby addressing stakeholder concerns with the initial proposal to abrogate Rule 39. The retention of Rule 39 keeps the rule intact for, among other purposes, judicial education, attorney training, and legal research. Careful drafting of section (v) provisions has attempted to avoid conflicts with corresponding victims’ rights provisions in Rule 39.

(g) The section (v) approach is consistent with the committee’s underlying objectives. The section (v) approach fulfills the committee’s objectives—as the Chair noted at the first meeting—of adding clarity to the rules on victims’ rights, improving the organization of those rules, and assuring that these rules safeguard victims’ constitutional rights to justice, fairness, and due process.

(h) The section (v) approach achieves fuller integration. Finally, the section (v) approach achieves fuller integration, i.e., rules that contain victims’ rights will have a clear and concise statement of those rights within section (v) of that rule.

VI. The section (v) amendments. The section (v) amendments to 40 rules are shown in Appendix A to this report. Appendix B lists those rules and contains a concise explanation for each of the amendments. Appendix B also suggests consideration of additional issues that are arguably separate from the question of integration.

Not every reference to a “victim” in the criminal rules required a section (v) amendment. For example, Rule 1.2 (“purpose and construction”) requires “courts, parties, and crime victims” to construe the rules in the specified manner. This is a general rule of construction, and it confers no right on victims. Rule 2.3 (“content

of complaint”) requires the prosecutor to notify the clerk if a charged offense involves a juvenile victim. Once again, this does not give rise to a victim’s right. Several provisions in Rule 31 (“appeals”) require the appellate court to consider the rights of the victim to a prompt and final conclusion of the case, but similarly, these provisions do not confer a specific right on a victim. Accordingly, some provisions that refer to “victim” have not been relocated to a new section (v). The approach distinguishes between rights that a victim can personally exercise, which are in the section (v) amendments, and duties and obligations of others with regard to victims, which are retained within the current body of the rules.

Several of the rule amendments described in Appendix B would require the Court’s further consideration to address potential changes to substantive victims’ rights under the following rules:

- Rule 5.1, and whether a magistrate needs to consider a victim’s views on a motion to continue a preliminary hearing.
- Rule 8.5, to confirm that the trial court does not need to set a hearing for the sole purpose of considering the victim’s views on a motion to continue a trial date.
- Rule 15.1, and the committee’s proposal to amend current subpart (i)(1)(C) by eliminating the prosecutor’s duty to confer with the victim before

stipulating to extend the deadline for filing a notice of intent to seek the death penalty.

- Rule 27.4, to confirm that the court does not need to set a hearing for the sole purpose of considering the victim's views on a petition for early termination of probation.

VII. Conclusion. By a formal 8-2 vote of the members at their June 27, 2022, meeting, the committee once again rejected further integration of victims' rights into the Rules of Criminal Procedure. (Every committee member participated in the vote except the Chair, who by committee rules votes only to break a tie.) The 8-2 vote against fuller integration on June 27, 2022, is identical to the numerical vote count against integration at the September 2, 2021, meeting. (See Part IV of this report.) Although a majority of the committee voted against integration, however, the committee unanimously agreed to provide the section (v) amendments to assist the Court in the event it deems integration to be preferable.

The members appreciated the opportunity to serve on this committee. Almost every meeting was attended by the full complement of members. Ms. Rassas, who was present at virtually every meeting, and the members' proxies (Judge Kent Cattani, Judge Michael Butler, and Kevin Heade) made commendable contributions.

Committee members are cognizant that their primary recommendation—to make no changes to the criminal rules—might be unexpected. This report

emphasizes that members gave considerable thought to integration. Members worked diligently and collaboratively and discussed the text of the amendments proposed initially by R-20-0031, as well as the proposed section (v) amendments, at more than a dozen lengthy meetings. Each member of the committee is an experienced judicial officer or attorney, and every member without question acknowledges and supports the rights of victims in criminal proceedings.

Although the committee's membership included a variety of stakeholder perspectives, if the Court proceeds with the section (v) alternative, additional input should be sought from other individuals and organizations concerning those amendments. Accordingly, if the Court chooses that alternative, it should open the section (v) amendments for public comment. The committee further requests, if the Court proceeds with this alternative, that the committee have an opportunity to file a reply to the public comments.

Respectfully submitted this 1st day of July 2022.

/s/ _____
Justice John R. Lopez IV
Committee Chair

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