Kathleen E. Brody (#026331)
kathy@mscclaw.com
MITCHELL | STEIN | CAREY | CHAPMAN, PC
2600 North Central Avenue, Suite 1000
Phoenix, AZ 85004
Telephone: (602) 358-0290
Facsimile: (602) 358-0291

Jared G. Keenan (#027068)
jkeenan@acluaz.org
American Civil Liberties Union Foundation of Arizona
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014
Telephone: (602) 773-6021

*Attorneys for Arizona Attorneys for Criminal Justice*

**SUPREME COURT OF ARIZONA**

| | |
|---|---|
| In the matter of: | Arizona Supreme Court |
| | No. R-22- _____ |
| Petition to Amend Arizona Rule of Criminal Procedure 39(b)(12) | PETITION TO AMEND ARIZONA RULE OF CRIMINAL PROCEDURE 39(b)(12) |
| | **Expedited Consideration Requested** |

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, Arizona Attorneys for Criminal Justice ("AACJ") petitions the Court to amend Arizona Rule of Criminal Procedure 39(b)(12)(A) and (B), as reflected in Exhibit 1 this

petition.[1] AACJ also requests that the Court give this petition expedited consideration. Ariz. R. Sup. Ct. 28(h)(1). As explained below, there are compelling circumstances requiring the Court's consideration before its annual rules agenda. In short, Rule 39(b)(12)'s analogue statute, A.R.S. § 13-4433(B), has been found unconstitutional in violation of the First Amendment by the U.S. District Court for the District of Arizona. *AACJ et al. v. Brnovich et al.*, No. CV-17-01422-PHX-SPL (Nov. 2, 2022).[2] There is thus no reason for the continued existence of that rule.

In fact, the District Court's order declaring the statute unconstitutional and leaving the rule in place is already causing confusion among judges presiding over criminal cases in Arizona, lawyers involved in litigating those cases, the State Bar of Arizona, and others. This Court should amend Rule 39(b)(12) on an emergency basis to alleviate this confusion. More importantly, however, the Court should amend the rule because, for the reasons thoroughly explained by the District Court regarding A.R.S. § 13-4433(B), Rule 39(b)(12)'s restrictions on communications between criminal-defense lawyers and crime victims violates their free-speech rights under the U.S. and Arizona Constitutions. U.S. Const. amend. I; Ariz. Const. art. 2, § 6.

[1] **Exh. 1** (proposed amendments).
[2] **Exh. 2** (Doc. 269, Findings of Fact and Conclusions of Law); **Exh. 3** (Doc. 270, Order).

## Background on AACJ

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal-defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal legal system, and the role of the defense lawyer.

## Background on *AACJ v. Brnovich*

AACJ is a plaintiff in the federal litigation, first filed in May 2017, challenging the constitutionality of A.R.S. § 13-4433(B), along with five individual criminal-defense lawyers and an investigator who regularly works with defense lawyers. The defendants in the case are the Arizona Attorney General, the Chief Counsel of the State Bar of Arizona, and the Director of the Arizona Department of Public Safety. AACJ's litigation challenged the constitutionality of the statute, but did not challenge the analogous provisions in Rule 39(b)(12). After a long procedural history that addressed and eventually disposed of numerous

procedural defenses, the District Court held a bench trial on the merits on September 22, 2022.

Following post-trial briefing, the District Court held on November 2, 2022, that § 13-4433(B), which requires that defense lawyers "shall only initiate contact with the victim through the prosecutor's office," violates the First Amendment rights of defense lawyers and others working on the defense team.[3] The court's thorough Findings of Fact and Conclusions of Law make clear that criminal-defense attorneys have a First Amendment right to initiate contact with crime victims and to engage with those victims in robust communications, including discussion and questions about the facts and circumstances of any crime with which the attorney's client is charged.[4]

As most relevant to this petition, the District Court found that criminal-defense lawyers and investigators "wish to speak to crime victims to investigate the facts and circumstances of the alleged criminal offense."[5] The court noted that "law enforcement investigations often fail to capture an accurate or complete accounting of the events—especially the background history and surrounding circumstances of the crime," and thus defense lawyers want to speak with crime victims to gain a "fuller picture of the facts," to possibly "uncover exculpatory

[3] *See generally* **Exhs. 2 & 3**.
[4] **Exh. 2**.
[5] *Id.* at 11.

information," and often to "gather mitigation evidence."[6] The court also found that defense lawyers "want to be able to communicate with victims who have unresolved questions about the crime committed against them."[7] Indeed, defense lawyers "wish to communicate a variety of messages to victims."[8] The court also found that, "as opposed to contributing to the proper functioning of the legal system, there is evidence that the Statute actually **detracts from it by inhibiting the defense team's ability to investigate the relevant facts**."[9]

Similarly, in its Conclusions of Law, the District Court held that criminal-defense attorneys and their agents have a First Amendment right to "pure communication through the expression or exchange of ideas."[10] In holding that the statute "is facially content neutral but speaker based," the court noted that the First Amendment protects the right of criminal-defense attorneys and their agents "to speak to victims about **all topics**."[11]

Because the federal litigation did not explicitly challenge Rule 39(b)(12), the District Court stated in a footnote that its order should not "be construed to enjoin enforcement of . . . the requirement under Arizona Rule of Criminal Procedure

---

[6] *Id.*
[7] *Id.* at 14.
[8] *Id.*
[9] *Id.* at 20 (emphasis added).
[10] *Id.* at 26.
[11] *Id.* at 36 (emphasis added).

39(b)(12) that the defense must communicate a request to interview a victim to the prosecutor rather than the victim."[12] Another footnote in the District Court's Findings of Fact relatedly notes,

> Defendants argue that the Statute is not the only obstacle to Plaintiff's speech, as Arizona Rule of Criminal Procedure 39(b)(12)(A) contains a similar prohibition. But as the Ninth Circuit held, the Statute is broader than Rule 39(b)(12)(A), so it is possible to violate the Statute without violating the Rule.[13]

The Attorney General has filed a notice of appeal in the federal litigation, but has not requested a stay of the District Court's orders from either the District Court or the Ninth Circuit.

**Confusion Related to Rule 39(b)(12)**

On November 16, 2022, the Chief Bar Counsel filed a Rule 59(e) Motion to Alter or Amend Judgment with the District Court asking for clarification of the orders and claiming that "she just needs to know what she is allowed to do without violating the Court's judgment" because the court's note about Rule 39(b)(12) "creates . . . ambiguity" about whether she can "investigate and seek discipline against defense attorneys who directly 'request to interview' a crime victim

[12] **Exh. 3** at 1 n.1.
[13] **Exh. 2** at 10 n.4.

without going through the prosecutor."[14] AACJ and the other plaintiffs filed their response to the Chief Bar Counsel's motion on November 28, 2022.[15]

In the meantime, AACJ has begun receiving information about how people in the legal community are interpreting and implementing the District Court's orders, including defense lawyers and investigators, prosecutorial agencies, and courts. For example, shortly after the District Court issued its orders, the Maricopa County Attorney's Office requested, and a Maricopa County Superior Court granted, an order preventing a criminal-defense lawyer from speaking with crime victims because "any inquiry into the facts of the [client's] case is an interview and must come through the State pursuant to Rule 39."[16] The Maricopa County Attorney's Office also has begun notifying crime victims about the District Court's order but is advising victims that "the defendant's attorney and the attorney's employees are prohibited from asking you to participate in an interview or otherwise interview you. Any request to interview you must still go through the Maricopa County Attorney's Office."

Given this confusion among the State Bar, the courts, and the legal community about how to deal with Rule 39(b)(12) in light of the District Court's

[14] **Exh. 4** at 1-2.
[15] **Exh. 5**.
[16] **Exh. 6**.

orders holding A.R.S. § 13-4433(B) unconstitutional, this Court should amend Rule 39(b)(12) as soon as possible.

**Background on Rule 39(b)(12)**

This Court first adopted Rule 39 in 1989.[17] The original Rule 39 prescribed several protections for victims related to pre-trial interviews and depositions, but the rule did not require the defense team to initiate contact with a crime victim, about an interview or anything else, through the prosecution.[18] In fact, the first version of Rule 39 recognized that there might be a "conflict of interest between the state or any other prosecutorial entity and the wishes of the victim."[19] The first version of Rule 39 also recognized that "society's interests in furthering the truth-finding function of the proceedings" could be compromised by a victim's refusal to answer questions in a pre-trial deposition or interview.[20]

---

[17] **Exh. 7**.

[18] The provisions in the original Rule 39 relating to pre-trial interviews and depositions included a victim's rights to refuse to be interviewed or deposed by a pro se defendant; to refuse to be interviewed or deposed with the defendant personally present; to place certain conditions on an interview or deposition; and to terminate the interview or deposition "if not conducted in a dignified and professional manner." **Exh. 7** at 46 (bottom page number; original Rule 39(b)(9), (10), (11)(i), (ii)).

[19] *Id.* (original Rule 39(c)(3)).

[20] *Id.* (original Rule 39(b)(11)(iii); "If, on balancing the interest of protection of the victim from further distress against society's interests in furthering the truth-finding function of the proceeding, the court finds there is no substantial benefit to be derived from requiring the victim to submit to deposition and that any information sought by the defendant could be obtained by written interrogatories, it may order that the victim submit only to written interrogatories."); *see also id.* at

In November 1990, Arizona voters approved the Victims' Bill of Rights ("VBR") as a constitutional amendment. Among the provisions of the VBR is the right of a victim to refuse a pre-trial interview or deposition. Ariz. Const. art. 2, § 2.1(A)(5). AACJ did not challenge that provision (or any other part of the VBR) in the federal litigation and does not with this petition ask this Court to remove the corresponding provision in Rule 39.

After the Court first promulgated Rule 39, the State Bar of Arizona formed a committee to make recommendations regarding statutes and court rules to implement the VBR. That committee recommended language similar to what is now in Rule 39(b)(12)(A) and (B),[21] but it was controversial and received the committee's recommendation by a majority of only one vote:

> This recommended requirement that defense counsel communicate through the prosecutor was adopted by an 8 to 7 vote of the Committee; limiting this requirement to the period after charges are filed was adopted by a 12 to 5 vote. Four members of the Committee, Patience Huntwork, Tom Karas, Judge Thomas Kleinschmidt and Michael Benchoff, strongly object to requiring communications to go through the prosecutor and wish to go on record to that effect. They believe that the prosecutor would be unable to be objective and neutral in transmitting

---

47 (bottom page number; original Rule 39 Comment (noting that a rule prohibiting defense counsel from interviewing police officers "might constitute a considerable impediment to the truth-seeking function of the court" and that "[t]he best this Court can do is to adopt rules that balance the interests of victims in being treated with dignity and compassion with the interests of society as a whole in preserving the truth-seeking function of judicial proceedings.")).

[21] **Exh. 8** at 22 (bottom page number).

> the defense request to the victim. They would delete the requirement.[22]

The State Bar committee issued its report in April 1991.

In 1991, the legislature enacted the Victims' Rights Implementation Act, of which A.R.S. § 13-4433(B) is a part. That provision states:

> The defendant, the defendant's attorney or an agent of the defendant shall only initiate contact with the victim through the prosecutor's office. The prosecutor's office shall promptly inform the victim of the defendant's request for an interview and shall advise the victim of the victim's right to refuse the interview.

In 1992, this Court amended Rule 39. The amendments included the language recommended by the State Bar committee, which impose similar requirements to those imposed by § 13-4433(B). The Court has not substantially modified what is now Rule 39(b)(12) since then. It currently reads:

> (b) Victims' Rights. These rules must be construed to preserve and protect a victim's rights to justice and due process. Notwithstanding the provisions of any other rule, a victim has and is entitled to assert each of the following rights:
>
> . . .
>
> (12) the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on the defendant's behalf, and:

[22] *Id.* at 25 (bottom page number).

> (A) the defense must communicate requests to interview a victim to the prosecutor, not the victim;
>
> (B) a victim's response to such requests must be communicated through the prosecutor; and
>
> (C) if there is any comment or evidence at trial regarding a victim's refusal to be interviewed, the court must instruct the jury that a victim has the right under the Arizona Constitution to refuse an interview[.]

AACJ proposes that the Court amend the rule to remove subsections (b)(12)(A) and (B), because those are provisions in the rule that correspond to the statute that the District Court struck down as unconstitutional.

**Proposed Amendments to Arizona Rule of Criminal Procedure 39(b)(12)**

As indicated in Exhibit 1, AACJ proposes removing subsections (A) and (B) from Rule 39(b)(12). Now that the statutory analogue for those provisions has been found unconstitutional by the federal court, there are no grounds for the Court to retain those provisions in its rules. In fact, the continued existence of Rule 39(b)(12)(A) and (B) is already resulting in confusion among the legal community and in the courts, as described above, which the Court should step in to resolve.

Most importantly, the Court should amend Rule 39 to remove subsections (b)(12)(A) and (B) because those provisions violate the free-speech rights of criminal-defense lawyers and other working on defense teams. As explained in detail in the District Court's Findings of Fact and Conclusions of Law, Rule 39(b)(12)(A) and (B), like the statute, is a unique-to-Arizona, speaker-based, direct

restraint on speech that undermines, rather than advances, the balance and objectivity that our criminal legal system requires. *See also* Ariz. R. Prof'l Conduct 3.4(f) ("A lawyer shall not: . . . request a person other than a client to refrain from voluntarily giving relevant information to another party[.]").

**Request for Expedited Consideration and Emergency Adoption**

AACJ requests that the Court consider this petition on an expedited basis and adopt the proposed amendments to Rule 39(b)(12) on an emergency basis. Ariz. R. Sup. Ct. 28(h)(1)-(2).

RESPECTFULLY SUBMITTED December 1, 2022.

MITCHELL | STEIN | CAREY | CHAPMAN, PC

By: Kathy Brody
Kathleen E. Brody

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF ARIZONA

Jared G. Keenan

*Attorneys for Arizona Attorneys for Criminal Justice*

MITCHELL STEIN
CAREY CHAPMAN PC
ATTORNEYS AT LAW

# Exhibit | 1

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IX. Miscellaneous
Rule 39. Victims' Rights

16A A.R.S. Rules Crim.Proc., Rule 39

# Rule 39. Victims' Rights

Effective: September 24, 2022

Currentness

**(a) Definitions and Limitations.**

(1) *Criminal Proceeding.* As used in this rule, a "criminal proceeding" is any matter scheduled and held before a trial court, telephonically or in person, at which the defendant has the right to be present, including any post-conviction matter.

(2) *Identifying and Locating Information.* As used in this rule, "identifying and locating information" includes a person's date of birth, social security number, official state or government issued driver license or identification number, the person's address, telephone number, email addresses, and place of employment.

(3) *Limitations.*

(A) Cessation of Victim Status. A victim retains the rights provided in these rules until the rights are no longer enforceable under A.R.S. §§ 13-4402, 13-4402.01, and 13-4433.

(B) Legal Entities. The victim's rights of any corporation, partnership, association, or other similar legal entity are limited as provided in statute.

**(b) Victims' Rights.** These rules must be construed to preserve and protect a victim's rights to justice and due process. Notwithstanding the provisions of any other rule, a victim has and is entitled to assert each of the following rights:

(1) the right to be treated with fairness, respect and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process;

(2) the right to notice regarding the rights available to a victim under this rule and any other provision of law, and the court must prominently post or read the statement of rights in accordance with A.R.S. § 13-4438;

(3) upon request, the right to reasonable notice of the date, time, and place of any criminal proceeding in accordance with A.R.S. § 13-4409;

(4) the right to be present at all criminal proceedings;

(5) upon request, the right to be informed of any permanent or temporary release or any proposed release of the defendant;

(6) upon request, the right to confer with the State regarding:

(A) any decision about the preconviction release of the defendant;

(B) any pretrial resolution including any diversion program or plea offer;

(C) a decision not to initiate a criminal prosecution or to dismiss charges; and

(D) the trial, before the trial begins;

(7) upon request, the right to notice of and to be heard at any criminal proceeding involving:

(A) the initial appearance;

(B) the accused's post-arrest release or release conditions;

(C) a proposed suspension of Rule 8 or a continuance of a trial date;

(D) the court's consideration of a negotiated plea resolution;

(E) sentencing;

(F) the modification of any term of probation that will substantially affect the victim's safety, the defendant's contact with the victim, or restitution;

(G) the early termination of probation;

(H) a probation revocation disposition; and

(I) post-conviction release.

(8) the right to be accompanied at any interview, deposition, or criminal proceeding by a parent or other relative, or by an appropriate support person named by a victim, including a victim's caseworker or advocate, unless testimony of the person accompanying the victim is required in the case. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, it may impose sanctions, including holding counsel in contempt;

(9) if the victim is eligible, the right to the assistance of a facility dog when testifying as provided in A.R.S. § 13-4442;

(10) the right to refuse to testify regarding any identifying or locating information unless the court orders disclosure after finding a compelling need for the information, and any proceeding on any motion to require such testimony must be in camera;

(11) the right to require the prosecutor to withhold, during discovery and other proceedings, the victim's identifying and locating information as provided by A.R.S. § 13-4434.

(A) Exception. A court may order disclosure of the victim's identifying and locating information as necessary to protect the defendant's constitutional rights or as otherwise provided by law. If disclosure is made to defense counsel, counsel must not disclose the information to any person other than counsel's staff and designated investigator, and must not convey the information to the defendant without prior court authorization.

(B) Redactions. Rule 15.5(e) applies to information withheld under this rule;

(12) the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on the defendant's behalf, and:

~~(A) the defense must communicate requests to interview a victim to the prosecutor, not the victim;~~

~~(B) a victim's response to such requests must be communicated through the prosecutor; and~~

(C) if there is any comment or evidence at trial regarding a victim's refusal to be interviewed, the court must instruct the jury that a victim has the right under the Arizona Constitution to refuse an interview;

(13) at any interview or deposition conducted by defense counsel, the right to condition the interview or deposition on specification of a reasonable date, time, duration, and location of the interview or deposition, including a requirement that it be held at the victim's home, at the prosecutor's office, or at an appropriate location in the courthouse;

(14) the right to terminate an interview at any time or refuse to answer any question during the interview;

(15) the right to a copy of any presentence report provided to the defendant except those parts that are excised by the court or are confidential by law;

(16) the right to be informed of the disposition of the case;

(17) the right to a speedy trial or disposition and a prompt and final conclusion of the case after conviction and sentence; and

(18) the right to be informed of a victim's right to restitution upon conviction of the defendant, of the items of loss included within the scope of restitution, and of the procedures for invoking the right.

**(c) Exercising the Right to Be Heard.**

(1) *Nature of the Right*. If a victim exercises the right to be heard, the victim does not do so as a witness and the victim is not subject to cross-examination. A victim is not required to disclose any statement to any party and is not required to submit any written statement to the court. The court must give any party the opportunity to explain, support, or refute the victim's statement. This subsection does not apply to victim impact statements made in a capital case under A.R.S. § 13-752(R).

(2) *Victims in Custody*. If a victim is in custody for an offense, the victim's right to be heard under this rule is satisfied by affording the victim the opportunity to submit a written statement.

(3) *Victims Not in Custody*. A victim who is not in custody may exercise the right to be heard under this rule through an oral statement or by submitting a written or recorded statement.

(4) *Before Disclosure of Identifying or Locating Information.* Before a court orders disclosure of identifying or locating information under (b)(11)(A), the victim must be notified and given an opportunity to be heard.

(5) *At Sentencing.* The right to be heard at sentencing allows the victim to present evidence,

information, and opinions about the criminal offense, the defendant, the sentence, or restitution. The victim also may submit a written or oral impact statement to the probation officer for use in any presentence report.

**(d) Assistance and Representation.**

(1) *Right to Prosecutor's Assistance.* A victim has the right to the prosecutor's assistance in asserting rights enumerated in this rule or otherwise provided by law. The prosecutor must inform a victim of these rights and provide a victim with notices and information that a victim is entitled to receive from the prosecutor by these rules and by law.

(2) *Standing.* The prosecutor has standing in any criminal proceeding, upon the victim's request, to assert any of the rights to which a victim is entitled by this rule or by any other provision of law.

(3) *Conflicts.* If any conflict arises between the prosecutor and a victim in asserting the victim's rights, the prosecutor must advise the victim of the right to seek independent legal counsel and provide contact information for the appropriate state or local bar association.

(4) *Representation by Counsel.* In asserting any of the rights enumerated in this rule or provided by any other provision of law, a victim has the right to be represented by personal counsel of the victim's choice. After a victim's counsel files a notice of appearance, all parties must endorse the victim's counsel on all pleadings. When present, the victim's counsel must be included in all bench conferences and in chambers meetings with the trial court that directly involve the victim's constitutional rights. At any proceeding to determine restitution, the victim has the right to present information and make argument to the court personally or through counsel.

**(e) Victim's Duties.**

(1) *Generally.* Any victim desiring to claim the notification rights and privileges provided in this rule must provide his or her full name, address, and telephone number to the entity prosecuting the case and to any other entity from which the victim requests notice, and to keep this information current.

(2) *Legal Entities.*

(A) Designation of a Representative. If a victim is a corporation, partnership, association, or other legal entity that has requested notice of the hearings to which it is entitled by law, that legal entity must promptly designate a representative by giving notice to the prosecutor and to any other entity from which the victim requests notice. The notice must include the representative's address and telephone number.

(B) Notice. The prosecutor must notify the defendant and the court if the prosecutor receives notice under (e)(2)(A).

(C) Effect. After notice is provided under (e)(2)(B), only the representative designated under (e)(2)(A) may assert the victim's rights on behalf of the legal entity.

(D) Changes in Designation. The legal entity must provide any change in designation in writing to the prosecutor and to any other entity from which the victim requests notice. The prosecutor must notify the defendant and court of any change in designation.

**(f) Waiver.** A victim may waive the rights and privileges enumerated in this rule. A prosecutor or a court may consider a victim's failure to provide a current address and telephone number, or a legal entity's failure to designate a representative, to be a waiver of notification rights under this rule.

**(g) Court Enforcement of Victim Notice Requirements.**

(1) *Court's Duty to Inquire.* At the beginning of any proceeding that takes place more than 7 days after the filing of charges by the State and at which the victim has a right to be heard, the court must inquire of the State or otherwise determine whether the victim has requested notice and has been notified of the proceeding.

(2) *If the Victim Has Been Notified.* If the victim has been notified as requested, the court must further inquire of the State whether the victim is present. If the victim is present and the State advises the court that the victim wishes the court to address the victim, the court must inquire whether the State has advised the victim of their rights. If not, the court must recess the hearing and the State must immediately comply with (d)(1).

(3) *If the Victim Has Not Been Notified.* If the victim has not been notified as requested, the court may not proceed unless public policy, the specific provisions of a statute, or the interests of due process require otherwise. In the absence of such considerations, the court may reconsider any ruling made at a proceeding at which the victim did not receive notice as requested.

**(h) Appointment of Victim's Representative.** Upon request, the court must appoint a representative for a minor victim or for an incapacitated victim, as provided in A.R.S. § 13-4403. The court must notify the parties if it appoints a representative.

**Credits**

Added by Aug. 31, 2017, effective Jan. 1, 2018. Amended on an emergency basis, effective Aug. 27, 2019, adopted on a permanent basis Dec. 12, 2019; amended on an emergency basis Aug. 29, 2022, effective Sept. 24, 2022.

16A A. R. S. Rules Crim. Proc., Rule 39, AZ ST RCRP Rule 39
State Court Rules are current with amendments received and effective through 11/1/22. The Code of Judicial Administration is current with amendments received through 11/1/22

End of Document

MITCHELL STEIN
CAREY CHAPMAN PC
ATTORNEYS AT LAW

# Exhibit | 2

**WO**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Arizona Attorneys for Criminal Justice, et al.,

Plaintiffs,

vs.

Doug Ducey, et al.,

Defendants.

No. CV-17-01422-PHX-SPL

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On May 8, 2017, Plaintiffs filed this action challenging the constitutionality of A.R.S. § 13-4433(B). (Doc. 1). In the operative Second Amended Complaint, Plaintiffs allege two counts—(1) violation of the First Amendment, and (2) unconstitutional overbreadth—against Maret Vessella, Chief Bar Counsel of the State Bar of Arizona;[1] Colonel Helston Silbert, Director of the Arizona Department of Public Safety, in his official capacity; and Mark Brnovich, Attorney General of the State of Arizona, in his official capacity. (Doc. 150 ¶¶ 25–27, 87–99; Doc. 203). Plaintiffs seek declaratory and injunctive relief, as well as reasonable costs and attorneys' fees. (Doc. 150 at 20). Defendants timely answered the Second Amended Complaint on May 27, 2022. (Docs. 230, 231, 233).

This case arises under the United States Constitution and is brought pursuant to 42 U.S.C. § 1983. The case is thus within this Court's jurisdiction under 28 U.S.C. §§ 1331

[1] Defendant Vessella takes no position on the constitutionality of A.R.S. § 13-4433(B), merely taking a limited position as to the scope of any injunction. (Doc. 243).

and 1343. The Court may grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Venue is proper in this District pursuant to 28 U.S.C. § 1391. (Doc. 150 ¶¶ 12–15; Doc. 253 at 3–4).

On August 22, 2022, without objection from the parties (Doc. 246), the Court set a consolidated Preliminary Injunction Hearing and Bench Trial pursuant to Fed. R. Civ. P. 65(a)(2). (Doc. 247). The Hearing and Bench Trial was held before this Court on September 22, 2022. (Doc. 258). The Court has carefully considered the briefing of the Motion for Preliminary Injunction (Docs. 238, 240, 242–44); the Joint Pretrial Statement (Doc. 253); the proposed findings of fact and conclusions of law (Docs. 254, 255); the testimony received (Docs. 264, 266); the exhibits admitted into evidence; and the post-trial supplemental briefing (Docs. 267, 268). The Court now makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(a) and LRCiv 52.1:

## FINDINGS OF FACT

### The Parties

1. Plaintiff Arizona Attorneys for Criminal Justice ("AACJ") is an organization made up of criminal defense attorneys and others associated with criminal defense work in Arizona. (Doc. 264 at 77:7–9). AACJ was formed to represent the interests of the criminal defense bar. (Doc. 264 at 77:9–14).
2. Plaintiff John Canby is a member of the State Bar of Arizona and a practicing attorney. (Doc. 264 at 130:22–24). He is currently employed by the Maricopa County Public Defender's Office and works on capital cases. (Doc. 264 at 132:4–15).
3. Plaintiff Christopher Dupont is a member of the State Bar of Arizona and a practicing attorney. (Doc. 266-2 at 66:16–20). He works in private practice doing "almost entirely" criminal law. (Doc. 266-2 at 70:19–71:1).
4. Plaintiff Jeffrey A. Kirchler is a member of the State Bar of Arizona and a practicing attorney. (Doc. 266-3 at 14:10–13). He is currently employed by the

Maricopa County Public Defender's Office and works on capital cases. (Doc. 266-3 at 17:17–18, 17:24–18:2).

5. Plaintiff Richard L. Lougee is a member of the State Bar of Arizona and a practicing attorney. (Doc. 266-3 at 29:11–15). He has previously worked as a public defender and is currently in private practice doing exclusively criminal defense work. (Doc. 266-3 at 32:19–33:5).

6. Plaintiff Richard D. Randall is a member of the State Bar of Arizona and a practicing attorney. (Doc 266-3 at 54:21–25). He has worked as a public defender since 2005. (Doc. 266-3 at 56:18–23).

7. Plaintiff Rich Robertson is a private investigator licensed by the State of Arizona. (Doc. 264 at 113:15–16). Most of his work involves conducting fact investigations for criminal defense attorneys. (Doc. 264 at 114:16–21). In every criminal defense case that he has worked, he has worked on behalf of and at the direction of the criminal defendant's criminal defense attorney. (Doc. 264 at 126:23–127:6).

8. Defendant Mark Brnovich is the Attorney General and chief legal officer of the State of Arizona (the "State") and is sued in his official capacity. (Doc. 150 ¶ 27; Doc. 230 ¶ 27).

9. Defendant Maret Vessella is the Chief Bar Counsel of the State Bar of Arizona. (Doc. 150 ¶ 25; Doc. 233 ¶ 25).

10. Defendant Heston Silbert is the Director of the Arizona Department of Public Safety ("DPS") and is sued in his official capacity. (Doc. 150 ¶ 26; Doc. 203; Doc. 231 ¶ 26).

**The Statute**

11. In 1991, the Arizona Legislature enacted the Victims' Rights Implementation Act, A.R.S. §§ 13-4401 to -4443. Victims' Rights Implementation Act, ch. 229, 1991 Ariz. Sess. Laws 1137; (Trial Ex. 107).

12. Section 13-4433(B) of the Victims' Rights Implementation Act (the "Statute")—

which is the only provision Plaintiffs challenge in this case—provides as follows:

> The defendant, the defendant's attorney or an agent of the defendant shall only initiate contact with the victim through the prosecutor's office. The prosecutor's office shall promptly inform the victim of the defendant's request for an interview and shall advise the victim of the victim's right to refuse the interview.

13. Other relevant subsections of A.R.S. § 13-4433 state the following:

> (A) Unless the victim consents, the victim shall not be compelled to submit to an interview on any matter, including any charged criminal offense witnessed by the victim and that occurred on the same occasion as the offense against the victim, or filed in the same indictment or information or consolidated for trial, that is conducted by the defendant, the defendant's attorney or an agent of the defendant. . . .
>
> (C) The prosecutor shall not be required to forward any correspondence from the defendant, the defendant's attorney or an agent of the defendant to the victim or the victim's representative.
>
> (D) If the victim consents to an interview, the prosecutor's office shall inform the defendant, the defendant's attorney or an agent of the defendant of the time and place the victim has selected for the interview. If the victim wishes to impose other conditions on the interview, the prosecutor's office shall inform the defendant, the defendant's attorney or an agent of the defendant of the conditions. The victim has the right to terminate the interview at any time or to refuse to answer any question during the interview. The prosecutor has standing at the request of the victim to protect the victim from harassment, intimidation or abuse and, pursuant to that standing, may seek any appropriate protective court order. . . .
>
> (G) This section applies to the parent or legal guardian of a minor child who exercises victims' rights on behalf of the minor child. . . .

///

///

14. The Victims' Rights Implementation Act defines "victim" as follows:

> [A] person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person, except if the person or the person's spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused.

A.R.S. § 13-4401(19).

15. The Victims' Rights Implementation Act defines "defendant" as "a person or entity that is formally charged by complaint, indictment or information of committing a criminal offense." A.R.S. § 13-4401(9).

16. A.R.S. § 13-4402(A) provides as follows:

> [T]he rights and duties that are established by this chapter arise on the arrest or formal charging of the person or persons who are alleged to be responsible for a criminal offense against a victim. The rights and duties continue to be enforceable pursuant to this chapter until the final disposition of the charges, including acquittal or dismissal of the charges, all post-conviction release and relief proceedings and the discharge of all criminal proceedings relating to restitution. If a defendant is ordered to pay restitution to a victim, the rights and duties continue to be enforceable by the court until restitution is paid.

The victim's right to refuse a defense interview, however, remains enforceable beyond a final disposition, except in cases involving a dismissal with prejudice or an acquittal. A.R.S. § 13-4433(H).

17. In sum, the Statute on its face prohibits an attorney or other agent working on behalf of a defendant in an ongoing criminal proceeding in Arizona from initiating direct contact with the victim of the alleged crime, including the

parents or guardians of a minor victim and the second-degree relatives of a victim who is killed or incapacitated. Instead, the attorney or agent must initiate contact through the prosecutor, who must promptly inform the victim of the request.

18. The "Legislative intent" section of the Victims' Rights Implementation Act reads as follows:

> The legislature recognizes that many innocent persons suffer economic loss and personal injury or death as a result of criminal acts. It is the intent of the legislature of this state to:
>
> 1. Enact laws that define, implement, preserve and protect the rights guaranteed to crime victims by article II, section 2.1, Constitution of Arizona.
> 2. Ensure that article II, section 2.1, Constitution of Arizona, is fully and fairly implemented and that all crime victims are provided with basic rights of respect, protection, participation and healing of their ordeals.
> 3. Ensure at all stages of the criminal justice process that the duties established by article II, section 2.1, Constitution of Arizona, are fairly apportioned among all law enforcement agencies, prosecution agencies, courts and corrections agencies in this state.
> 4. Ensure that employees of this state and its political subdivisions who engage in the detention, investigation, prosecution and adjudication of crime use reasonable efforts to see that crime victims are accorded the rights established by article II, section 2.1, Constitution of Arizona.

Victims' Rights Implementation Act, ch. 229, § 2, 1991 Ariz. Sess. Laws 1137, 1138; (Trial Ex. 107).

///

///

///

19. Article II, § 2.1 of the Arizona Constitution is the Victims' Bill of Rights, which was approved by Arizona voters in 1990. The Victims' Bill of Rights provides in relevant part as follows:

> (A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:
>
> 1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process. . . .
>
> 5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.

Ariz. Const. art. II, § 2.1. The rights enumerated in the Victims' Bill of Rights do not include the right to not be contacted by the defense or anything else similar to the Statute.

20. The Victims' Bill of Rights further provides that "[t]he legislature . . . [has] the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section," and that "[t]he enumeration . . . of certain rights for victims shall not be construed to deny or disparage others granted by the legislature or retained by victims." Ariz. Const. art. II, § 2.1(D)–(E).

**Enforcement of the Statute**

21. Defendant Brnovich, as Arizona Attorney General (the "Attorney General"), is the chief legal officer of the State. A.R.S. § 41-192(A). The Attorney General's Office prosecutes many criminal trials, almost all felony direct appeals, and all federal capital habeas corpus litigation in Arizona. (Doc. 150 ¶ 51; Doc. 230 ¶ 51). The Attorney General's Office is also charged by law with supervising all county attorneys in Arizona and, when necessary, assisting county attorneys with their duties. A.R.S. § 41-193(A)(4)–(5).

22. The Attorney General's Office is further charged with maintaining a victims'

rights program by "administer[ing] an annual plan for assisting and monitoring state and local entities that are required to implement and comply with victims' rights," including distributing funds, conducting training and audits, and providing other assistance. A.R.S. § 41-191.06(A); (*see also* Doc. 150 ¶ 56; Doc. 230 ¶ 56).

23. The Attorney General's Office investigates allegations of victims' rights violations and assists victims who believe their rights were violated. (Doc. 150 ¶ 60; Doc. 230 ¶ 60).

24. Moreover, under the Victims' Rights Implementation Act, "the prosecutor may assert any right to which the victim is entitled" upon the victim's request. A.R.S. § 13-4437(C).

25. Defendant Brnovich has expressed an intention to take every action necessary to uphold victims' rights. (Doc. 150 ¶ 57; Doc. 230 ¶ 57).

26. Defendant Brnovich and the prosecutors that he supervises therefore have authority to investigate and assert violations of the Statute, in addition to acting as the conduit for a defense attorney or agent who wishes to contact a victim in cases the Attorney General's Office prosecutes, pursuant to the terms of the Statute.

27. Defendant Silbert, as DPS Director, administers all aspects of private investigator licensing in Arizona. A.R.S. § 32-2402; (*see also* Doc. 150 ¶ 44; Doc. 231 ¶ 44). He has authority to investigate and prosecute private investigators licensed in Arizona for alleged violations of the Statute. A.R.S. § 32-2457(A)(5); (Doc. 150 ¶ 47; Doc. 231 ¶ 47).

28. If a private investigator is found to have violated the Statute, Defendant Silbert may take disciplinary action up to and including the suspension or revocation of the private investigator's license. A.R.S. § 32-2457(B)–(G).

29. Defendant Vessella, as Chief Bar Counsel, has authority to investigate and prosecute members of the State Bar of Arizona for alleged violations of the

Arizona Rules of Professional Conduct. (Doc. 150 ¶ 39; Doc. 233 ¶ 39).

30. Rule 8.4(d) of the Arizona Rules of Professional Conduct provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." (*See also* Doc. 150 ¶ 40; Doc. 233 ¶ 40).

31. The State Bar of Arizona has initiated disciplinary investigations or proceedings against members of Plaintiff AACJ based on allegations that they violated the Statute. (Doc. 264 at 79:18–81:9, 110:8–11).

32. There is at least a perception among criminal defense attorneys, including Plaintiffs, that certain prosecuting agencies in Arizona routinely seek to enforce the Statute when they believe it has been violated. (Doc. 264 at 146:23–147:11).

33. All of these aspects create a credible threat that Defendants will enforce the Statute against the criminal defense team[2] and that a person who violates the Statute will face professional discipline.

**Application and Effects of the Statute**

*Communication of a Defense Contact Request to a Victim*

34. In cases prosecuted by the Attorney General's Office, when the defense attorney contacts the prosecutor with a request to contact a victim, the prosecutor notifies the assigned victim advocate. (Doc. 266-2 at 6:9–15). The advocate then notifies the victim by sending a letter. (Doc. 266-2 at 6:16–20).

35. The Attorney General's Office's victim advocates use a standard template when sending a letter notifying a victim of a request for an interview. In other words, except for case-specific information like the names of the prosecutor, victim, and criminal defendant, the letters sent to victims use identical language. (Doc. 266-2 at 6:21–24, 92:7–13; *see also* Trial Ex. 1). The letter is therefore not tailored in any way to any specific message the defense attorney may wish to convey to the victim.

---

[2] The Court uses "defense team" to refer to the criminal defendant's attorney and those working on the attorney's behalf.

36. The form letter used by the Attorney General's Office informs the victim of their right to refuse any discovery request by the defense, including a deposition, and explains that "[i]f you do not want to sit down and be interviewed on tape or sit through a formal deposition with a court-reporter before the trial, you just need to tell this office and we will communicate your wishes to the defense attorneys." (Trial Ex. 1). The letter then asks the victim to mark one of two lines indicating "whether you want to assert your rights to refuse defense discovery requests or whether you wish to be interviewed and/or deposed by the defense prior to trial" and return the letter to the victim advocate. (Trial Ex. 1).

37. The process used by the Attorney General's Office to inform victims of a request by the defense to contact the victim is not required by any law; other prosecuting agencies in Arizona may use other processes. But the Statute *requires* prosecutors to "promptly inform the victim of the defendant's request for an interview."[3] A.R.S. § 13-4433(B).

*The Statute's Chilling Effect*

38. Because of the Statute and Defendants' enforcement of it,[4] Plaintiffs do not initiate contact with victims in ongoing state-court cases in which they represent the criminal defendant without going through the prosecutor. (*See, e.g.*, Doc. 264 at 79:14–17, 115:18–116:1, 139:22–140:4).

39. In the absence of the Statute, Plaintiffs would initiate direct contact with victims in ongoing state-court cases where they represent the criminal defendant. (Doc.

---

[3] Several Plaintiffs testified that they do not believe that prosecutors always communicate their requests for victim contact to the victim, but the minimal evidence supporting those beliefs is anecdotal at best. (*See, e.g.*, Doc. 264 at 91:3–92:13, 144:25–146:3; Doc. 266-3 at 38:1–23). And regardless, a prosecutor's failure to fulfill a statutory duty does not affect the facial validity of that statute.

[4] Defendants argue that the Statute is not the only obstacle to Plaintiff's speech, as Arizona Rule of Criminal Procedure 39(b)(12)(A) contains a similar prohibition. But as the Ninth Circuit held, the Statute is broader than Rule 39(b)(12)(A), so it is possible to violate the Statute without violating the Rule. (Doc. 220-1 at 4–5). Thus, "enjoining Defendants from enforcing [the Statute] would relieve a discrete injury." (Doc. 220-1 at 5).

264 at 84:19–85:1, 140:23–141:1; *see* Doc. 264 at 117:5–17). There are many topics about which they would like to communicate with victims:

a. The Plaintiffs in this case wish to speak to crime victims to investigate the facts and circumstances of the alleged criminal offense. (Doc. 264 at 78:9–25, 85:2–14, 117:5–17). Multiple witnesses testified that law enforcement investigations often fail to capture an accurate or complete accounting of the events—especially the background history and surrounding circumstances of a crime—because law enforcement typically investigates the particular act with the purpose of making an arrest. (Doc. 264 at 97:15–21, 117:11–14, 117:23–118:5; *see also* Doc. 264 at 115:3–5 (testimony from Plaintiff Robertson that he finds evidence inconsistent with the police report in "[p]ractically every case" that he investigates)). Having a fuller picture of the facts allows the defense team to better predict the client's likelihood of success at trial and may help resolve the case prior to trial. (Doc. 264 at 85:15–86:4, 125:12–126:1). Or it may uncover exculpatory information showing that the defendant did not in fact commit the alleged crime. (Doc. 264 at 98:3–8, 118:6–12).

b. In capital cases, Plaintiffs often wish to speak to statutory crime victims to gather mitigation evidence—evidence that the defendant should receive a life sentence rather than the death penalty. (Doc. 264 at 141:5–9). In a case where the criminal defendant is charged with killing a relative, the people who hold that mitigation evidence are often covered by the Statute—meaning the defense team can initiate contact with them only through the prosecutor who is seeking the death penalty. *See* A.R.S. § 13-4401(19) (defining "victim" to include first- and second-degree relatives of a deceased victim). Plaintiff Canby offered the following example:

> [A] client who is accused of killing his abusive father for instance. His brother who grew up in

> the same home would be covered under the [S]tatute.
>
> And that's a person who would likely have valuable mitigation that would be beneficial to the client, because that person grew up in the same home. Would know about the abuse. May have been subject to the same abuse. Would know about mental health issues. Would know about the neighborhood. Would know about . . . just a wealth of information that other people may not have, and there may not be another person.
>
> And that prohibition against talking to people would extend to the mother, too, who would also have a lot of that same information.

(Doc. 264 at 141:14–142:3). In this way, the Statute may altogether block Plaintiffs' ability to access certain information.[5]

c. Relatedly, Plaintiffs want to speak to victims in order to further truth-seeking within the legal system. Rhonda Neff, the incoming president of Plaintiff AACJ and a member of the Arizona Bar who does almost exclusively criminal defense work, (Doc. 264 at 75:21, 76:11–14), testified:

> [T]he truth seeking function of the criminal justice system, it's not intended to be just about prosecutions and criminal convictions and incarceration. It's intended to be about community and stabilization and people in general.
>
> And when one side of it is blocked from having access to important information of what actually constitutes truth, but the other side is given unfair access to that, we have no ability going into trial to say that in fact truth has been found at the end of it. . . .

[5] To the extent Plaintiffs argue that the Statute hinders their ability to effectively represent their clients by limiting their ability to investigate facts, circumstances, mitigation evidence, and the like, (*see, e.g.*, Doc. 238 at 10–11, 21–22), the Court finds that these issues go not to Plaintiff's First Amendment rights but rather to their clients' Sixth Amendment rights, which are not at issue here.

(Doc. 264 at 96:24–97:12; *see also* Doc. 264 at 54:2–25, 126:2–4). Regardless of whether one shares the beliefs that undergird Ms. Neff's testimony, it demonstrates that the conversations that Plaintiffs wish to initiate with victims are deeply intertwined with their personal views about the goals of the criminal legal system and its proper functioning. Thus, the Statute inhibits their ability to communicate those views.[6]

d. Plaintiffs in this case would like the opportunity to share information about the legal process that they believe could be helpful to victims, as well as to themselves and their clients, particularly in capital cases. For example, Plaintiff Canby testified that if he could contact victims directly, he would explain that the process of pursuing the death penalty takes years, involves multiple sets of prosecutors over the various stages, and requires more contact with the legal system—potentially leading victims to conclude that pursuit of the death penalty could cause them additional trauma. (Doc. 264 at 142:13–22, 143:16–144:14). His desire to communicate this message comes from his belief that this information would help victims make a decision that is in their best interest, and incidentally, it would be in his own interest and the interest of his client. (Doc. 264 at 142:23–143:3; *see also* Doc. 264 at 51:12–52:17). Plaintiff Canby testified that in his experience, victims' views are one of the primary factors in the prosecution's decision to seek a death sentence, so if victims drop their support for the death penalty, the defendant is more likely be able to plead to life in prison. (Doc. 264 at 143:2–11; *see also* Doc. 264 at 149:11–150:5). Then, the criminal defendant would avoid a possible death

[6] To be sure, Plaintiff have not expressed a desire to communicate such views to victims in an explicit manner (although the Statute would inhibit their ability to do that, as well). But implicit communication of a message is still communication of a message—and a conversation with a crime victim about what happened to them can certainly communicate a message about the concept of truth and its role in a criminal prosecution.

sentence—in line with Plaintiff Canby's personal moral and practical opposition to the death penalty—and Plaintiff Canby would avoid having to litigate a capital trial. (Doc. 264 at 138:21–139:12, 143:1–3). Again, then, the Statute inhibits Plaintiffs' ability to communicate their core beliefs about trauma, punishment, and justice.

e. Plaintiffs in this case want to be able to communicate with victims who have unresolved questions about the crime committed against them and the criminal defendant in hopes of aiding in the victim's understanding and healing. (Doc. 264 at 94:11–17, 94:24–95:2; *see also* Doc. 264 at 46:25–48:9).

f. To summarize, Plaintiffs wish to communicate a variety of messages to victims, including but not limited to messages that explicitly or implicitly advance their own personal views on matters of the utmost public concern such as capital punishment, the pursuit of truth in our criminal legal system, and what justice should look like in our society.

40. Obviously, the topics about which Plaintiffs wish to speak with victims go well beyond—and in fact do not include—harassment or intimidation. (*See* Doc. 264 at 88:6–13, 123:17–124:3). They nonetheless fall within the Statute's prohibition on any defense-initiated contact with the victim that does not go through the prosecutor. It bears emphasizing that the prosecutor need not convey any particular message from the defense team to the victim—just the request for an interview—so the defense team's specific messages are unlikely to reach a victim unless the victim consents to speak to the defense based on the prosecutor's correspondence. *See* A.R.S. 13-4433(C); *see supra* Findings of Fact ¶ 35.

41. The Statute also chills speech beyond that which is plainly restricted on the face of the Statute. For example, Ms. Neff, incoming president of Plaintiff AACJ, testified as to her standard practice when she receives a phone call from a victim

in a case where she represents the defendant. If she does not answer the call and the victim leaves a message, she does not return the call but instead notifies the prosecutor's office. (Doc. 264 at 81:18–21). This is because of her reasonable concern over the word "initiating" in the Statute; she is uncertain whether she can return a message from a victim, or initiate a second conversation with a victim who initiated the first conversation, without running afoul of the Statute. (Doc. 264 at 82:7–19). But even if she answers the initial call and learns she is speaking to a victim, she tells them that she cannot speak to them and that if they would like to contact her, they must go through the prosecutor or involve independent counsel. (Doc. 264 at 81:22–82:2).

42. Plaintiff Robertson, the private investigator, has been instructed by some criminal defense attorneys not to speak to victims even when the attorney's client has not yet been charged with a crime due to the "radioactiv[ity]" of victims. (Doc. 264 at 119:15–24).

43. Even inadvertent contact with a victim can result in a disciplinary investigation of a criminal defense attorney. (*See* Doc. 264 at 80:7–81:9).

44. In sum, Plaintiffs are exceedingly cautious with respect to the Statute and often avoid *any* contact with victims in cases where they represent the criminal defendant based on the fear of professional discipline. *See supra* Findings of Fact ¶¶ 21–33. (*See generally* Doc. 264 at 146:23–147:6).

*Communication Not Foreclosed by the Statute*

45. There are several forms of speech that the Statute does *not* limit. (*See* Doc. 264 at 25:2–19). First, other provisions of the Victims' Rights Implementation Act make it plain that the Statute applies only from formal charging through final disposition of the charges. *See supra* Findings of Fact ¶¶ 15–17. Although some criminal defense attorneys may choose not to contact a victim prior to the filing of charges, *see supra* Findings of Fact ¶ 42, the Statute is clear in this respect, and there is no evidence that any criminal defense attorney, private investigator,

or other member of a defense team has been reported, investigated, or disciplined for contacting a victim before formal charging or after final disposition.

46. Second, the Statute plainly applies only to criminal defendants and their attorneys or agents; anyone else is free to contact the victim in a case. A.R.S. § 13-4433(B).

47. In addition, when a prosecutor informs a victim of a member of the defense team's request for contact with the victim and the victim agrees to be contacted, then the defense team may freely communicate directly with the victim. (*See* Doc. 264 at 32:23–25, 129:13–16, 137:3–7, 158:1–5; Doc. 266-3 at 23:19–24:7).

48. More broadly, the Statute does not restrict *victim*-initiated contact. Thus, a member of the defense team may freely communicate with a victim when the victim contacts them. (*See* Doc. 264 at 129:9–12, 157:20–25). Still, as explained previously, there is some ambiguity as to what it means to "initiate" contact—for example, it is not clear whether a defense attorney returning a voicemail from a victim is defense-initiated or victim-initiated contact—such that the Statute chills Plaintiffs from communicating with victims even when it may qualify as victim-initiated contact. *See supra* Findings of Fact ¶ 41.

49. Next, criminal defense attorneys may, to an extent, be able to speak to a victim within the context of a court proceeding. In addition to potentially cross-examining a victim, the criminal defense attorney may be able to indirectly deliver a message to a victim who is attending the proceeding by, for example, mentioning the criminal defendant's willingness to plead while addressing the court. (Doc. 264 at 140:4–22). Obviously, the ability to communicate in this manner is contingent on whether the victim is present in the courtroom and is constrained by all of the substantive and procedural limitations of a court proceeding.

50. Finally, Plaintiffs have sought relief from the Statute in individual cases from the state, county, or municipal court where the criminal case is pending. (Doc. 264 at

157:2–5). Such motions are "sometimes" granted, allowing for direct contact with victims. (Doc. 264 at 157:6–8). If the request is denied, Plaintiffs can seek review of that decision through a special action. (Doc. 264 at 157:9–12).

**The State's Interests in the Statute**

51. Defendants assert that the Statute serves four compelling interests: (1) implementing and protecting the rights of victims set forth in the Arizona Constitution; (2) regulating the professional conduct of lawyers and their agents during ongoing proceedings; (3) protecting victims from being retraumatized; and (4) leveling the playing field between victims with the means and understanding to obtain counsel and those without counsel. (Doc. 264 at 24:3–25).

*The State's Interest in Implementing and Protecting Victims' Rights Under the Arizona Constitution*

52. Defendants assert that the Statute protects two rights enumerated in the Victims' Bill of Rights: the right to refuse a defense interview and the right to be treated with fairness, respect, and dignity and to be free from intimidation, harassment, or abuse.

53. First, Defendants argue that the Statute protects victims' right to refuse an interview by the defense team. To be sure, at least some criminal defense attorneys and their agents, if allowed to contact victims directly, would not affirmatively inform victims of their right to refuse an interview. (*See* Doc. 264 at 160:18–21).

54. But by existing law, a prosecutor must inform victims of their rights under the Victims' Bill of Rights, its implementing legislation, and court rules within seven days after the prosecutor charges a crime and the defendant is taken into custody or served a summons. A.R.S. § 13-4408(A)(1). Likewise, trial courts are required to "prominently post[ ]" a notice advising victims of their rights, including the right "to choose whether or not to be interviewed by the defendant or the

defendant's attorney," and superior court judges must also read the notice aloud before criminal hearings begin. A.R.S. § 13-4438. The victim may also be notified of the right to refuse an interview by law enforcement shortly after the crime is committed and by a victim advocate. *See* A.R.S. § 13-4405(A); (Doc. 264 at 82:24–84:1).

55. Accordingly, victims already receive ample notice of the right to refuse an interview by the defense, and the Statute is not necessary in order to protect that right. (*See also* Doc. 266-1 at 8:2–4 (testimony from Paul Ahler, chief counsel for the criminal division at the Attorney General's Office, that "I don't know if [going through the prosecutor is] the *only* way" to protect the victim's right to decide whether or not to speak to the defense, "but I think it's probably one of the best ways" (emphasis added))).

56. Second, Defendants argue that the Statute protects victims' right to be treated with fairness, respect, and dignity and to be free from intimidation, harassment, or abuse. It is possible that some members of the defense team may be disrespectful to victims if allowed to contact them directly—just as it is possible that any other person would be. (*See* Doc. 266-1 at 95:8–11).

57. There is no evidence, however, that members of the defense team were contacting victims in a disrespectful, harassing, or abusive manner before the Statute was enacted.[7] In fact, the chief counsel for the criminal division at the

---

[7] Plaintiffs *have* presented some evidence of defense attorneys harassing victims via questions asked during interviews. (*See* Trial Ex. 100 at 6; Trial Ex. 101 at 1–2). But victims already have the right to refuse an interview by the defense and—if they consent to an interview—to set conditions for the interview, to refuse to answer any questions, and to terminate the interview at any time. A.R.S. § 13-4433(A), (D). Further, if the victim requests it, the prosecutor has standing to protect the victim from harassment, intimidation, or abuse. *Id.* § 13-4433(D). Thus, the Statute is not necessary to protect a victim from harassment during an interview.

Plaintiffs have also presented evidence of criminal defendants harassing their victims. (*See* Trial Ex. 102 at 2; Trial Ex. 103 at 3). But the Statute's prohibition against direct contact by the defendant is not at issue in this case. *See infra* Conclusions of Law ¶ 43.

Arizona Attorney General's Office testified that he was not even aware of defense teams contacting victims prior to the Statute's passage. (Doc. 266-1 at 11:15-19).

58. The Statute does not apply victims in federal criminal cases, nor does it apply to cases charged in other states with victims who reside in Arizona. (Doc. 264 at 115:22–116:12). There is no evidence that those victims endure disrespectful or harassing conduct from defense attorneys.

59. Moreover, several other regulations already protect victims from harassment. Namely, attorneys and private investigators are subject to discipline for unprofessional conduct. *See* Ariz. Rules of Professional Conduct r. 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person."); *id.* r. 5.3 (requiring lawyers to make reasonable efforts to ensure that assistance provided by nonlawyers is compatible with the lawyer's professional obligations and holding the lawyer responsible for the nonlawyer's conduct under certain circumstances); A.R.S. § 32-2457(A)(25) (providing that a private investigator is subject to discipline for "[c]ommitting any act of unprofessional conduct"). In addition, a defense attorney may be subject to contempt proceedings or other sanctions by the court if they violate an order to treat the victim with dignity and respect. (Doc. 264 at 88:15–20). Finally, harassment is a crime in Arizona. A.R.S. § 13-2921.

60. There is no reason to believe that members of the defense team will act inconsistently with their professional obligations or the law in the absence of the Statute. (*See, e.g.*, Doc. 264 at 86:15–24, 88:6–20, 116:17–117:4). The defense team has an incentive to treat victims with respect because doing otherwise may alienate the victim, close off the line of communication, and have an adverse effect on the outcome of the case for the criminal defendant—not to mention the

serious risk of State Bar complaints and other professional consequences. (*See* Doc. 264 at 51:17–52:7, 84:6–18, 123:17–124:3). Thus, the Statute is not necessary to protect the rights enumerated in the Victims' Bill of Rights.

*The State's Interest in Regulating Professional Conduct*

61. Defendants assert that the Statute serves the State's interest in regulating the professional conduct of attorneys and private investigators, "including the pursuit of criminal justice through the proper functioning and administration of the state judicial system." (Doc. 242 at 13). But it is not clear *how* the Statute does so. There is simply no evidence, or even any more specific argument, that the Statute does anything to further the administration of justice or the functioning of the judicial system. And to say that the purpose of a regulation is to regulate, without some other justification, is circular.

62. Defendants argue that the Statute is merely a "straightforward application" of Rule 4.2 of the Arizona Rules of Professional Conduct ("ER 4.2"), which prohibits lawyers from communicating about a case with someone who is represented by another lawyer in that case. But that ethical rule applies even-handedly to all lawyers in a given case and "contributes to the proper functioning of the legal system" by protecting the lawyer-client relationship. ABA Model Rules of Professional Conduct r. 4.2 cmt. 1.[8] The Statute, on the other hand, restricts only the communications of criminal defense attorneys by requiring them to initiate contact with victims through the defense's adversaries, the prosecutors, who themselves may contact victims without limitation. And as opposed to contributing to the proper functioning of the legal system, there is evidence that the Statute actually detracts from it by inhibiting the defense team's ability to investigate the relevant facts. *See supra* Findings of Fact ¶ 39(a)–(c). Finally, ER 4.2 restricts only communications "about the subject of the

[8] ABA Model Rule 4.2 is substantively identical to Arizona ER 4.2.

representation" for which the lawyer has been retained, unlike the Statute which has no such limitation. Thus, the Statute and ER 4.2 are different in several crucial ways.

63. Even when victims have their own counsel, the plain language of the Statute still requires the defense team to go through the prosecutor if the defense team wishes to contact the victim directly; the Statute does not contain an exception for victims with representation. (Doc. 264 at 93:23–94:9). This further emphasizes that although the Statute and ER 4.2 in part have a similar effect as applied to victims in that they prevent the defense team from contacting a victim directly, the regulations are not analogs: ER 4.2 safeguards a victim's relationship with his or her attorney by requiring the defense team to communicate through that attorney, while the Statute skews the adversarial system by requiring the defense team to communicate through the prosecutor, even when a victim has representation.

*The State's Interest in Protecting Victims from Being Retraumatized*

64. Defendants also assert that the Statute furthers the State's interest in protecting crime victims from additional trauma. There is a modicum of conjectural evidence that mere contact by the defense team is harmful to some victims. For example, Amy Bocks, the Attorney General's Office's Advocate Program Manager who supervises victim advocates, testified that in her opinion, "in some situations, direct initial contact with a crime victim by defense counsel could be harmful in some way to some victims" because "some victims associate defense counsel closely with the defendant . . . and may experience an emotional or physical response to what they see as defendant contact rather than just defense counsel contact." (Doc. 266-2 at 12:3–23; *see also* Doc. 266-1 at 6:13–22 (testimony from Mr. Ahler that in his experience prosecuting sex crimes and homicides, in particular, "the victims are really traumatized in these cases, in most instances, and to have to go through and relive this thing and -- especially

. . . from a defendant or defense attorney, can cause those issues to come back up to the surface and cause them emotional pain and suffering.");[9] Doc. 266-2 at 15:22–16:8). Similarly, Richard Burr, a Texas capital defense attorney and an expert on defense-initiated victim outreach, testified that "there is a chance of retraumatization" when the defense team contacts a deceased victim's relative because "we are connected to the person that they believe killed their loved one. And that's frightening." (Doc. 264 at 43:25–44:3. *But see* Doc. 264 at 49:10–14 (testimony from Mr. Burr that he has no direct knowledge of victims being retraumatized by mere receipt of a letter or phone call, though he has "in very rare instances" heard of it)). It is possible that some victims may experience a negative reaction if contacted directly by the defense team.

65. Still, Ms. Bocks acknowledged that the impact of contact with the defense team on a victim varies: "Every one is an individual. It depends on the victim's position in their healing and recovery." (Doc. 266-2 at 16:9–11). In that vein, there is also evidence that some victims may benefit from contact with the defense team. For example, Ms. Neff, the incoming president of Plaintiff AACJ, does some work representing crime victims. (Doc. 264 at 76:8–10). She testified that victims often want answers to questions about why a crime happened that only the defense has. (Doc. 264 at 94:11–17). She further indicated that prosecutors or victim advocates often explain a victims' rights in terms of *not* talking to the defense without conveying any potentially positive outcomes. (Doc. 264 at 94:23–95:2; *see also* Doc. 264 at 46:3–8 (testimony from Mr. Burr that "no matter how honest and forthright prosecutors are, the fact that [a request for contact] comes through a prosecutor suggests to survivors that they shouldn't talk with us")). Ms. Neff emphasized that victims often do not "know what

[9] The Court notes that Mr. Ahler's distinguishment of defense attorneys is conclusory and self-serving given his role as a prosecutor, and the Court gives that aspect of his testimony less weight.

questions to ask of a prosecutor about contact with the defendant or whether it would be useful," so one of the only ways to get that information is for the defense team to be able to contact the victim. (Doc. 264 at 95:3–13); *see supra* Findings of Fact ¶ 39(d)–(e). It is possible that some victims may benefit from being contacted directly by the defense team.

66. The bulk of the evidence, however, shows that contact with *any* part or participant of the legal system can retraumatize a victim—that there is nothing particularly harmful about contact with the defense team. (*See, e.g.*, Doc. 264 at 49:15–50:15 (Mr. Burr's testimony that retraumatization is possible "any time anybody contacts survivors about a murder"); Doc. 264 at 144:4–8 (testimony from Plaintiff Canby that he has seen victims run out of courtrooms from what they hear during trial); Doc. 266-1 at 6:4–11 (testimony from Mr. Ahler that "especially in some of these more serious cases like homicides, sex offenses, aggravated assaults, having to go through that again to be subjected to . . . either cross-examination or interviews by people, I think, did retraumatize people or had the possibility of retraumatizing people"); Doc. 266-2 at 59:16–60:1 (testimony from David Cole, a supervisor in the Attorney General's Office criminal appeals and capital litigation groups, that the Statute prevents retraumatization by the defense "where a victim's gone through a horrific event or sometimes chain of events, has already been interviewed by police officers, detectives, prosecutors")). Notably, as Defendants themselves put it, "[s]ocial science research suggests participation in *criminal proceedings* can retraumatize the victim," and "[s]econdary victimization . . . can result from 'interaction with *the criminal justice system* – through contact with law enforcement, defense attorneys, prosecutors, judges and other legal system personnel and processes.'" (Doc. 242 at 14 n.9 (emphasis added) (quoting *Polyvictims: Victims' Rights Enforcement as a Tool To Mitigate "Secondary Victimization" in the Criminal Justice System*, Nat'l Crime Victim L. Inst. Victim L. Bull. 1, 1 (March 2013))).

*None* of the social science or empirical research that Defendants cite makes any distinction between contact with the defense team and contact with any other facet of the legal system.[10] (*See* Doc. 242 at 14 n.9).

67. Taking all of the evidence together, then, the Court concludes that in general, mere contact with the criminal defense team is no more or less likely to retraumatize a victim than contact with any other participant in the legal system, including prosecutors. (*See also* Doc. 246 at 34:22–24).

*The State's Interest in Leveling the Playing Field Between Victims*

68. Finally, Defendants argue that the Statute furthers the State's interest in minimizing the disparity between victims who have the means and wherewithal to obtain counsel—who thus fall within the scope of ER 4.2's prohibition on direct contact with a person represented by counsel—and those who do not. There is no evidence of the size or severity of this disparity in the absence of the Statute.

69. Plaintiffs counter that the State could achieve this interest without burdening their First Amendment rights by providing crime victims with their own state-funded counsel. (Doc. 264 at 185:18–22; Doc. 267 at 9). This alternative would, at minimum, allow the defense team to directly contact the victim's representative rather than going through the prosecutor, their adversary in the case who does not represent the victim. *See infra* Conclusions of Law ¶ 6. In addition, it would eliminate the discrepancy between the prosecution and defense

---

[10] Defendants cite several such research articles. *See* Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traumatic Stress 159, 159 (2003) ("[I]nvolvement in the *justice system* may compound the original injury." (emphasis added)); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traumatic Stress 182, 183 (2010) (defining "secondary victimization" as when "crime victims feel blamed by the *justice system* or experience other negative societal reactions" (emphasis added)); Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 Violence & Victims 261, 268 (1999) (recounting survey results in which 81% of mental health professionals who treated rape victims believed that "[r]eporting a rape *to the criminal justice authorities* can be psychologically detrimental" (emphasis added)).

in terms of their ability to initiate contact with the victim. (*See* Doc. 266-1 at 12:2–7). Thus, there is at least one other way for the State to achieve its interest in leveling the playing field between victims.

## CONCLUSIONS OF LAW

1. The First Amendment of the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech." It "applies to state laws and regulations through the Due Process Clause of the Fourteenth Amendment." *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1053 (9th Cir. 2000). Plaintiffs here assert that the Statute is unconstitutional on its face and ask the Court to enjoin enforcement of the Statute against criminal defendants' attorneys and their agents. *See infra* Conclusions of Law ¶ 43; *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1174–75 (9th Cir. 2018) (discussing the distinction between facial and as-applied challenges).

2. In the First Amendment context, there are two types of facial challenges. In the first, a plaintiff "must show 'that no set of circumstances exists under which the regulation would be valid' or—although the Supreme Court has acknowledged some uncertainty on this issue—that the regulation 'lacks any plainly legitimate sweep.'" *Prison Legal News v. Ryan*, 39 F.4th 1121, 1129 (9th Cir. 2022) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)). In the second type of First Amendment facial challenge, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep." *Id.* (quoting *Stevens*, 559 U.S. at 473).

**The Statute primarily regulates speech, not conduct.**

3. The Court first considers whether the Statute is a regulation of speech at all. "If a 'law's effect on speech is only incidental to its primary effect on conduct,' there is no 'abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by

means of language, either spoken, written, or printed.'" *Monarch Content Mgmt. LLC v. Ariz. Dep't of Gaming*, 971 F.3d 1021, 1029 (9th Cir. 2020) (quoting *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017)). Specific to this case, the government "may regulate professional conduct, even though that conduct incidentally involves speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2372 (2018).

4. "[D]rawing the line between speech and conduct can be difficult," and there is no bright-line rule to distinguish them. *Id.* at 2373. With respect to the legal profession, the Supreme Court has stated that "[l]ongstanding torts for professional malpractice, for example, fall within the traditional purview of state regulation of professional conduct." *Id.* (internal quotation marks omitted). On the other hand, the Supreme Court has treated ethical regulations of extrajudicial comments by attorneys on pending cases as regulations of speech, albeit speech that is subject to regulation for reasons discussed *infra* Conclusions of Law ¶¶ 14–18. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1076 (1991) (Rehnquist, C.J.).[11]

5. The Statute's effect on speech is not incidental; rather, the Statute is aimed at speech as speech. *See NAACP v. Button*, 371 U.S. 415, 439 (1963) ("[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."). Initiating contact with a victim is far more analogous to extrajudicial statements than to professional malpractice. Contacting a victim and making an extrajudicial statement both necessarily involve pure communication through the expression or exchange of ideas, not necessarily related to the client's interests, whereas malpractice goes fundamentally to *how* attorneys practice law on behalf of a client and whether their practice meets professional

[11] Justice Kennedy and Chief Justice Rehnquist each, in part, delivered the opinion of the Supreme Court in *Gentile*. 501 U.S. at 1032. This Court cites only to portions of *Gentile* that were joined by a majority of the Supreme Court.

standards. It is true that a criminal defense attorney's contact with a victim may be part of the practice of law, but the same is true of extrajudicial comments, which are nonetheless considered speech.[12]

6. Moreover, unlike professional malpractice, there is no "longstanding" prohibition on or remedy for a defense attorney's mere communication with a victim of a crime. *NIFLA*, 138 S. Ct. at 2373. As noted *supra* Findings of Fact ¶ 62, Defendants argue that the Statute is merely an extension of the traditional prohibition on direct contact with a represented party found in ER 4.2. But ER 4.2 applies even-handedly and serves the administration of justice by protecting

---

[12] Cases involving the practice of medicine also support this Court's conclusions. In *NIFLA*, the plaintiffs challenged a state law that required certain clinics with the primary purpose of providing family planning or pregnancy services to give patients a government-drafted notice about state programs providing access to comprehensive family planning services, prenatal care, and abortion. *NIFLA*, 138 S. Ct. at 2368–69. The Supreme Court found the law was a regulation of "speech as speech" rather than a regulation of professional conduct. *Id.* at 2374. The Court reasoned that the notice was distinct from informed-consent requirements that are "firmly entrenched in American tort law." *Id.* at 2373 (internal quotation marks omitted); *see also Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 884–85 (1992) (upholding an informed-consent requirement for doctors performing abortions as part of the practice of medicine, "no different from a requirement that a doctor give certain specific information about any medical procedure"), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The Court further reasoned that the notice was "not tied to a procedure at all" as it applied "to all interactions between a covered facility and its clients, regardless of whether a medical procedure is sought, offered, or performed." *NIFLA*, 138 S. Ct. at 2373. This is analogous to the Statute, which applies to *any* defense-initiated contact with the victim, even if it were unrelated to the pending criminal case. The Court also found the fact that the law required only *some* facilities providing family planning and pregnancy services to provide the notice to be "telling[ ]," suggesting that a regulation that applies selectively to a profession is not a regulation of professional conduct. *Id.* at 2374.

Most recently, in *Tingley v. Ferguson*, the Ninth Circuit held that a state's ban on the practice of conversion therapy on minors was a regulation of professional conduct rather than speech. 47 F.4th 1055, 1064 (9th Cir. 2022). The Ninth Circuit reasoned that "[s]tates do not lose the power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through the scalpel." *Id.* Put another way, the "speech" that the state regulated *was itself* the practice of medicine. This is in alignment with the Supreme Court's statement that legal malpractice law regulates conduct rather than speech; in fact the Ninth Circuit recognized in *Tingley* that a contrary holding would "endanger centuries-old medical malpractice laws." *Id.* at 1082. There is no such danger here, as a criminal defense attorney directly contacting a victim and an attorney committing malpractice are plainly different.

the lawyer-client relationship such that it is not analogous to the Statute. *See supra* Findings of Fact ¶¶ 62–63. Defendants have done nothing to show that the Statute contributes to the proper functioning of the legal system. *See supra* Findings of Fact ¶¶ 61, 63. Specifically, unlike ER 4.2, the Statute does not protect any lawyer-client relationship because the Arizona courts have stated clearly and repeatedly that "a prosecutor does not 'represent' the victim in a criminal trial; therefore, the victim is not a 'client' of the prosecutor." *State ex rel. Romley v. Superior Ct.*, 891 P.2d 246, 250 (Ariz. Ct. App. 1995); *see also Lindsay R. v. Cohen*, 343 P.3d 435, 437 (Ariz. Ct. App. 2015). There is no tradition of limiting the defense team's ability to initiate contact with a crime victim.

7. The state of the law in other jurisdictions makes the lack of tradition even more clear. A majority of states give victims a constitutional right to be treated with fairness, dignity, and respect and/or to be free from intimidation, harassment, and abuse by the criminal justice system,[13] and even more jurisdictions, including the federal government provide such a right by statute.[14] More than a dozen states give victims the right to refuse an interview, deposition or discovery request by the defense.[15] But no other jurisdiction limits the defense's ability to initiate

---

[13] *See, e.g.*, Alaska Const. art. I, § 24; Cal. Const. art. I, § 28(b)(1); Conn. Const. art. I, § 8(b)(1); Fla. Const. art. I, § 16(b)(1)–(2); Idaho Const. art. I, § 22(1); Ill. Const. art. I, § 8.1(a)(1); Ind. Const. art. I, § 13(b); Ky. Const. art. § 26A La. Const. art. I, § 25; Md. Const. Decl. of Rts. art. 47(a); Mich. Const. art. I, § 24(1); Miss. Const. art. 3, § 26A(1); Nev. Const. art. I, §8A(1)(a); N.J. Const. art. I, § 22; N.M. Const. art. II, § 24(A)(1); N.C. Const. art. I, § 37; N.D. Const. art. I, § 25(1)(a)–(b); Ohio Const. art. I, § 10a(A)(1); Okla. Const. art. II, § 34(A); R.I. Const. art. I, § 23; S.C. Const. art. I, § 24(A)(1); S.D. Const. art VI, § 29(1)–(2); Tenn. Const. art. I, § 35(b); Tex. Const. art. 1, § 30(a)(1); Utah Const. art. I, § 28(1)(a); Va. Const. art. I, §8-A(2); Wis. Const. art. I, § 9m(2)(a); *see also* Or. Const. art. I, § 42(1); Wash. Const. art. I, § 35.

[14] *See, e.g.*, 18 U.S.C. § 3771(a)(8); D.C. Code § 23-1901(b)(1); Ga. Code § 17-17-1(9); N.H. Rev. Stat. § 21-M:8-k(II)(a); Wyo. Stat. Ann. § 14-6-504(a); *see also* Vt. Stat. tit. 13, § 5303(a).

[15] *See, e.g.*, Ala. Code § 15-23-70; Cal. Const. art. I, § 28(b)(5); Ga. Code § 17-17-8.1(a); Idaho Const. art. I, § 22(8); La. Const. art. I, § 25; Mass. Gen Laws ch. 258B, § 3(m); N.D. Const. art. I, § 25(1)(f); Ohio Const. art. I, § 10a(A)(6); Okla. Const. art. II,

contact with crime victims in the first place.[16]

8. Further, the Statute targets the expression of certain speakers: criminal defense attorneys and those working with them. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (finding a statute "impose[d] more than an incidental burden on protected expression" where it did "not simply have an effect on speech, but [was] directed at certain content and [was] aimed at particular speakers."). The fact that the Statute restricts only the defense team's communications and not the prosecution's underscores that it is not a regulation of professional conduct because it does not apply to *attorneys* in general but rather to *attorneys who represent criminal defendants*.[17] In other words, the Statute regulates attorneys not based on the fact that they are attorneys but based on who they represent. A statute that does not regulate attorneys equally even within a single case—and in fact, favors one attorney over another by requiring the defense to communicate with the victim *through* the prosecutor—cannot be said to be a regulation of attorneys' professional conduct. *See NIFLA*, 138 S. Ct. at 2374.

9. This point is made clear when one attempts to define precisely what "professional conduct" the Statute regulates. It cannot be "the practice of law" generally—like malpractice regulates—because then prosecutors, too, would be subject to its prohibition. Nor can it be the more specific "contacting of a victim" for the same reason There is no class of "professional conduct" that the Statute

---

§ 34(A); Or. Const. art. I, § 42(1)(c); S.D. Const. art VI, § 29(6); Tenn. Code § 40-38-117; Wis. Const. art. I, § 9m(2)(L).

[16] Texas has a somewhat similar provision, but it is far narrower than the Statute because it applies only to defense-initiated victim outreach specialists in capital felony cases, and the court acts as the conduit for victim contact rather than the prosecutor. *See* Tex. Code Crim. Proc. art. 56A.051(a)(14).

[17] Defendants' argument that "the Statute regulates all attorneys working on behalf of a defendant in the context of criminal proceedings" instead of "singling out defense attorneys as a group" is a distinction without a difference: an attorney working on behalf of a defendant in the context of criminal proceedings *is* a defense attorney, whether or not criminal defense is their primary practice area. (Doc. 268 at 3). Even within a single proceeding, the Statute does not regulate all attorneys—just those representing the criminal defendant.

regulates that does not necessitate the qualifier of "by a criminal defense attorney"—which takes it outside the realm of professional conduct.[18]

10. Finally, to further bolster this Court's conclusion, in Arizona, "the practice of law is a matter exclusively within the authority of the Judiciary." *Home v. Rothschild*, 253 P.3d 1242, 1243 (Ariz. 2011) (quoting *Hunt v. Maricopa Cnty. Emps. Merit Sys. Comm'n*, 619 P.2d 1036, 1038–39 (Ariz. 1980)); *see also Scheehle v. Justs. of the Sup. Ct.*, 120 P.3d 1092, 1100 (Ariz. 2005) (explaining the Arizona Supreme Court's exclusive authority to regulate attorneys pursuant to article 6, section 3 of the Arizona Constitution). This Court will not invade the province of the state courts to decide issues of state law, but the fact that the Statute was promulgated by the Arizona Legislature rather than the Arizona Supreme Court is some evidence that it is not a regulation of the practice of law.[19]

11. If it is not a regulation of professional conduct, the Statute's restriction on communication is plainly a regulation of speech. The Supreme Court has stated that "if the acts of 'disclosing' and 'publishing' information do not constitute

---

[18] It is true, of course, that there are rules of professional conduct that apply only to prosecutors. *See, e.g.*, Ariz. Rules of Professional Conduct r. 3.8. Those rules exist because "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate," which "carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons." *Id.* r. 3.8 cmt. 1; *see also Pool v. Superior Court*, 677 P.2d 261, 266 (Ariz. 1984) ("[T]he prosecutor is not the representative of an ordinary litigant; he is a representative of a government whose obligation to govern fairly is as important as its obligation to govern at all. . . . It is the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction just as it is his duty to use all proper methods to bring about a just conviction."). Prosecutors therefore occupy a "unique role in the justice system," and their special responsibilities are tied directly to that role. *In re Martinez*, 462 P.3d 36, 41 (Ariz. 2020).

[19] To be sure, the Arizona Supreme Court has, in the past, adopted legislative provisions regulating the practice of law. *See Hunt*, 619 P.2d at 1041. And Arizona Rule of Criminal Procedure 39(b)(12)(A), promulgated by the Arizona Supreme Court, is "similar" to the Statute. (Doc. 220-1 at 4; *see* Doc. 242-1 at 32, 53). Still, the Arizona Supreme Court has not adopted the Statute, and the Statute goes further than Rule 39(b)(12)(A). (Doc. 220-1 at 5).

speech, it is hard to image what does fall within that category." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (internal quotation marks omitted). The same can be said of "initiating contact": it is speech through and through.

12. In sum, the Statute's requirement that defense attorneys and their agents "shall only initiate contact with the victim through the prosecutor's office" is plainly a regulation that primarily affects speech. Speech does not become conduct simply because it occurs in the context of one's profession. *See NIFLA*, 138 S. Ct. at 2371–72, 2374–75; *NAACP*, 371 U.S. at 439.

**The Statute is not subject to lesser First Amendment scrutiny as a regulation of professional speech.**

13. In 2018, in *NIFLA*, the Supreme Court held that "[s]peech is not unprotected merely because it is uttered by 'professionals,'" including lawyers. 138 S. Ct. at 2372. Still, the Court acknowledged that is "has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking." *Id.* First, the Court has "applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'"[20] *Id.* This case plainly does not involve commercial speech, so that standard does not apply. Second was the exception for professional conduct, which this Court finds inapplicable. *Id.* Thus, under the test set forth in *NIFLA*, which involved medical professionals, Plaintiffs' speech is accorded the same First Amendment

[20] The *NIFLA* Court cited to *Ohralik v. Ohio State Bar Association* as an example of this type of case: one involving commercial speech, which is subject to lesser scrutiny whether it is spoken by a professional or not. *NIFLA*, 138 S. Ct. at 2372 (citing *Ohralik*, 436 U.S. 447, 455–56 (1978) and other cases); *see also Ohralik*, 436 U.S. at 456–57 ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. . . . In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, . . . it lowers the level of appropriate judicial scrutiny."). Thus, Defendant's citation to *Ohralik* as an example of the Court upholding a restriction because it regulates professional conduct, rather than speech, is off base. (Doc. 268 at 2–3).

protection as any other, non-professional speech. *See also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995) ("There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer.").

14. Nonetheless, this Court recognizes that the Supreme Court previously held in *Gentile* in 1991 that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard . . . ." 501 U.S. at 1074 (Rehnquist, C.J.). When evaluating the constitutionality of such regulations, courts must "engage[ ] in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Id.* at 1073.

15. *Gentile* involved a lawyer who held a press conference the day after his client was indicted in a highly publicized case. *Id.* at 1063. The Nevada State Bar and the Nevada Supreme Court determined that the lawyer was subject to professional discipline for violating an ethical rule against making extrajudicial statements with a substantial likelihood of materially prejudicing an adjudicative proceeding in which the lawyer is participating. *Id.* at 1064–65. Presented with the lawyer's First Amendment challenge to the regulation, the United States Supreme Court held that the prohibition did not violate the lawyer's First Amendment rights, although it did find that the ethical rule was void for vagueness based on a safe-harbor provision. *Id.* at 1075; *id.* at 1048 (Kennedy, J.).

16. The *Gentile* Court cited a variety of reasons in support of its conclusion that the speech of lawyers representing clients in ongoing proceedings is subject to lesser First Amendment protection, all of which relate to the need to provide fairness and impartial administration of justice. First, the Court explained that a lawyer participating in a case "is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." *Id.*

at 1072 (Rehnquist, C.J.) (quoting *In re Sawyer*, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting) (involving the suspension of an attorney for impugning a judge's integrity)). The Court then noted that courts must be permitted to "protect their processes from prejudicial outside interferences." *Id.* (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966)). Next, the Court noted that litigants' "rights may be subordinated to other interests that arise in" the setting of litigation and that the Court had repeatedly approved restrictions on the speech of trial participants "where necessary to ensure a fair trial for a criminal defendant." *Id.* at 1073 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32–33 n.18 (1984)). In the same vein, the Court stated that "as officers of the court, . . . attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.* at 1074 (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring)). The Court further reasoned that a lawyer's extrajudicial comments are particularly threatening to the fairness of pending proceedings due to lawyers' special access to information and position of authority. *Id.*

17. Applying its balancing test to the facts of *Gentile*, the Supreme Court found that the restriction on prejudicial extrajudicial comments was "designed to protect the integrity and fairness of a State's judicial system, and it impose[d] only narrow and necessary limitations on lawyers' speech." *Id.* at 1075. The Court placed particular emphasis on the fact that the restriction targeted comments likely to prejudice the jury pool, noting that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors." *Id.*

///

///

///

///

18. Ultimately, the final paragraph of the Court's First Amendment analysis in *Gentile* closely resembles an analysis under ordinary First Amendment principles:

> The restraint on speech is *narrowly tailored* to achieve [the state's] objectives. The regulation of attorneys' speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is *neutral as to points of view*, applying equally to all attorneys participating in a pending case; and it merely *postpones* the attorneys' comments until after the trial. While supported by the *substantial state interest* in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

*Id.* at 1076 (emphasis added); *see Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[T]he government may impose reasonable restrictions on the *time*, place, or manner of protected speech, provided the restrictions are justified *without reference to the content* of the regulated speech, that they are *narrowly tailored* to serve a *significant governmental interest*, and that they leave open ample alternative channels for communication of the information." (emphasis added) (internal quotation marks omitted)).

19. To the extent *Gentile* established a lower standard for restrictions on the speech of lawyers representing clients in ongoing proceedings that survives after *NIFLA*, it is inapplicable here. Defendants' interests in the Statute have no connection to protecting the integrity or fairness of the adjudicative process—which was the reason *Gentile* cited for applying a lower standard. *See supra* Conclusions of Law ¶ 16. *Gentile* does not give the government license to more strictly regulate *any* speech by a lawyer during the course of ongoing proceedings; rather, it sets forth a lower standard for regulations of speech that threatens the fairness, integrity, or administration of the judicial system. The Statute is not such a

regulation. *See supra* Findings of Fact ¶¶ 61–62.

20. Even if the *Gentile* standard did apply here, the Statute would fail. The Statute is notably different from the regulation in *Gentile* because it applies only to defense counsel, it prohibits all defense-initiated contact with a victim while the case is ongoing, and it is not narrowly tailored to the State's interests, as the Court will explain in its later analysis. *See infra* Conclusions of Law ¶¶ 30–33.

**The Statute is a content-based restriction on speech subject to strict scrutiny.**

21. Having found that the Statute restricts protected speech, the Court must next determine what level of scrutiny applies. "[T]he appropriate level of scrutiny is . . . tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

22. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Alternatively, even if a law is facially content neutral, it is considered content based if it "cannot be 'justified without reference to the content of the regulated speech,' or . . . [was] adopted by the government 'because of disagreement with the message the speech conveys.'" *Id.* at 164 (quoting *Ward*, 491 U.S. at 791).

23. Moreover, "[g]overnment discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" *Id.* at 168 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

24. "[T]he fact that a distinction is speaker based does not . . . automatically render the distinction content neutral." *Reed*, 56 U.S. at 170. Rather, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.* (quoting *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 658 (1994)). This is "[b]ecause 'speech

restrictions based on the identity of the speaker are all too often simply a means to control content.'" *Id.* (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010)).

25. Here, the Statute is facially content neutral, but speaker based: it singles out and disfavors the speech of a category of speakers—members of the criminal defense team—and limits their ability to speak to victims about all topics by requiring that they initiate contact with a victim through the prosecutor, whose own ability to communicate with the victim is unfettered.

26. The Court is particularly suspect of the Statute's speaker-based distinction given the favor it shows to prosecutors, who represent the State itself and are the adversaries of the defense team. This makes it all the more likely that the Statute "reflect[s] the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broad. Sys., Inc.*, 512 U.S. at 658.

27. The State's justifications for the Statute rely on an assumption that victims need more protection from the criminal defense team's speech than any other person's speech—that the criminal defense team's speech is more likely to cause harm to the victim or violate the victims' rights. *See supra* Findings of Fact ¶ 51. Regardless of whether that is true, a law that regulates speech based on its potential "emotive impact" on the audience is content based. *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see also Turner Broad. Sys., Inc.*, 512 U.S. at 658 (recounting the Supreme Court's prior holding that a law "concerned with the communicative impact of the regulated speech" was subject to strict scrutiny because "the legislature's speaker preference reflects a content preference" (citing *Buckley v. Valeo*, 424 U.S. 1, 17, 48 (1976), *superseded by statute*)). If the Statute were unrelated to the content of expression, "there would have been no perceived need" for the Arizona Legislature to protect victims from the defense team but not from prosecutors or anyone else. *Turner Broad. Sys., Inc.*, 512 U.S.

at 658. Accordingly, the Statute is a content-based regulation of protected speech and is subject to strict scrutiny.[21]

**The Statute fails strict scrutiny.**

28. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *see also United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). "The State must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (internal quotation marks and citations omitted). "It is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy Ent. Grp., Inc.*, 529 U.S. at 818.

29. A statute is not narrowly tailored "[i]f a less restrictive alternative would serve the Government's purpose." *Id.* at 813. In addition, "a statute is not narrowly tailored if it is either underinclusive or overinclusive in scope." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020); *see also Reed*, 576 U.S. at 172 ("[A] 'law cannot be regarded as protecting an interest of the highest order, and

---

[21] The Court also notes that the Statute limits Plaintiffs' ability to speak on "matters of public concern" which are "at the heart of the First Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (opinion of Powell, J.)). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community' . . . ." *Id.* at 453 (quoting *Connick*, 461 U.S. at 146). Topics such as the purpose and functioning of the legal system and the propriety of capital punishment fall squarely within this category. *See supra* Findings of Fact ¶ 39; *Ohlson v. Brady*, 9 F.4th 1156, 1158 (9th Cir. 2021) (finding that "the manner in which . . . evidence is produced and presented in court[ ] is a matter of public concern"); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1103 (9th Cir. 2011) ("Speech that deals with the functioning of government is a matter of inherent public concern." (internal quotation marks omitted)).

thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited . . . .'" (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002))); *Brown*, 564 U.S. at 804–05 (finding a statute overinclusive because it restricted speech that fell outside the state's asserted interest).

30. The Court will address each of the State's four asserted interests in the Statute in turn. *See supra* Findings of Fact ¶ 51. First, the State has a compelling interest in implementing and protecting the rights of victims as set forth in the Arizona Constitution, but the Statute is not narrowly tailored to serve that interest.

    a. The State of course has a compelling interest in protecting the rights assured to its citizens under its state constitution. But it cannot do so in a manner that violates the rights enshrined in the United States Constitution. *See* U.S. Const. art. VI, cl. 2.

    b. The Statute is not narrowly tailored to protecting victims' right to refuse an interview by the defense team because it is not "actually necessary" to achieving that goal. *See Brown*, 564 U.S. at 799. As this Court found, victims receive ample notice of their right to refuse a defense interview under several other provisions of state law, making the Statute unnecessary.[22] *See supra* Findings of Fact ¶¶ 54–55.

    c. Likewise, the Statute is not narrowly tailored to protecting victims' right to be treated with fairness, respect, and dignity and to be free from

[22] Citing examples like the *Miranda* warning and Fed. R. Civ. P. 4(a)(1)(E)'s requirement that a summons provide notice of the consequences of failure to appear, Defendants argue that "[t]he government clearly has an interest in creating prophylactic rules to protect constitutional and other rights." (Doc. 268 at 8 n.7). Not necessarily. In addition to the obvious differences between requiring a speaker to notify the audience of their rights as opposed to prohibiting the speaker from contacting the audience altogether, "[b]road prophylactic rules in the area of free expression are suspect" because "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button*, 371 U.S. at 438. Thus, prophylactic rules involving speech—even those aimed at protecting other constitutional rights—are not immune from ordinary First Amendment scrutiny. Because the State has other means of protecting victims' right to refuse an interview, a prophylactic rule that so broadly inhibits speech is not justified.

intimidation, harassment, or abuse. Finding no evidence that members of the defense team were infringing on this right when initiating contact with victims prior to the Statute's enactment or that they would do so in the Statute's absence now, the Court cannot conclude that the Statute solves an "actual problem." *Playboy Ent. Grp., Inc.*, 529 U.S. at 822–23 (finding that the government failed to establish an actual problem where it presented only "anecdote and supposition"); *see supra* Findings of Fact ¶¶ 57–58, 60. Even if there were evidence of an actual problem, less restrictive alternatives—including regulations of professional conduct, the possibility of court sanctions, and the criminalization of harassment—already protect against harassment of victims without burdening Plaintiffs' First Amendment rights. *See supra* Findings of Fact ¶ 59. And unlike the Statute, those regulations are targeted towards speech that would violate the victim's right to be free from harassment; the Statute is overinclusive because it restricts *all* defense-initiated speech to victims regardless of whether it goes to the State's interest in protecting victims' rights—making the Statute exceedingly overinclusive with respect to this interest. *See supra* Findings of Fact ¶ 40.

d. The fact that many other jurisdictions give victims constitutional rights to refuse an interview and to be free from harassment and intimidation without any protections similar to the Statute further supports the conclusion that the Statute is unnecessary to solve any actual problem.[23]

[23] It is true, as Defendants note, that this Court has granted motions to enforce the Statute in federal habeas cases. *See, e.g.*, Order at 2, *Bearup v. Ryan*, No. CV-16-03357-PHX-SPL (D. Ariz. Jan. 20, 2017), ECF No. 18 (finding that the Statute "furthers the goal of respecting a crime victim's dignity and privacy without unduly burdening" the criminal defendant). But this Court has also denied such motions. *See, e.g.*, *Burns v. Shinn*, No. CV-21-1173-PHX-SPL, 2021 WL 5280601, at *4 (D. Ariz. Nov. 12, 2021) (finding that the federal victims' rights statute adequately protected state crime victims' right to fairness, respect, and dignity in federal habeas proceedings). The same is true looking at the case law of this District as a whole: sometimes courts grant motions to preclude victim contact, and sometimes they deny them. *Compare, e.g.*, *Gomez v. Shinn*,

*See supra* Conclusions of Law ¶ 7; *McCullen v. Coakley*, 573 U.S. 464, 490 (2014) (stating that the fact that no other state had a law as restrictive on speech as the state law at issue "raise[s] concern that the [state] has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage").

31. Next, the Statute does not serve the State's compelling interest in regulating professional conduct for the reasons discussed *supra* Findings of Fact ¶¶ 61–63 and Conclusions of Law ¶¶ 5–12. The Statute does not in fact regulate professional conduct, but rather regulates the speech of those representing a criminal defendant.

32. Third, even assuming that the State's interest in protecting victims from being retraumatized is sufficiently compelling to justify infringing on Plaintiffs' free speech rights,[24] the Statute is fatally underinclusive and overinclusive with

---

587 F. Supp. 3d 939, 945–48 (D. Ariz. 2022), *and Reeves v. Shinn*, No. CV-21-1183-PHX-DWL, 2021 WL 5771151, at *4–6 (D. Ariz. Dec. 6, 2021), *with Miller v. Shinn*, No. CV-21-00992-PHX-ROS, 2021 WL 4503461, at *1–4 (D. Ariz. Oct. 1, 2021), *and Armstrong v. Ryan*, No. CV-15-00358-TUC-RM, 2019 WL 1254653, at *2 (D. Ariz. Mar. 19, 2019). Thus, there is no persuasive consensus as to whether the Statute is necessary or even helpful to protecting victims' rights under the Arizona Constitution beyond those provided under the federal Crime Victims' Rights Act, 28 U.S.C. § 3771(a), including "[t]he right to be treated with fairness and respect for the victim's dignity and privacy." Moreover, that issue, and the larger issue of whether the Statute infringes on attorneys' First Amendment rights, is far more flushed out in this case than it has ever been in a federal habeas case in this District.

[24] This may be a generous assumption. "Reactive harms," or those resulting from an emotional or intellectual response to speech, "generally may *not* be used as justifications for regulation of speech." 1 Smolla & Nimmer on Freedom of Speech §§ 4.18–19. "In most circumstances, 'the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Snyder*, 562 U.S. at 459 (holding picketers near a soldier's funeral with signs expressing views that God kills American soldiers as punishment for the nation's immorality were protected from liability by the First Amendment) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11 (1975)); *see also id.* at 461 ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."). *But see Cohen v. California*, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect

respect to this interest.

a. *Brown* is instructive here. In that case, California passed a law prohibiting the sale of violent video games to minors, which the Supreme Court found was a content-based restriction on speech subject to strict scrutiny. *Brown*, 564 U.S. at 789, 799. The state asserted an interest in "protecting children from portrayals of violence" that "corrupt the young or harm their moral development." *Id.* at 804–05. Initially, the Supreme Court determined that this interest could not justify the law because the state could not "show a direct causal link between violent video games and harm to minors" such that there was evidence of a problem that the law actually solved; the state legislature's "predictive judgment," based on competing evidence, "that such a link exists" did not satisfy strict scrutiny. *Id.* at 799–800. Further, the evidence the state *did* have showing that violent video games produced some effect on children's aggression showed that those effects were "indistinguishable from effects produced by other media," including cartoons, video games rated for young children, and pictures of guns. *Id.* at 800–01. Because California had not prohibited any of those forms of media, the Court determined that the "regulation [was] wildly underinclusive when judged against its asserted justification, which . . . [was] alone enough to defeat it." *Id.* at 801–02. In other words, the law failed strict scrutiny because "California . . . singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and [gave] no persuasive

---

others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."); *Fla. Bar*, 515 U.S. at 625 (crediting as substantial, in a case involving attorneys' commercial speech, *see supra* note 20, the state's interest in preventing lawyers from "engaging in conduct that . . . is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families" by sending direct-mail personal-injury solicitations within 30 days of an accident or disaster (internal quotation marks omitted)). But the Court need not decide this difficult issue in light of the Statute's underinclusiveness with respect to this interest.

reason why." *Id.* at 802.

b. Likewise, here, Defendants have presented only minimal, conjectural evidence that direct contact by the defense team may retraumatize some victims. *See supra* Findings of Fact ¶ 64. When asked directly about the evidence, defense counsel asserted that there is "some evidence" (in the form of the deposition testimony recounted *supra* Findings of Fact ¶ 64) that defense-initiated contact causes a higher likelihood of retraumatization, that "it's a matter of just human nature," and that "it's not unreasonable or irrational for the Arizona Legislature to come to that conclusion in enacting this regulation." (Doc. 264 at 34:22–35:22). But *Brown* is clear that the government must provide "compelling" evidence to meet its burden under strict scrutiny, and that "ambiguous proof" and legislative judgments—as Defendants present here—do not suffice. *Brown*, 564 U.S. at 799–800.

c. More importantly still, the bulk of the evidence before the Court shows that contact with the criminal defense team is no more or less likely to traumatize a victim than contact with the prosecutor or any other participant in the legal system. *See supra* Findings of Fact ¶¶ 66–67. Just as California in *Brown* lacked clear reasoning for singling out violent video games, Defendants have given no persuasive explanation for why the Statute singles out criminal defense attorneys. In fact, the Statute is even more egregious by requiring criminal defense teams to initiate contact with victims through prosecutors—whose own contact with the victim, based on the evidence, is no less likely to retraumatize a victim. *See Brown*, 564 U.S. at 802 ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."). Even more so than the law in *Brown*, then, the Statute is "wildly underinclusive" as to the State's asserted interest in preventing additional trauma to victims such that it

cannot be justified by that interest. *Id.*

d. Not only that, but the Statute is overinclusive with respect to this interest, as well. Certainly, not all defense-initiated contact will traumatize victims, and there is evidence that some communication may be helpful to them. *See supra* Findings of Fact ¶¶ 64–65. The Statute nevertheless prohibits *all* such contact and is therefore not narrowly tailored to the State's interest. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948 (9th Cir. 2011) (finding an ordinance overinclusive and not narrowly tailored where there were "several obvious examples of prohibited speech that [did] not cause the types of problems that motivated the [o]rdinance" (internal quotation marks omitted)).

e. The Court finds the Statute is both underinclusive and overinclusive with respect to protecting victims from being retraumatized, so the Statute is not narrowly tailored to this interest.

33. Finally, the Statute is not narrowly tailored to the State's interest in leveling the playing field between victims with counsel and those without because it is not the least restrictive means of furthering that interest, even assuming the interest can be considered compelling.[25]

a. The State could provide victims with government-funded counsel such that they would be covered by ER 4.2. *See supra* Findings of Fact ¶ 69. The Court does not doubt that this would come at significant expense to the State, but the fact that an alternative is costly does not make it infeasible or unavailable. *See Underwood v. BNSF Ry. Co.*, 359 F. Supp. 3d 953, 959 (D. Mont. 2018) (stating that a "cost analysis does not supplant the protections of the First Amendment").

---

[25] This is an especially generous assumption given that Defendants presented no evidence regarding the disparity that would purportedly exist in the Statute's absence. *See supra* Findings of Fact ¶ 68.

b. It is also true that this alternative would still not allow Plaintiffs to make direct contact with the victim, as ER 4.2 would require them to initiate contact through the victim's attorney. But it would allow Plaintiffs to at least communicate directly with the victim's own representative who has certain fiduciary duties to the victim, including duties of loyalty and obedience. *See Cecala v. Newman*, 532 F. Supp. 2d 1118, 1133–34 (D. Ariz. 2007) (describing a lawyer's fiduciary duties under Arizona law). The prosecutor, in contrast, does not represent the victim and is not the victim's fiduciary. *See supra* Conclusions of Law ¶ 6.

c. More importantly, this alternative would eliminate Plaintiffs' First Amendment injury caused by the Statute, making it less restrictive of their First Amendment rights. *See supra* Findings of Fact ¶ 69; *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2355–56 (2020) (stating that, although the plaintiffs did not receive relief in the form of being permitted to speak in the way they desired, the elimination of unequal treatment addressed their First Amendment injury). Though the constitutionality of ER 4.2 is not before the Court, the Court notes that the ethical rule applies equally to all attorneys in a matter, is limited in scope to communications related to the matter, and aids in the functioning of the legal system by protecting the lawyer-client relationship. *See supra* Findings of Fact ¶ 62; *Gentile*, 501 U.S. at 1075–76.

d. Because the State can further its interest in leveling the playing field between victims equally well in a manner that does not infringe on First Amendment rights, the Statute is not narrowly tailored. *See Playboy Ent. Grp., Inc.*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.").

///

///

34. In sum, the Statute is not narrowly tailored to any compelling government interest and therefore cannot withstand strict scrutiny.[26]

**Even if the Statute has a plainly legitimate sweep, it is overbroad in relation to its legitimate sweep and violates the First Amendment.**

35. Moving to Plaintiffs' overbreadth challenge, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). When construing a state statute, federal courts must "defer to a state court's authority to interpret its own law." *Stevens*, 559 U.S. at 474.

36. Here, there is minimal Arizona case law interpreting the Statute. In one case, the Arizona Court of Appeals held that the trial court did not abuse its discretion by refusing to allow defense counsel to cross-examine a victim about statements that the victim made to counsel when counsel spoke to the victim without going through the prosecutor, in violation of the Statute. *See State v. Jimenez*, No. 1 CA-CR 09-0505, 2010 WL 4969831, at *3–4 (Ariz. Ct. App. Nov. 16, 2010). Several months after the alleged crime, the defense attorney went to the crime scene, near the victim's trailer, to take photos. *Id.* at *3. When he encountered the victim, he identified himself as defense counsel and told the victim that "he had an absolute right not to speak with him" and that the victim could call the prosecutor "to see whether or not he wished to talk to me." *Id.* at *3 (internal quotation marks omitted). Defense counsel also told the victim, however, that if the victim wished to speak with defense counsel, "he could do so while counsel was there taking pictures." *Id.* at *3. The victim indicated that he "had no problem with talking to" defense counsel, who then asked the victim about what had occurred. *Id.* at *3 (internal quotation marks omitted). In affirming exclusion

[26] Because the Statute fails strict scrutiny, the Court need not consider Plaintiffs' argument that the Statute is an impermissible prior restraint.

of the evidence, the Arizona Court of Appeals rejected defense counsel's argument that he did not intend to violate the victim's rights because it was "difficult to suppose that counsel would not have had at least some intimation that [the victim] might be there." *Id.* at *5. It also rejected his argument that it would have been "awkward" for him to just ignore the victim while taking photos, explaining that "logic dictates that counsel could have and should have simply explained that he was there to take photographs and refrained from speaking to the victim concerning the actual crime without first contacting the prosecutor." *Id.* (internal quotation marks omitted). *Jimenez* thus shows that the Arizona courts may interpret the Statute with some leniency towards inadvertent, non-case-related contact, but that it does not matter if the victim voluntarily agrees to speak to the defense team when contacted. This Court finds no other useful Arizona case law interpreting the Statute.[27]

37. The existence of relatively little interpretation of the Statute may be a result of the fact that the Statute's text is quite clear. *See supra* Findings of Fact ¶¶ 12, 17. Terms that may otherwise be ambiguous are given specific definitions in other sections of the Victims' Rights Implementation Act. *See supra* Findings of Fact ¶¶ 14–15. Besides perhaps a narrow (and, for purposes of this litigation, unimportant) disagreement about the meaning of "initiate," *see supra* Findings of Fact ¶ 41, the parties—including Defendant Brnovich, the State's chief legal officer—are largely in agreement that the Statute covers exactly what it says it does: direct contact initiated by the defense team to a statutory victim from the time that the criminal defendant is formally charged until final disposition.

38. The next question is whether the Statute "covers a substantial amount of

---

[27] Other cases go to the proper remedy when a prosecutor fails to inform a victim of the defense team's request for an interview, which is not helpful in determining the scope of speech prohibited by the Statute. *See State v. Manez*, No. 1 CA-CR 16-0727, 2017 WL 6627621, at *1–3 (Ariz. Ct. App. Dec. 28, 2017); *State v. Rasch*, 935 P.2d 887, 890–91 (Ariz. Ct. App. 1996).

protected speech, 'not only in an absolute sense, but also relative to [its] plainly legitimate sweep.'" *Marquez-Reyes v. Garland*, 36 F.4th 1195, 1205 (9th Cir. 2022) (quoting *Williams*, 553 U.S. at 292). "An overbroad statute infringes on a substantial amount of constitutionally protected speech when . . . the statute is 'susceptible of regular application to protected expression.'" *United States v. Hansen*, 25 F.4th 1103, 1109–10 (9th Cir. 2022) (quoting *City of Houston v. Hill*, 482 U.S. 451, 467 (1987)).

39. As the Court determined, the Statute is a regulation of speech as speech, not professional conduct. *See supra* Conclusions of Law ¶¶ 3–12. Even if the Statute has a plainly legitimate sweep with respect to speech that is harassing, intimidating, or abusive, that is but a fraction of what the Statute covers. *See supra* Findings of Fact ¶ 39–40. Given that the Statute covers *all* defense-initiated contact with victims in ongoing proceedings, it is plain that "the presumptively impermissible applications . . . far outnumber any permissible ones." *Stevens*, 559 U.S. at 481 (holding that a statute prohibiting depictions of animal cruelty was facially invalid where it covered protected expression including hunting magazines and videos).

40. Accordingly, the Statute is impermissibly overbroad and violates the First Amendment.

**Plaintiffs are entitled to declaratory and injunctive relief.**

41. The Declaratory Judgments Act, 28 U.S.C. § 2201(a), permits federal courts to "declare the rights and other legal relations of any interested party seeking such declaration."[28] Because the Statute violates Plaintiffs' First Amendment rights,

[28] In addition, the Declaratory Judgments Act permits relief only "[i]n a case of actual controversy." 28 U.S.C. § 2201(a). That requirement "refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). The issue of Article III standing was litigated extensively at the motion-to-dismiss stage in this case, and on appeal, the Ninth Circuit held that Plaintiffs had sufficiently alleged each element of standing. (Doc. 220-1); *Ariz. Att'ys for Crim. Just. v. Brnovich*, No. 20-16293, 2021 WL 3743888 (9th Cir. Aug. 24, 2021), *cert. denied*, 142 S. Ct. 2648 (2022). This Court now finds that Plaintiffs have proven each

they are entitled to declaratory relief.

42. To obtain a permanent injunction, a plaintiff must show:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Plaintiffs have satisfied this test.

a. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Because the Statute violates Plaintiffs' First Amendment rights, this factor is satisfied.

b. "[C]onstitutional violations cannot be adequately remedied through damages . . . ." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (internal quotation marks omitted). The second factor, too, is satisfied.

c. When the government is a party, the final two factors—the balance of hardships and the public interest—are considered together. *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). "Courts . . . have consistently recognized the significant public interest in upholding First Amendment

---

element of standing. First, they have proven injury in fact because they have proven "a credible threat of enforcement" and that "they self-censor due to fear of professional discipline." (Doc. 220-1 at 3); *see supra* Findings of Fact ¶¶ 33, 38, 44. Second, they have proven causation and traceability because Defendants Vessella and Silbert "have the authority to pursue professional discipline for defense attorneys and investigators who violate" the Statute, while Defendant Brnovich "seeks to enforce [the Statute] in proceedings to which he is a party, and because his office can refer alleged violations of [the Statute] for disciplinary investigation." (Doc. 220-1 at 3–4 (citation omitted)); *see supra* Findings of Fact ¶¶ 21–31. Finally, Plaintiffs have proven redressability because "the requested relief [will] stop Defendants from enforcing [the Statute], and thus relieve a discrete injury." (Doc. 220-1 at 4); *see supra* Findings of Fact ¶ 38 and note 4; *infra* Conclusions of Law ¶¶ 42–43.

principles." *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020) ("It is always in the public interest to prevent the violation of a party's constitutional rights." (internal quotation marks omitted)). Plaintiffs want the opportunity to communicate messages about important issues of public concern—an opportunity protected by the First Amendment. On the other hand, the Court cannot ignore the fact that some victims may have a negative reaction if contacted directly by the defense team. *See supra* Findings of Fact ¶ 64. But, for all of the reasons discussed, the State's asserted interests in protecting victims do not justify the Statute's broad infringement on First Amendment rights. *See supra* Conclusions of Law ¶¶ 30–33. This Court is extremely familiar with the trauma that crime victims too often experience while navigating the legal system. That trauma cannot, however, be attributed primarily or specifically to contact with the defense team, and thus cannot rationalize a regulation that hinders the expression of the defense team alone—particularly given the favor it shows to the prosecution. Moreover, an injunction will allow those victims who might unknowingly benefit from contact with the defense team to receive those messages, an important First Amendment consideration in its own right. *See supra* Findings of Fact ¶ 39(d)–(e); *Boardman v. Inslee*, 978 F.3d 1092, 1117 (9th Cir. 2020) ("[T]he First Amendment 'protects the right to receive information and ideas.'" (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969))). Finally, the fact that no other state jurisdiction has a prohibition like the Arizona Statute reassures the Court that an injunction is unlikely to have any catastrophic effects on crime victims. *See supra* Conclusions of Law ¶ 7. Given the fundamental nature of the First Amendment right to free speech and the lack of

persuasive evidence that contact with defense counsel is likely to be more harmful to a victim than contact with the rest of the legal system, the balance of hardships and the public interest favor Plaintiffs.

d. In sum, all four factors favor issuance of an injunction.

43. The only remaining question is the form of the injunction. When specifically asked by the Court at the Bench Trial, Plaintiffs stated that they seek to enjoin enforcement of the Statute only against "attorneys and their agents," not against criminal defendants themselves. (Doc. 264 at 28:21–29:2). Although Plaintiffs' proposed form of injunction provides no such limitation, (Doc. 254-1), in light of that answer and, more importantly, the lack of evidence or argument regarding the First Amendment rights of criminal defendants and the fact that Plaintiffs are composed only of attorneys and a private investigator who works on behalf of attorneys, the Court will limit its injunction to enjoin enforcement of the Statute only against attorneys and their agents.[29]

Dated this 2nd day of November, 2022.

Honorable Steven P. Logan
United States District Judge

[29] The Court notes that the Statute prohibits "[t]he defendant, the defendant's attorney *or an agent of the defendant*" from initiating direct contact with the victim. A.R.S. § 14-4433(B) (emphasis added). But in light of Plaintiff Robertson's testimony that in criminal defense cases, he always works on behalf of the criminal defense attorney *see supra* Findings of Fact ¶ 7, the Court will enjoin enforcement of the Statute only against attorneys and agents of attorneys because such an injunction will relieve Plaintiffs' injuries in full. *See E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992) (stating that an injunction must be "tailored to eliminate only the specific harm alleged").

MITCHELL STEIN
CAREY CHAPMAN PC
ATTORNEYS AT LAW

# Exhibit | 3

**WO**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| Arizona Attorneys for Criminal Justice, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>Doug Ducey, et al.,<br><br>Defendants. | No. CV-17-01422-PHX-SPL<br><br>**ORDER** |

This matter was tried before the Court on September 22, 2022. Pursuant to the Findings of Fact and Conclusions of Law (Doc. 269) filed this date, the Court finds in favor of Plaintiffs. Accordingly,

**THE COURT DECLARES** that A.R.S. § 13-4433(B) violates the First Amendment of the United States Constitution.

**IT IS ORDERED** that Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, are permanently enjoined from enforcing A.R.S. § 13-4433(B) against a criminal defendant's attorney or an agent of that attorney.[1]

[1] Nothing in this Order shall be construed as enjoining Defendants from enforcing A.R.S. § 13-4433(B) against a criminal defendant or an agent of the criminal defendant who is not the criminal defendant's attorney or an agent of that attorney. Nor shall anything in this Order be construed to enjoin enforcement of any other provision of Arizona law, including a crime victim's right to refuse an interview, deposition, or other discovery request pursuant to Article II, § 2.1(A)(5) of the Arizona Constitution and the requirement under Arizona Rule of Criminal Procedure 39(b)(12) that the defense must communicate a request to interview a victim to the prosecutor rather than the victim.

**IT IS FURTHER ORDERED** that Defendant Brnovich, his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him, are permanently enjoined from requiring that a criminal defendant's attorney or an agent of that attorney initiate contact with a statutory crime victim through the prosecutor's office.

**IT IS FURTHER ORDERED** that Defendant Brnovich, his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him, are permanently enjoined from making referrals for disciplinary investigations or other sanctions solely because a criminal defendant's attorney or an agent of that attorney directly initiated contact with a statutory crime victim.

**IT IS FURTHER ORDERED** that Defendants Vessella and Silbert, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, are permanently enjoined from conducting investigations, pursuing discipline, and imposing discipline solely because a criminal defendant's attorney or an agent of that attorney directly initiated contact with a statutory crime victim.

**IT IS FURTHER ORDERED** that Plaintiffs may file a motion for attorneys' fees to which they believe they are entitled in accordance with Fed. R. Civ. P. 54(d)(2) and LRCiv 54.2 no later than **November 23, 2022**.

**IT IS FURTHER ORDERED** that Plaintiffs' Motion for Preliminary Injunction (Doc. 238) is **denied as moot**.

**IT IS FURTHER ORDERED** that the Clerk of Court shall enter judgment accordingly in favor of Plaintiffs against Defendants and **terminate** this action.

Dated this 2nd day of November, 2022.

Honorable Steven P. Logan
United States District Judge

MITCHELL STEIN
CAREY CHAPMAN PC
ATTORNEYS AT LAW

# Exhibit | 4

Daniel O. King, Bar #026550
Jonathan P. Barnes, Jr., Bar #028014
JONES, SKELTON & HOCHULI P.L.C.
40 N. Central Avenue, Suite 2700
Phoenix, Arizona 85004
Telephone: (602) 263-4437
Fax: (602) 200-7813
dking@jshfirm.com
jbarnes@jshfirm.com

Attorneys for Defendant Maret Vessella

**UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

Arizona Attorneys for Criminal Justice, et al.,

Plaintiffs,

v.

Mark Brnovich, in his official capacity as Attorney General of the State of Arizona, et al.,

Defendants.

No. 2:17-cv-01422-SPL

**DEFENDANT MARET VESSELLA'S RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT**

Defendant Vessella moves the Court to alter or amend the judgment by clarifying its November 2, 2022 order [Doc. 270], which is ambiguous regarding the injunction's scope. Vessella seeks this clarification without advocating for any particular outcome; she just needs to know what she is allowed to do without violating the Court's judgment. A motion to alter or amend the judgment pursuant to Rule 59(e) is the proper vehicle for seeking clarification regarding the scope of an injunction. *Birdsong v. Wrotenbery*, 901 F.2d 1270, 1272 (5th Cir. 1990).

The order declares A.R.S. § 13-4433(B) unconstitutional and enjoins its enforcement. [Doc. 270 at 1.] The statute provides, in relevant part: "the defendant's attorney or an agent of the defendant shall only initiate contact with the victim through the prosecutor's office." A.R.S. § 13-4433(B). The Court specifically enjoined Vessella "from conducting investigations, pursuing discipline, and imposing discipline solely because a

criminal defendant's attorney or an agent of that attorney *directly initiated contact* with a statutory crime victim." [Doc. 270 at 2 (emphasis added).]

The above-emphasized language, "directly initiated contact," is what creates the ambiguity when read in context with the Court's footnote, which expressly limits the injunction's scope. It states, "[n]othing in this Order shall … be construed to enjoin enforcement of … the requirement under Arizona Rule of Criminal Procedure 39(b)(12) that the defense must communicate a *request to interview* a victim to the prosecutor rather than the victim." [*Id.* at 1 n.1 (emphasis added).][1] This part of the order is confusing because a "request to interview" is a specific type of contact that, logically speaking, fits squarely within the "directly initiated contact" umbrella.

So, on the one hand, the Court broadly enjoined Vessella from investigating or seeking discipline against any defense attorney who "directly initiated contact" with crime victims in violation of A.R.S. § 13-4433(B). On the other hand, the Court seems to have carved out an exception allowing Vessella to investigate and seek discipline against defense attorneys who directly "request to interview" a crime victim without going through the prosecutor, in violation of Rule 39(b)(12), Ariz. R. Crim. P. This is not clear, however, given that a defense lawyer cannot directly request to interview a victim without first initiating contact with the victim.

Because reasonable minds could differ as to whether "requesting an interview" is a form of "directly initiated contact," the order is ambiguous. *See Young v. Owners Ins. Co.*, 562 F. Supp. 3d 250, 255 (D. Ariz. 2021) (language is ambiguous when "it lends itself to two or more contradictory meanings"). This ambiguity requires clarification so that Vessella has clear guidance from the Court regarding the injunction's scope, and in particular whether she may investigate and/or seek discipline based on a defense attorney's direct request to interview crime victims in violation of Rule 39(b)(12), Ariz. R. Crim. P.

[1] The Rule provides: "the defense must communicate requests to interview a victim to the prosecutor, not the victim." Rule 39(b)(12), Ariz. R. Crim. P.

## CONCLUSION

For the foregoing reasons, Vessella moves the Court to alter or amend the judgment by clarifying whether she is enjoined from investigating or seeking discipline against defense attorneys who merely "request to interview" a crime victim without going through the prosecutor in violation of Rule 39(b)(12), Ariz. R. Crim. P.

DATED this 16th day of November, 2022.

JONES, SKELTON & HOCHULI, P.L.C.

By /s/ Jonathan P. Barnes, Jr.

Daniel O. King
Jonathan P. Barnes, Jr.
40 N. Central Avenue, Suite 2700
Phoenix, Arizona 85004
Attorneys for Defendant Maret Vessella

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of November, 2022, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing; and served on counsel of record via the Court's CM/ECF system.

/s/ Ginger Stahly

MITCHELL STEIN
CAREY CHAPMAN PC
ATTORNEYS AT LAW

# Exhibit | 5

**ACLU Foundation of Arizona**
Jared G. Keenan (Bar No. 027068)
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014
Telephone: 602-650-1854
Email: jkeenan@acluaz.org

**Mitchell | Stein | Carey | Chapman PC**
Kathleen E. Brody (Bar No. 026331)
2600 North Central Avenue, Suite 1000
Phoenix, AZ 85004
Telephone: 602-358-0290
Email: kathy@mscclaw.com

**Killmer, Lane & Newman, LLP**
David A. Lane (*pro hac vice*)
Andrew McNulty (*pro hac vice*)
1543 Champa Street
Denver, Colorado 80202
Telephone: 303-571-1000
Email: dlane@kln-law.com
Email: amcnulty@kln-law.com

*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Attorneys for Criminal Justice; et al.,

Plaintiffs,

vs.

Mark Brnovich, in his official capacity as Attorney General of the State of Arizona; et al.,

Defendants.

No. 2:17-cv-01422-SPL

**PLAINTIFFS' RESPONSE TO DEFENDANT MARET VESSELLA'S RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT**

Plaintiffs do not oppose Defendant Maret Vessella's request for clarification in her Rule 59(e) Motion to Alter or Amend Judgment. Plaintiffs believe, however, that this Court's Findings of Fact and Conclusions of Law (Doc. 269) make clear that criminal defense attorneys have a First Amendment right to initiate contact with crime victims and to engage with those victims in robust communications, including discussion and questions about the facts and circumstances of any crime with which the attorney's client is charged. The Court should not undermine its own ruling to authorize Defendant Vessella, as her request suggests, to violate the First Amendment rights of criminal defense attorneys and their agents by investigating and disciplining them for making a "request to interview" a crime victim.

## I. This Court's Findings of Fact and Conclusions of Law Support a Broad First Amendment Right of Criminal Defense Attorneys and Their Agents to Speak with Crime Victims.

In its Findings of Fact and Conclusions of Law, this Court was clear that "plaintiffs in this case wish to speak to crime victims to *investigate the facts and circumstances of the alleged criminal offense*." (Doc 269 at 11) (emphasis added). This Court further noted that "law enforcement investigations often fail to capture an accurate or complete accounting of the events—especially the background history and *surrounding circumstances of the crime*," and thus Plaintiffs want to speak with crime victims to gain a "fuller picture of the facts," to possibly "uncover exculpatory information," and often to "gather mitigation evidence." *Id.* (emphasis added). This Court also found that "Plaintiffs in this case want to be able to communicate with victims who have unresolved questions about the crime committed against them." *Id.* at 14. Indeed, "Plaintiffs wish to communicate a variety of messages to victims." *Id.* Moreover, this Court found that "as opposed to contributing to the proper functioning of the legal system, there is evidence that the Statute actually detracts from it by inhibiting the defense team's ability to *investigate the relevant facts*." *Id.* at 20 (emphasis

added).

Similarly, in its Conclusions of Law, the Court held that criminal defense attorneys and their agents have a First Amendment right to "pure communication through the expression or exchange of ideas." *Id.* at 26. Moreover, in holding that the statute "is facially content neutral but speaker based," the Court noted that the First Amendment protects the right of criminal defense attorneys and their agents "to speak to victims about *all topics*." *Id.* at 36 (emphasis added).

Despite the Court's clarity, Defendant Vessella claims that footnote 1 of the Court's November 2, 2022 Order (Doc. 270) is confusing because "a 'request to interview' is a specific type of contact that, logically speaking, fits squarely within the 'directly initiated contact' umbrella," and asks this Court for clarification on whether she can "investigate and seek discipline against defense attorneys who directly 'request to interview' a crime victim without going through the prosecutor." (Doc. 274).[1] Yet to read Rule 39's language this broadly would negate much of this court's 50-page Findings of Fact and Conclusions of Law. Indeed, any clarification that limits what or how defense attorneys may communicate with victims based on the "request to interview" language of Rule 39 would violate the First Amendment, as explained in this court's Findings of Fact and Conclusions of Law.

[1] Moreover, it appears that local prosecutors are already attempting an end-run around this Court's well-reasoned 50-page opinion and orders by focusing on the language of this single footnote and ignoring the rest of the decision's thorough explanation of the broad First Amendment rights of criminal defense attorneys and their agents to "to speak to crime victims to investigate the facts and circumstances of the alleged criminal offense." (Doc. 270). Recently, in *State of Arizona v. Eric Shaw*, CR2021-129014, a prosecutor with the Maricopa County Attorney's Office requested, and a Maricopa County Superior Court granted, an order preventing a criminal defense attorney from speaking with crime victims by claiming "any inquiry into the facts of the [client's] case is an interview and must come through the State pursuant to Rule 39." *See* Email from Deputy County Attorney Tamara Barnett to criminal defense attorney Stephen Mercer (Nov. 18, 2022), attached as Ex. A.

## II. Arizona Rule of Criminal Procedure 39 Refers to Formal Interview Requests and Cannot Limit the First Amendment Rights of Criminal Defense Attorneys and Their Agents.

In Arizona, requesting an interview is a formal part of the pre-trial discovery process in criminal cases. Ariz. R. Crim. P. 15.3(a)-(b). As the Arizona Supreme Court explained, "[p]arties in criminal cases generally are allowed to request interviews from witnesses other than the defendant." *J.D. v. Hegyi*, 236 Ariz. 39, 41, ¶ 11 (2014) (*citing* Ariz. R.Crim. P. 15.3(a)). The Arizona Supreme Court further noted that "[i]n some circumstances, including when a material witness refuses to grant an interview, the trial court may order a witness to submit to questioning at a deposition." *Id.* Thus, while criminal defense attorneys and their agents have a First Amendment right to initiate contact with crime victims and to "to speak to victims about all topics," (Doc. 270 at 36), including to investigate the facts and circumstances of the alleged criminal offense," *id.* at 11, any request for a formal Rule 15.3 interview must still be made through the prosecutor pursuant to Rule 39. Yet any broad reading of the "request to interview" language of Rule 39 that would limit the free speech rights of criminal defense attorneys and their agents to speak with crime victims "about all topics" would not only violate the First Amendment, it would also "skew[] the adversarial system." (Doc. 269 at 21).

## III. Conclusion.

For the foregoing reasons, Plaintiffs request that any clarification from this Court make clear that criminal defense attorneys have a First Amendment right to initiate contact with crime victims and to engage with those victims in robust communications, including discussion and questions about the facts and circumstances of any crime with which the attorney's client is charged.

Dated this 28th day of November 2022.

ACLU FOUNDATION OF ARIZONA

By: */s/ Jared G. Keenan*
Jared G. Keenan

MITCHELL | STEIN | CAREY | CHAPMAN
Kathleen E. Brody

KILLMER, LANE & NEWMAN, LLP
David A. Lane
Andrew McNulty

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties.

*/s/ Jared G. Keenan*
Jared G. Keenan

MITCHELL STEIN
CAREY CHAPMAN PC
ATTORNEYS AT LAW

# Exhibit | 6

---------- Forwarded message ---------
From: **Tamara Barnett (MCAO)** <barnettt@mcao.maricopa.gov>
Date: Fri, Nov 18, 2022 at 11:31 AM
Subject: Eric Shaw: Victim Interviews CR2021-129014-001
To: Stephen Mercer <stephenmercerlaw@gmail.com>

Mr. Mercer,

As promised, I reached out to each of the victims in this case, Drew, Jon and Korinne Caldera, and asked if they wished to participate in an interview. They each said they did not want to participate in a Defense interview.

I expect this moots the need for you to contact the victims given, that the Court has ruled that any inquiry into the facts of the case is an interview and must come through the State pursuant to Rule 39, and we now know the victims do not wish to participate in an interview. However, if you still need to contact the victims, the State understands that the Federal ruling would allow you to contact them for other appropriate reasons.

Thank you and I would appreciate it if you could confirm that you received this email.

*Tamara Barnett*
Deputy County Attorney

Maricopa County Attorney's Office

225 W. Madison Street

Phoenix, AZ 85003
barnettt@mcao.maricopa.gov
Office: 602-506-7599

MITCHELL STEIN
CAREY CHAPMAN PC
ATTORNEYS AT LAW

# Exhibit | 7

# ARIZONA REVISED STATUTES

## ANNOTATED

**1989**

**Cumulative Pocket Part**

*For Use In 1989–1990*

Replacing 1988 Pocket Part in back of volume

**Volume 17**

**Rules of Criminal Procedure**

For Rules Of Evidence,
See Volume 17A

ST. PAUL, MINN.
WEST PUBLISHING CO.

el the reason for such decision shall

insel for his or her first petition for post-conviction relief the court may court declines to appoint counsel it

first raises a claim of ineffective onviction relief includes a claim of t required to appoint counsel on a el. Any petition for post-conviction esult in the appointment of counsel. amended petition is expanded from time is afforded for the benefit of na counties. Paperwork associated nd as a matter of course appointed n addition to the fifteen (15) days e period of time from fifteen (15) to nsions of time.

8 Ariz. 219, 762 P.2d 506, appeal after 158 Ariz. 222, 762 P.2d 509.

lant's petition for postconviction relief, on ineffective assistance of counsel, scribed numerous instances of ineffec- which were related to his trial counsel's tate of intoxication during trial, present- rable claim, which entitled defendant to ntiary hearing on his claims regarding effectiveness. State v. D'Ambrosio 3 Ariz. 71, 750 P.2d 14.

not provide trial court with opportunity meritorious issues in compliance with criminal procedure, so that Court of would decline to consider claim of inef- sistance of counsel. State v. Wagstaff ) 775 P.2d 1130.

habeas petition; state court denied sec- postconviction petition on merits, with- essing state's procedural argument, reme Court denied petition for review explanation, and the state Supreme nexplained affirmance would be pre- include acceptance of reasoning as well ent of trial court. Dickey v. Lewis, riz.)1988, 859 F.2d 1365.



## IX. POWERS OF COURT

### RULE 33. CRIMINAL CONTEMPT

**Forms**

See West's Arizona Legal Forms, Domestic Relations.

**Library References**

Contempt ⇐3, 30 et seq.
C.J.S. Contempt §§ 5 et seq., 43 et seq.

### RULE 34. SUBPOENAS

**Library References**

Witnesses ⇐7 to 15.
C.J.S. Witnesses § 13 et seq.

### RULE 35. FORM, CONTENT AND SERVICE OF MOTIONS AND REQUESTS

**Library References**

Criminal Law ⇐696(1) to (9), 752½.
C.J.S. Criminal Law §§ 1067 et seq., 1149.

### RULE 36. LOCAL RULES

**Library References**

Courts ⇐78 et seq.
C.J.S. Courts § 170 et seq.

### RULE 38. SUSPENSION OF PROSECUTION FOR THE DEFERRED PROSECUTION PROGRAMS

**Library References**

Criminal Law ⇐578 et seq.
C.J.S. Criminal Law § 481 et seq.

### RULE 39. VICTIMS' RIGHTS

**a. Victim defined.** As used in this rule, a "victim" is defined as a person against whom a criminal offense has allegedly been committed, or the spouse, parent, legal guardian, child, or sibling of someone killed or incapacitated by the alleged criminal offense, except where the spouse, parent, legal guardian, child, or sibling is also the accused.

**b. Victims' rights.** Notwithstanding the provisions of any other rule in these Rules of Criminal Procedure, a victim shall have and be entitled to assert each of the following rights:

1. The right to be provided with written notice regarding those rights available to the victim under this rule and under any other provision of law.
2. The right to be given reasonable written notice of the date, time, and place of any hearing directly or indirectly involving the defendant, including hearings before trial, the trial itself, and any post-conviction proceedings.
3. The right to be notified of any escape of the defendant.
4. The right to be informed of any release or proposed release of the defendant, whether that release be before expiration of the sentence or by expiration of the sentence, and whether it be permanent or temporary in nature.
5. The right to confer with the prosecution and be heard at any proceeding involving release of the defendant or any plea bargain; and if the case goes to trial, the right to confer with the prosecutor prior to trial.

6. The right to be accompanied at any interview, deposition, or judicial proceeding by a parent or other relative, except persons whose testimony is required in the case.

If the court finds, under this subsection 6 or subsection 7 below, that a party's claim that a person is a prospective witness is not made in good faith, it may impose any sanction it finds just, including holding counsel in contempt.

7. The right to name an appropriate support person, including a victim's caseworker, to accompany the victim at any interview, deposition, or court proceeding, except where such support person's testimony is required in the case.

8. The right to require the prosecutor to withhold, during discovery and other proceedings, the home address of the victim, the address of the victim's place of employment, and the name of the victim's employer; providing, however, that for good cause shown by the defendant, the court may order that such information be disclosed to defense counsel and may impose such further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel to any person other than counsel's staff and designated investigator and shall not be conveyed to the defendant.

9. The right to refuse to be interviewed and to refuse to submit to deposition by a defendant acting *pro se*.

10. The right to refuse to be interviewed or to submit to deposition if the defendant is to be personally present at such interview or deposition. If the interests of justice require that the defendant be able to communicate with counsel during a deposition, the court may make an appropriate order to permit the absent defendant to hear and view such interview or deposition and to communicate by telephone with counsel.

11. At any interview or deposition to be conducted by defense counsel, the right to condition the interview or deposition on any of the following:

(i) Specification of a reasonable date, time, duration, and location of the interview or deposition, including a requirement that the interview or deposition be held at the victim's home, at the prosecutor's office, or in an appropriate location in the courthouse.

(ii) The right to terminate the interview or deposition if it is not conducted in a dignified and professional manner.

(iii) The right to refuse to submit to any deposition, or any portion thereof, on the grounds that it has no legitimate discovery purpose and is not calculated to lead to relevant information. If, on balancing the interest of protection of the victim from further distress against society's interests in furthering the truth-finding function of the proceeding, the court finds there is no substantial benefit to be derived from requiring the victim to submit to deposition and that any information sought by the defendant could be obtained by written interrogatories, it may order that the victim submit only to written interrogatories.

12. The right to a copy of any presentence report when the same is filed in court.

13. The right to be informed of the disposition of the case.

**c. Assistance and representation.**

1. The victim shall also have the right to the assistance of the prosecutor in the assertion of the rights enumerated in this rule or otherwise provided for by law. The prosecutor shall have the responsibility to inform the victim of the rights provided by this rule and by law, and to provide the victim with notices and information to which the victim is entitled by this rule or by law.

2. The prosecutor shall have standing in any judicial proceeding to assert any of the rights to which the victim is entitled by this rule or by any other provision of law.

3. In the event of any conflict of interest between the state or any other prosecutorial entity and the wishes of the victim, the prosecutor shall have the responsibility to direct the victim to the appropriate legal referral, legal assistance, or legal aid agency.

4. In asserting any of the rights enumerated in this rule or provided for in any other provision of the law, the victim shall also have the right to engage and be represented by personal counsel of his or her choice.

**d. Waiver.** The rights and privileges enumerated in this rule may be waived by any victim. Any victim desiring to claim the rights and privileges provided by this rule must

, deposition, or judicial proceeding
testimony is required in the case.
ection 7 below, that a party's claim
in good faith, it may impose any
ontempt.
n, including a victim's caseworker,
or court proceeding, except where
ase.
hold, during discovery and other
address of the victim's place of
providing, however, that for good
hat such information be disclosed
restrictions as are appropriate,
t be disclosed by counsel to any
stigator and shall not be conveyed

fuse to submit to deposition by a

mit to deposition if the defendant
sition. If the interests of justice
h counsel during a deposition, the
bsent defendant to hear and view
telephone with counsel.
l by defense counsel, the right to
llowing:
ion, and location of the interview
view or deposition be held at the
an appropriate location in the

sition if it is not conducted in a

n, or any portion thereof, on the
and is not calculated to lead to
of protection of the victim from
ing the truth-finding function of
ntial benefit to be derived from
t any information sought by the
ies, it may order that the victim

when the same is filed in court.
he case.

istance of the prosecutor in the
rwise provided for by law. The
victim of the rights provided by
ces and information to which the

l proceeding to assert any of the
by any other provision of law.
e state or any other prosecutori-
shall have the responsibility to
assistance, or legal aid agency.
rule or provided for in any other
t to engage and be represented

this rule may be waived by any
eges provided by this rule must



provide the entity prosecuting the case with his or her full name, address, and telephone number. Failure to keep the address and telephone number current shall be considered as a waiver of the rule.

Added July 24, 1989, effective Aug. 1, 1989.

### Comment

In response to the growing perception that victims of crimes are encountering serious problems with the criminal justice system, the court appointed a distinguished committee to study Rules 9, 15, and 32 of the Rules of Criminal Procedure. Certain modifications to Rule 32 were recommended by the committee and have already been promulgated by the Court. After discussion, the committee submitted alternative proposals for amendments to Rules 9 and 15. In addition, under the provisions of Rule 28, Rules of the Supreme Court, the Supreme Court staff and the Arizona Prosecuting Attorneys Advisory Council submitted proposed amendments to those rules.

After circulating these various proposals for comment, and after public notice, the Court held a public hearing on June 14, 1989. At that hearing, the Court heard comments from many interested persons and organizations, including many crime victims or organizations representing the interests of crime victims.

After taking the matters under advisement, the Court concluded that it should adopt certain modifications to Rule 9.3, which are being promulgated simultaneously with the adoption of this rule. The Court concluded that it should adopt a rule specifically dealing with victims' rights because the various proposals for amendment to Rule 15 uniformly dealt with matters at best peripheral to victims' rights. For instance, the rule changes proposed by Arizona Prosecuting Attorneys' Advisory Counsel would have prevented defendants or defense counsel from interviewing police officers. While that rule may or may not be a salutary change, it makes a fundamental change in Arizona procedure and one that would benefit police officers, not victims, and might constitute a considerable impediment to the truth-seeking function of the court.

The purpose of the entire proceeding initiated by this Court was to ascertain and ameliorate, if possible, the problems encountered by victims. Consequently, in an attempt to steer a straight course toward that objective, the Court has adopted a rule that deals explicitly, precisely, and, we hope, comprehensively with victims' rights and the concerns conveyed in the written and oral comments submitted to this Court.

In requiring that the victim be notified of various matters (*see, e.g.*, subsections (b)(3) and (4)), the Court is well aware that it generally has no jurisdiction except over lawyers, personnel in the judicial department, and those who are neither lawyers nor employees of the judicial department but are parties to litigation before the court. For example, the court cannot enact rules requiring the Board of Pardons and Paroles or the Department of Corrections to give notice. Thus, the requirements in this rule are directed to prosecutorial agencies staffed by lawyers and engaged in prosecuting cases before the court. Implementation of the rule requiring notice to be given to victims regarding escape, release, parole, and the like may therefore require the enactment of some statutes, a matter we call to the attention of the legislature.

The rule adopted does not cure all problems encountered by victims. Regrettably, neither this Court nor any other institution can solve all the problems arising from the tragedies that befall our society. The best this Court can do is to adopt rules that balance the interests of victims in being treated with dignity and compassion with the interests of society as a whole in preserving the truth-seeking function of judicial proceedings. We bear in mind that what is involved is not so much the "rights of criminals" as constraints against governmental action that the founders of this country believed were fundamental to liberty.

The foregoing rule adopts the major part of the proposals made in the Statement of Recommended Judicial Practices published by the United States Department of Justice's National Institute of Justice.

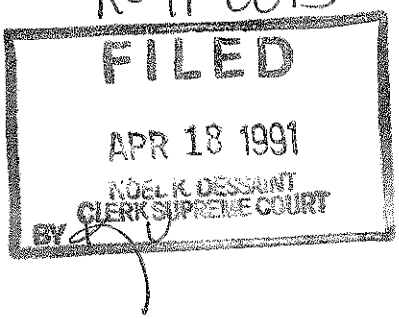
†

MITCHELL STEIN
CAREY CHAPMAN PC
ATTORNEYS AT LAW

# Exhibit | 8

(1)

R-91-0013




# FINAL REPORT

# OF THE

# STATE BAR OF ARIZONA

# AD HOC

# PROPOSITION 104 IMPLEMENTATION

# COMMITTEE

---

April 11, 1991

STATE BAR OF ARIZONA, 363 NORTH FIRST AVENUE, PHOENIX, ARIZONA 85003, (602) 252-4804

April 11, 1991

Mr. Frederick M. Aspey
123 North Leroux
Flagstaff, Arizona 86001

Dear Fritz:

Attached is the Report of the Proposition 104 Implementation Committee, which I hereby submit to you on behalf of the Committee. The Committee was charged with making recommendations about the steps necessary to implement the Victims' Bill of Rights, approved by the voters in November, 1990, as an amendment to the State Constitution.

As you will see, the Committee recommends more than a dozen changes in Arizona Rules of Court as well as the enactment of ten statutory provisions. Since the Victims' Bill of Rights has already become law, prompt consideration of these recommendations would be appropriate. I am, therefore, simultaneously transmitting copies of the Committee's Report to the Arizona Supreme Court, which has the responsibility for promulgating rules of court, to the President of the Arizona Senate and the Speaker of the House of Representatives, to the Chairs of the Judiciary Committees of each legislative branch, and to the Governor.

In addition to its recommendations for new court rules and legislation, the Committee also recommends that further study be made in two areas--the changes, if any, necessary in rules and statutes governing post-conviction proceedings, and the extension of victims' rights to juvenile proceedings. The State Bar may wish to respond to these recommendations by referring these matters to existing Bar committees or by creating specialized ad hoc groups.

Sincerely yours,

Paul Bender, Chair
Proposition 104 Implementation Committee

PB:gkd

Attachment

cc: All Committee Members
Bruce Hamilton

# REPORT OF THE PROPOSITION 104 IMPLEMENTATION COMMITTEE

## INTRODUCTION

### A. Background

On November 6, 1990, the voters of Arizona approved Proposition 104, the Victims' Bill of Rights, as an amendment to the State Constitution. The amendment became effective on November 26, 1990. The text of the Victims' Rights Amendment, codified as Article II, § 2.1 of the Constitution of Arizona, is reproduced in Appendix A to this Report.

On November 8, 1990, two days after the election at which Proposition 104 was approved, Chief Justice Frank X. Gordon, Jr., of the Arizona Supreme Court wrote to Bruce Hamilton, the Executive Director of the State Bar of Arizona, concerning this constitutional change. After noting that the Supreme Court should modify the Arizona Rules of Court in order to implement Proposition 104, the Chief Justice asked the Bar to assign the task of initially drafting the necessary rules changes to an appropriate committee or committees of the Bar. The draft changes would then be submitted to the Supreme Court for consideration and possible adoption. Chief Justice Gordon asked that the matter be given priority so that the courts in Arizona might comply with Proposition 104 as soon as possible.

In response to the Chief Justice's letter, Frederick M. Aspey, the President of the State Bar, appointed an ad hoc committee, named the Proposition 104 Implementation Committee, and asked it to respond to the Chief Justice's request. This is the Committee's Report.

### B. Committee Membership

In appointing members to the Committee, the Bar sought to include as wide a variety as possible of relevant approaches and experience. The Committee's membership includes leaders of several victims' rights organizations; Arizona's Attorney General; county prosecutors; defense attorneys; members of the State Bar Board of Governors; other members of the private Bar; members of the judiciary at the trial and appellate levels; employees of the Board of Pardons and Paroles, the Probation Department and the Department of Corrections; the President of the Fraternal Order of Police; a county Sheriff; a member of the Supreme Court Staff Attorney's office; and liaison members from the Judiciary Committees of the

State Senate and House of Representatives. Paul Bender, Professor of Law and former Dean of the Arizona State University College of Law, was asked to chair the Committee. The following list of the Committee's membership indicates organizational affiliations at the time of appointment:

| | |
|---|---|
| Paul Bender, Chair | Professor of Law<br>Arizona State University<br>College of Law |
| Roxana C. Bacon | Private Practice<br>State Bar of Arizona Board<br>of Governors |
| Michael E. Benchoff | Private Practice |
| Audrey Burke | Arizona Department of<br>Corrections |
| Ernest Calderon | Private Practice |
| Rusty Carstens | Arizona Fraternal Order of<br>Police |
| Carol N. Cure | Private Practice<br>State Bar of Arizona Board<br>of Governors |
| Hon. B. Michael Dann | Maricopa County Superior<br>Court |
| Karen Duffy | We the People Courtwatch |
| Booker T. Evans, Jr. | Private Practice |
| Michael D. Garvey | Arizona Board of Pardons<br>and Paroles |
| Joni Hoffman (Liaison Member) | Arizona Senate Judiciary<br>Committee Staff |
| Patience T. Huntwork | Arizona Supreme Court Staff<br>Attorney's Office |
| Boyd T. Johnson | Pinal County Attorney<br>State Bar of Arizona Board<br>of Governors |
| Cindy Kappler (Liaison Member) | Arizona House Judiciary<br>Committee Staff |

| | |
|---|---|
| Tom Karas | Private Practice<br>State Bar of Arizona Board of Governors |
| Hon. Thomas Kleinschmidt | Arizona Court of Appeals |
| Carol McFadden | Maricopa County Attorney Victim/Witness Division |
| Janet A. Napolitano | Private Practice |
| A. Fred Newton | Coconino County Attorney's Office * |
| Donna Pickering | Victims' Bill of Rights Task Force |
| Hon. Barbara Rodriguez | Maricopa County Juvenile Court Commissioner |
| Sharon Sikora | Mothers Against Drunk Driving |
| Don Stiles | Pima County Adult Probation Department |
| Neal C. Taylor | Maricopa County Public Defender's Office ** |
| David A. Williams (Staff Member) | State Bar of Arizona Staff |
| J. Grant Woods | Arizona Attorney General |

* Mr. Newton is now a member of the Arizona Attorney General's office

** Mr. Taylor is now a member of the Coconino County Attorney's office.

## C. Committee Procedures

The Committee's first meeting was held on December 18, 1990. At this meeting, the Committee decided to organize itself into four subcommittees for the initial stages of its work. These subcommittees would each deal with one of the major subject matter areas in which implementation action appeared necessary. The subcommittees would then make recommendations to the full Committee, which would consider them and prepare the final Committee Report. The Committee undertook to complete its final Report, if possible, by the beginning of April, 1991.

At its first meeting, the Committee agreed that, in order to further the process of open discussion within the Committee, Committee members should participate in the Committee as individuals rather than as designated representatives of organizations. In addition, the Committee decided to solicit views on the Committee's task from interested organizations and individuals. The responses to this solicitation were distributed to all Committee members. (See Appendix B for a copy of the solicitation letter, a list of the organizations and individuals to which it was sent, and a list of those responding to the request.)

After the Committee's first meeting, the Chair appointed members to the four subcommittees as follows:

### SUBCOMMITTEE I
### DEFINITION OF "VICTIM" AND IMPLEMENTATION OF THE RIGHT OF THE VICTIM TO REFUSE A PRE-TRIAL INTERVIEW

Hon. Barbara Rodriguez, Chair
Booker T. Evans, Jr.
Patience T. Huntwork
Tom Karas
Donna Pickering

### SUBCOMMITTEE II
### IMPLEMENTATION OF THE VICTIM'S RIGHT TO PROMPT RESTITUTION

Sharon Sikora, Chair
Roxana C. Bacon
Boyd T. Johnson
Hon. Thomas C. Kleinschmidt

SUBCOMMITTEE III
IMPLEMENTATION OF THE VICTIM'S RIGHTS AT PRE-TRIAL AND TRIAL PROCEEDINGS

Neal C. Taylor, Chair
Michael E. Benchoff
Earnest Calderon
Rusty Carstens
Hon. B. Michael Dann
Karen Duffy
Attorney General J. Grant Woods

SUBCOMMITTEE IV
IMPLEMENTATION OF THE VICTIM'S RIGHTS AT POST-CONVICTION PROCEEDINGS

A. Fred Newton, Chair
Audrey Burke
Carol N. Cure
Michael D. Garvey
Carol McFadden
Janet A. Napolitano
Don Stiles

The full Committee held its second meeting on January 14, 1991. At this meeting, the Committee reviewed detailed agendas to be assigned to each of the subcommittees. These agendas included the implementation issues and questions that each subcommittee should consider.

The subcommittees were asked to propose recommendations regarding the changes or additions to Arizona Rules of Court that were necessary in order to implement Proposition 104 effectively. Subcommittees were, in addition, asked to consider legislative and policy changes that might also be advisable or necessary.

Each of the four subcommittees held several meetings between mid-January and the end of February, 1991. Subcommittee reports were then drafted and adopted by each subcommittee and distributed to all Committee members. The full Committee subsequently met twice to consider the subcommittee recommendations. At the first of these meetings, held on March 9, most of the subcommittee recommendations were discussed in principle, and decisions were made to adopt, modify or reject them. A small drafting committee then translated these decisions into draft rules changes and specific recommendations for legislation. These recommendations were distributed to Committee members prior to the second meeting, held on March 25, at which the full Committee voted on these drafts and recommendations.

This final Report sets forth the recommendations made by the Committee through this process. The Report is in four parts. Part I contains the changes that the Committee recommends in the Arizona Rules of Court. Most of these recommendations concern Rule 39 of the Rules of Criminal Procedure, which focuses on victims' rights, but changes are also recommended for related Rules of Criminal Procedure, a Rule of Evidence and a Rule of the Supreme Court. Part II contains the Committee's legislative recommendations. Part III contains two recommendations for further study in specialized areas that may need implementation action, but where the Committee did not believe it had the time or expertise to formulate detailed recommendations. Part IV contains statements of Committee members who wished to add such individual statements to the Committee's Report. In the first three parts of the Report, explanatory Comments are inserted after each specific recommendation. These Comments explain the purpose or purposes of each proposed change and describe any substantial difference of views within the Committee regarding the recommendation.

# I. RECOMMENDATIONS FOR CHANGES IN ARIZONA RULES OF COURT

## Introductory Comment

The Victims' Bill of Rights gives victims the constitutional right "To have all rules governing criminal procedure and admissibility of evidence in all criminal proceedings protect victims' rights . . . ." The subject of victims's rights is currently treated in detail in Rule 39 of the Rules of Criminal Procedure, which was promulgated by the Supreme Court in July, 1989, and subsequently amended by the Court in September, 1989.

Many of the rights included in the Victims' Bill of Rights had thus already been included in Rule 39 at the time when Proposition 104 was approved by the voters. The Victims' Bill does, however, change the law in some substantial respects. This part of the Report contains the Committee's recommendations for the changes in Court Rules necessary to bring them into full compliance with the Victims' Bill. Most of the Committee's recommendations pertain to Rule 39; a few changes in other Rules are recommended as well. The Committee's recommendations are set forth here in the numerical order of the Rules involved. Recommended additions to current Rules are underlined; recommendations for deletions are indicated by striking out existing language. Text that is neither underlined nor stricken out is part of existing rules and should be retained.

All Committee members except Carol McFadden and Karen Duffy join in the recommendation that the Supreme Court act to implement the Victims' Bill of Rights through changes in Court Rules. These two Committee members believe that implementation should be accomplished exclusively through legislation. Unless otherwise indicated in the Comments following each recommendation, the remaining members of the Committee are unanimous in their recommendations.

In addition to the Rules changes recommended in this part of the Report, the Committee considered, but failed to adopt, a proposal to recommend adoption of a Rule of the Supreme Court to permit lawyer discipline for wilful failure to accord a victim rights guaranteed by law. The vote was 10 to 6 against the recommendation. Those opposed to this recommendation believe that such a wilful failure is already covered by existing disciplinary Rule 51(e).

1. The Committee recommends that Rule 8.5, Rules of Criminal Procedure, be amended as follows:

**b. Grounds for Motion.** A continuance shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice. A continuance may be granted only for so long as is necessary to the interests of justice, and in no case for longer than 30 days. In ruling on a motion for continuance, the court shall consider the rights of the victim, as defined in Rule 39a, Rules of Criminal Procedure, to a speedy disposition of the case.

Comment

This recommendation is designed to help implement § 2.1(A)10 of the Victims' Bill of Rights, which gives victims the constitutional right "To a speedy trial or disposition . . . ." In ruling on continuance motions, this victim's right must be considered in conjunction with the defendant's constitutional right to a fair trial.

2. The Committee recommends the addition of a new Rule 8.7 to the Rules of Criminal Procedure, to read as follows:

RULE 8.7
ACCELERATION OF TRIAL

Where special circumstances relating to the victim so warrant, the court may accelerate the trial to the earliest possible date that is consistent with the defendant's right to a fair trial. If necessary, the presiding judge shall assign another judge of the court to preside at trial in order to insure that the trial commences as scheduled.

Comment

This recommendation is designed for situations where the victim has an especially strong interest in accelerating the date of trial, as in cases where the victim's health may be failing. Any such acceleration must, however, be consistent with the defendant's fair trial right. See Rule 39c of the Rules of Criminal Procedure for the responsibilities of the prosecutor in asserting this and other victims' rights.

3. The Committee recommends that Rule 9.3a, Rules of Criminal Procedure, be amended as follows:

a. Witnesses. The court may, and at the request of either party shall, exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses. The court shall also direct them not to communicate with each other until all have testified. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, the person shall not be excluded from the courtroom. Once a witness has testified on direct examination and has been made available to all parties for cross-examination, the witness shall be allowed to remain in the courtroom unless the court finds, upon application of a party or witness, that the presence of the witness would be prejudicial to a fair trial. Notwithstanding the foregoing the victim, as defined in Rule 39a, Rules of Criminal Procedure, shall have the right to be present at all proceedings at which the defendant has such right. If the victim desires to be present in the courtroom during the presentation of evidence the court may, upon motion, direct the order of the victim's testimony in order to insure a fair trial for the defendant.

Comment

This recommended addition to Rule 9.3a is designed to implement § 5.1(A)3 of the Victims' Bill of Rights, which gives the victim the right "To be present at . . . all criminal

proceedings where the defendant has the right to be present." Under prior law, as set forth in the first four sentences of Rule 9.3a, the court could, and at the request of either party was required to, exclude a victim who was also a witness until the victim had testified.

The first sentence of the recommended addition to Rule 9.3a reflects the victim's new right to be present. The second recommended sentence would give the court the power to direct the order of the victim's testimony, where necessary in order to preserve the defendant's constitutional right to a fair trial. The court could, for example, require a victim who wished to be present throughout the trial to testify at or near the beginning of trial so as to minimize the danger that the victim's testimony might be influenced by the testimony of other witnesses.

The Committee divided 10 to 8 on whether to include the second sentence of this recommended addition. The entire recommendation was approved by a vote of 12 to 7. Those opposing the second sentence believe that the court should not have this authority over the prosecution's decision about how to present its case.

4. The Committee recommends that Rule 15.3, Rules of Criminal Procedure, be amended as follows:

a. Availability. Except as provided in Rule 39b(10) of these rules, upon motion of any party or a witness, the court may in its discretion order the examination of any person except the defendant upon oral deposition under the following circumstances:

(1) [no change]

(2) [no change]

(3) [no change]

b. [no change]

c. [no change]

d. Presence of Defendant. Except as provided in Rule 39b(11) of these rules, a defendant shall have the right to be present at any examination under Rules 15.3(a)(1) and (a)(3). If a defendant is in custody, the officer having custody shall be notified by the moving party of the time and place set for the examination and shall, unless the defendant waives, in writing, the right to be present, produce him at the examination and remain with him during it.

e. [no change]

Comment

This recommendation is designed to conform Rule 15.3 to the new right of the victim to refuse a pre-trial interview or deposition. The references to Rule 39b are to our recommended amendment of that rule.

5. The Committee recommends that Rule 26.12, Rules of Criminal Procedure, be amended as follows:

a. **Method of Payment - Installments.** The court may permit payment of any fine or restitution, or both, to be made within a specified period of time or in specified installments. Restitution shall be payable as promptly as possible in light of the defendant's ability to pay, and periodic payments of restitution shall be payable at least monthly.

b. **Method of Payment - To Whom.** The payment of a fine, restitution, or both, shall be made to the clerk of the Superior Court, unless the Court expressly directs otherwise. The clerk shall promptly forward restitution payments to the victim and shall promptly notify the victim of any delinquency.

c. [no change]

Comment

These amendments to Rule 26.12 are designed to implement the victim's right, under § 2.1(A)8 of the Victims' Bill of Rights, "To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury." Under the recommended addition to Rule 26.12a, restitution would have to be paid as promptly as possible in light of the defendant's financial resources, and periodic payments would be made on at least a monthly basis.

The recommended addition to Rule 26.12b is designed to deal with two problems that have occurred under prior law. Court clerks have, at times, not forwarded restitution payments to victims as they were received, but have accumulated payments before remitting

them to the victim. The recommended addition would require forwarding of payments by the clerk as they are received. In addition, when defendants have been delinquent in making restitution payments, the victim has sometimes not been informed of this fact, but has merely not received payment from the clerk. The recommended addition would require the clerk promptly to notify the victim when a required restitution installment is not received from the defendant.

6. The Committee recommends that Rule 27.2, Rules of Criminal Procedure, be amended as follows:

A probation officer may modify or clarify any regulation which he has imposed. The sentencing court may modify any condition which it has imposed and any regulation imposed by a probation officer. A probationer or a probation officer, at any time prior to absolute discharge, may request the sentencing court to modify or clarify any condition or regulation. The sentencing court may, where appropriate, hold a hearing on such request. A written copy of any modification or clarification shall be given to the probationer. If the victim, as defined in Rule 39a, Rules of Criminal Procedure, has so requested, the court shall afford the victim the opportunity to be present and to be heard at any proceeding involving modification of probation relating to contact with or safety of the victim, restitution, custody status, or early termination of probation.

Comment

Section 2.1(A)9 of the Victims' Bill of Rights gives the victim the right "To be heard at any proceeding when any post-conviction release from confinement is being considered." The Committee believes that this right should be applied to probation modification proceedings when that modification might threaten or endanger the victim, affect the victim's right to restitution, or result in a lesser degree of custody of the defendant. Other modifications of probation that are routinely and summarily made by the court on application would not be affected.

7. The Committee recommends that Rule 39a, Rules of Criminal Procedure, be amended as follows:

a. Victim Defined. As used in this rule, a "victim" is defined as a person against whom a ~~criminal offense has allegedly been committed, or the spouse, parent, legal guardian, child or sibling of someone killed or incapacitated by the alleged criminal offense, except where the spouse, parent, legal guardian, child or sibling is also the accused.~~ crime or alleged crime has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except where such representative is also the accused. With regard to the rights to be notified and to be heard pursuant to this rule, a person ceases to be a victim upon the acquittal of the defendant or upon the dismissal of the charges against the defendant as a final disposition. If a victim is in custody for an offense, the victim's right to be heard pursuant to this rule is satisfied through affording the victim the opportunity to submit a written statement.

Comment

This recommended amendment to Rule 39a would generally conform the Rule's definition of "victim" to the definition of that term contained in § 2.1(C) of the Victims' Bill of Rights. The Victims' Bill, however, defines a "victim" as a person against whom the criminal offense "has been committed." Since many of the rights of victims established by the Bill are intended to apply before the final determination, of whether a crime has in fact been committed,

the Committee recommends adding the language "or alleged crime" to the definition. This will insure that victims' rights are appropriately protected prior to the judicial determination of guilt or innocence. The next to last sentence of the recommended amended rule would terminate relevant victims' rights upon the acquittal of the defendant or the final dismissal of charges.

Section 2.1(C) of the Victims' Bill of Rights excludes persons in custody for an offense from its definition of "victim." Persons in custody, however, are sometimes the victims of crime, as when a person in custody is assaulted or raped by another inmate. The Committee believes it inadvisable, and perhaps unconstitutional as a denial of equal protection of the laws, to exclude such inmate/victims from the rights guaranteed by the Arizona Constitution. In such situations, however, it does seem appropriate to limit the inmate/victim's right to be heard to the right to submit a written statement. The last sentence of the recommended amended subsection a so provides.

In general, the Committee believes that the definition of victim should be a generous one. Law enforcement officers, for example, should not be excluded from the rights enjoyed by victims because of their employment in the criminal justice system. However, when a deceased or incapacitated victim's next of kin is also the accused, as where one family member is accused of committing homicide on another, exclusion of the accused from the definition of victim is appropriate.

The Victims' Bill definition of victim treats the appropriate family member as representative of the victim if the victim is "killed or incapacitated." This language suggests that a victim's rights may be exercisable by others only when the victim is injured as a result of the crime in question, and not when the victim dies or is incapacitated after the crime from other causes. Some members of the Committee would consider this to be an unnecessarily narrow definition of "victim."

The Committee considered, and rejected by a vote of 13 to 2, a proposal to limit victims' rights to victims of felonies and certain misdemeanors, such as those involving bodily harm. The Victims' Bill of Rights applies to victims of all "crime," and any more restrictive definition would therefore appear to create serious constitutional problems. The Committee also rejected, by a vote of 10 to 5, a proposal to authorize judicial hearings to determine who is a victim.

The Committee approved the recommended amendment to Rule 39a by a vote of 10 to 5.

8. The Committee recommends that Rule 39b, Rules of Criminal Procedure, be amended as follows:

b. Victims' Rights. These rules shall be construed to preserve and protect a victim's rights to justice and due process. Notwithstanding the provisions of any other rule in these Rules of Criminal Procedure, a victim shall have and be entitled to assert each of the following rights:

1. The right to be treated with fairness, respect and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.

~~1~~ 2. The right to be provided with written notice regarding those rights available to the victim under this rule and under any other provision of law.

~~2~~ 3. The right to be given reasonable notice of the date, time and place of any hearing directly or indirectly involving the defendant, including hearings before trial, the trial itself, and any post-conviction proceedings.

~~3~~ 4. The right to be notified of any escape of the defendant.

~~4~~ 5. The right to be informed of any release or proposed release of the defendant, whether that release be before expiration of the sentence or by expiration of the sentence, and whether it be permanent or temporary in nature.

~~5~~ 6. The right to confer with the prosecution ~~and be heard at any proceeding involving release of the defendant or any plea bargain~~ in connection with any decision involving release of the defendant, a plea bargain, dismissal of charges, a pre-trial diversion program, or other disposition prior to trial; the right to be heard at any such proceeding and at sentencing; and if the case goes to trial, the right to confer with the prosecution prior to trial.

~~6~~ 7. The right to be accompanied at any interview, deposition, or judicial proceeding by a parent or other relative, except persons whose testimony is required in the case.

If the court finds, under this subsection ~~6~~ 7 or subsection ~~7~~ 8 below, that a party's claim that a person is a prospective witness is not made in

good faith, it may impose any sanction it finds just, including holding counsel in contempt.

~~7~~ 8. The right to name an appropriate support person, including a victim's caseworker, to accompany the victim at any interview, deposition, or court proceeding, except where such support person's testimony is required in the case.

~~8~~ 9. The right to require the prosecutor to withhold, during discovery and other proceedings, the home address of the victim, the address of the victim's place of employment, and the name of the victim's employer, providing, however, that for good cause shown by the defendant, the court may order that such information be disclosed to defense counsel and may impose such further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel to any person other than counsel's staff and designated investigator and shall not be conveyed to the defendant.

~~9~~ 10. ~~The right to refuse to be interviewed and to refuse to submit to deposition by a defendant acting pro~~

~~se.~~ The right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant. After charges are filed, defense requests to interview the victim shall be communicated to the victim through the prosecutor. The victim's response to such requests shall also be communicated through the prosecutor. No comment shall be made at trial on the victim's exercise of the right to refuse to be interviewed or to submit to a deposition.

~~10~~ 11. The right to refuse to be interviewed or to submit to deposition if the defendant is to be personally present at such interview or deposition. If the interests of justice require that the defendant be able to communicate with counsel during a deposition, the court may make an appropriate order to permit the absent defendant to hear and view such interview or deposition and to communicate by telephone with counsel.

~~11~~ 12. At any interview or deposition to be conducted by defense counsel, the right to condition the interview or deposition on any of the following:

(i) Specification of a reasonable date, time, duration, and location of the interview or deposition, including a requirement that the interview or deposition be held at the victim's home, at the prosecutor's office, or in an appropriate location in the courthouse.

(ii) The right to terminate the interview or deposition if it is not conducted in a dignified and professional matter.

~~(iii) The right to refuse to submit to any deposition, or any portion thereof, on the grounds that it has no legitimate discovery purpose and is not calculated to lead to relevant information. If, on balancing the interest of protection of the victim from further distress against society's interests in furthering the truth-finding function of the proceeding, the court finds there is no substantial benefit to be derived from requiring the victim to submit to deposition and that any information sought by the defendant could be obtained by written interrogatories, it may order that the victim submit only to written interrogatories.~~

~~12~~ 13. The right to a copy of any pre-sentence report when the same is filed in court.

~~13~~ 14. The right to be informed of the disposition of the case.

15. The right to a speedy trial or disposition and prompt and final conclusion of the case after conviction and sentence.

16. The right to be informed of a victim's right to restitution upon conviction of the defendant, of the items of loss included thereunder, and of the procedures for invoking the right.

Comment

The recommended addition to the introductory language of subsection b is designed to have the Rule reflect the purpose of the Victims' Bill of Rights "To preserve and protect victims' rights to justice and due process."

The recommended new subsection b(1) is designed to add to the list of specific victims' rights already in Rule 39 the general right recognized by § 2.1.(A)(1) of the Victims' Bill to be treated with fairness and to be free from abuse throughout the criminal justice process. All remaining subsections of Rule 39b are renumbered to reflect this insertion.

The recommended change to the language of what would become subsection b(6) is designed explicitly to broaden the victim's rights to confer with the prosecution and to be heard so that it is clear that these rights apply to all pre-trial dispositions and sentencing. This change would implement § 2.1(A)(4) and (6) of the Victims' Bill of Rights.

The recommended amendment to what would become subsection (10) is designed to implement the victim's right, under § 2.1(a)(5) of the Victims' Bill of Rights, "To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." The second and third sentences of the recommended amended subsection (10) would require requests for victim interviews, and the responses to such requests, to be communicated through the prosecutor after charges are filed. This recommended requirement that defense counsel communicate through the prosecutor was adopted by an 8 to 7 vote of the Committee; limiting this requirement to the period after charges are filed was adopted by a 12 to 5 vote. Four members of the Committee, Patience Huntwork, Tom Karas, Judge Thomas Kleinschmidt and Michael Benchoff, strongly object to requiring communications to go through the prosecutor and wish to go on record to that effect. They believe that the prosecutor would be unable to be objective and neutral in transmitting the defense request to the victim. They would delete the requirement. The last sentence of the recommended amended subsection (10), prohibiting comment at trial on the victim's refusal of an interview, was approved by a 9 to 7 vote of the Committee. The entire recommended amended subsection (10) was adopted by a 13 to 4 Committee vote.

The recommended deletion of what would become subsection (12)(iii) would conform to the adoption of amended subsection (10). Subsection 12(iii) becomes unnecessary if the victim has an absolute right to refuse a pre-trial interview or deposition.

New subsections (15) and (16) are designed to incorporate within Rule 39b the rights established by §§ 2.1(A)(8) and (10) of the Victims' Bill of Rights.

9. The Committee recommends that Rule 39c, Rules of Criminal Procedure, be amended as follows:

c. **Assistance and Representation.**

1. The victim shall also have the right to the assistance of the prosecutor in the assertion of the rights enumerated in this rule or otherwise provided for by law. ~~The prosecutor shall have the responsibility to inform the victim of the rights provided by this rule and by law, and to provide the victim with notices and information to which the victim is entitled by this rule or by law.~~ Specifically, the prosecutor shall, within seven days after charges are filed, give to each victim a written notice of the following:

(i) A brief statement in understandable language of the procedural steps in the processing of a criminal case.

(ii) The rights of victims provided under Rule 39 and by law.

(iii) Suggested procedures if the victim is subject to threats or intimidation.

(iv) A person or office to contact for further information.

(v) The custody status of the defendant, and if the defendant has been released from custody, any terms and conditions of the release.

(vi) The victim's right to restitution upon conviction of the defendant, the items of loss included thereunder, and the procedure for invoking that right.

In addition, the prosecutor shall at that time give to each victim a form allowing the victim to decline notification of future court proceedings. Unless the victim declines such notice, the prosecutor shall thereafter give the victim written notice of the date, time, place and outcome of any hearing, trial or other proceeding involving the defendant. The prosecutor may assign the responsibility for providing the victim with such notice to a victim/witness assistance office if such exists in the county.

Unless the victim declines notice, the prosecutor shall, within 15 days after sentencing, notify the victim of the sentence imposed upon the defendant and shall provide the victim with a form that enables the victim to request notice of all future appellate, post-conviction, probation and parole board proceedings, and

all releases or escapes of the defendant. The prosecutor shall forward completed request forms to all appropriate agencies and departments. If the victim so requests, the prosecutor's office responsible for handling any appellate or post-conviction proceeding shall give the victim notice of such proceeding and of any decision arising out of it. If the victim so requests, the prosecutor shall also give the victim notice of any proceeding where the court is asked to modify, revoke or terminate probation or intensive probation of the defendant and of the victim's right to be heard at any proceeding involving a modification of probation relating to contact with or safety of the victim, restitution, custody status, or early termination.

2. The prosecutor shall have standing in any judicial proceeding to assert any of the rights to which the victim is entitled by this rule or by any other provision of law.

3. In any event of any conflict of interest between the state or any other prosecutorial entity and the wishes of the victim, the prosecutor shall have the responsibility to direct the victim to the appropriate legal referral, legal assistance, or legal aid agency.

4. In asserting any of the rights enumerated in this rule or provided for in any other provision of the law, the victim shall also have the right to engage and be represented by personal counsel of his or her choice.

Comment

Current Rule 39c generally assigns to the prosecutor the responsibility for informing the victim of the applicable victims' rights. The recommended amended rule is designed to clarify the prosecutor's specific responsibilities. In the Committee's view, the rights of victims to notice of various rights and proceedings under the Victims' Bill of Rights is most effectively implemented by assigning responsibilities at various stages of the criminal process to different parts of the criminal justice system. In our legislative recommendations, we outline the information that should be given to victims by law enforcement officers at the time of initial contact. Amended Rule 39c would then assign further notification responsibilities to the prosecutor within seven days after charges are filed. The Committee recommends that standardized forms and notices be designed to fulfill these responsibilities statewide. If possible, the forms and notices should be at least bilingual in English and Spanish.

The Committee recommends that, prior to the judicial determination of guilt or innocence, a victim be given notice of relevant events unless the victim affirmatively opts out of that right through submission of a standard form. This recommendation goes beyond the strict requirements of the Victims' Bill of Rights, which requires notice only "upon request of the victim." In the Committee's view, requiring an affirmative request from all victims would result in the practical non-effectuation of the constitutional right to notice for many of those victims, especially for members of minority groups and for victims who are economically disadvantaged.

Recommended Rule 39c was adopted by a Committee vote of 14 to 2.

10. The Committee recommends that Rule 39d, Rules of Criminal Procedure, be amended as follows:

d. Waiver. The rights and privileges enumerated in this rule may be waived by any victim. ~~Any victim desiring to claim the rights and privileges provided by this rule must provide the entity prosecuting the case with his or her full name, address and telephone number.~~ Failure to ~~keep the address and telephone number current~~ notify the prosecutor of changes in address and telephone number shall be considered as a waiver of notification rights under the rule.

Comment

The recommended amendment to this subsection is designed to conform to the "opt out" approach of recommended subsection c. The recommended amendment does provide, however, that a victim's failure to keep the prosecutor notified of changes of address and telephone number constitutes a waiver of the victim's right to notice under the Rule; otherwise, the burden on the prosecutor would be unrealistic.

11. The Committee recommends that a new subsection e be added to Rule 39, Rules of Criminal Procedure, as follows:

e. Court Enforcement of Victim Notice Requirements. At the commencement of any proceeding which takes place more than seven days after the filing of charges and at which the victim has a right to be heard, the court shall inquire of the prosecutor whether the victim has been notified as provided by paragraph c of this Rule. If the victim has not been notified, and has not declined or waived such notice pursuant to paragraph c, the court should not proceed unless public policy, the specific provisions of a statute, or the interests of due process otherwise require. In the absence of such considerations the court shall have discretion to reconsider any ruling made at a proceeding of which the victim did not receive notice as required by paragraph c of this Rule. The court shall not impose sentence unless informed by the prosecutor that the victim has been notified, as required by paragraphs b and c of this rule, of the victim's right to restitution.

Comment

The Committee recommends the addition of a new subsection e to Rule 39 in order to enhance effective enforcement of the rights guaranteed by the Victims' Bill of Rights. The new subsection e would require a court to inquire, at the commencement of a proceeding, about whether the victim has been notified as required by subsection c of Rule 39. Unless there are powerful considerations to the contrary, the court should not proceed unless the required victim notification has been given. In addition, if a court should discover, after ruling on a matter, that a victim

entitled to notice did not receive it, the court should ordinarily have discretion to reconsider its ruling, if it is appropriate and constitutional to do so. The last sentence of the recommended new subsection e would reinforce the victim's right to restitution by prohibiting the imposition of sentence unless the court is informed that the victim has been notified of this right.

Recommended new subsection e was adopted by a Committee vote of 10 to 6. Those opposed to recommending this subsection believe that its possible authorization of reconsideration of sentencing decisions and acceptance of guilty pleas may violate constitutional double jeopardy protections.

12. The Committee recommends that Rule 31a(4), Rules of the Supreme Court, be amended as follows:

4. Exceptions. Notwithstanding the provisions of subsection 3 of this section a:

A. [no change]

B. [no change]

C. [no change]

D. [no change]

E. A victim's assistance representative employed and supervised by any public prosecutor's office may, at the victim's request, represent a victim in any proceeding involving or resulting from a criminal prosecution for the limited purpose of assisting the victim in the exercise of victims' rights created by rule or law.

Comment

This recommendation, adopted by a Committee vote of 7 to 5, is designed to provide an additional source of independent representation of victims seeking to enforce victims' rights. Committee members who oppose the recommendation believe that it would not afford independent representation to those victims who need it most, i.e., to victims who disagree with prosecution decisions about aspects of the case such as the decision to offer a plea bargain.

13. The Committee recommends that Rule 615, Rules of Evidence, be amended as follows:

615. Exclusion of Witnesses. At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, ~~or~~ (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause~~.~~, or (4) a victim of crime, as defined in Rule 39(a), Rules of Criminal Procedure, who wishes to be present during proceedings against the defendant. If the victim wishes to be present in the courtroom during the presentation of evidence the court may, upon motion, direct the order of the victim's testimony in order to insure a fair trial for the defendant.

Comment

This change is necessary in order to conform this rule to the victim's right to be present recognized in the recommended amendment to Rule 9.3a of the Rules of Criminal Procedure.

## II. LEGISLATIVE RECOMMENDATIONS

### Introductory Comment

Although many of the rights incorporated in the Victims' Bill of Rights can be implemented through Rules of Court, some aspects of victims' constitutional rights require legislative implementation. Thus, while the Supreme Court has direct authority over prosecutors, lawyers, judges and court employees who participate in the criminal justice system, it does not have the same authority over non-lawyer officials such as police and corrections personnel. Nor can the Supreme Court adopt procedural rules making changes in substantive law, such as the creation of new causes of action for violations of victims' rights.

Unless otherwise indicated, the Committee's recommendations in this part of the Report are unanimous.

The Committee recommends the enactment by the Arizona Legislature of legislation on the following subjects:

1. Initial Notification to Victims by Law Enforcement Agencies.

§ 13-4411 M. 17-19 ✓

The Committee recommends the enactment of legislation requiring that, within 24 hours after the initial contact between a law enforcement agency and a victim (as defined in the Committee's recommended amendment to Rule 39a of the Rules of Criminal Procedure), the agency inform the victim of the following:

(a) The availability of emergency and medical services.

(b) The police report number.

(c) The availability of victim/witness assistance services.

(d) The victim's right to be present and to be heard at judicial proceedings.

(e) The victim's right to be informed of the defendant's release or escape from custody.

(f) The time and place of the initial hearing in the case, if that information is available; if the information is not available at the time of the initial contact, a telephone number and office through which the victim can obtain such information.

(g) The availability of victim compensation benefits.

Comment

The Committee recommends the enactment of this legislation in order to ensure the communication to victims, as soon as possible after the commission of a crime, of information about the progress of the particular case as well as general information about the criminal process and the victim's role and rights in it. We recommend that standardized, bilingual forms be developed for the communication of this information.

2. Notification to Victim of Pre-Trial Release or Escape from Custody.

13-4418 p. 24.

The Committee recommends the enactment of legislation requiring custodial agents to notify victims and prosecutors immediately whenever defendants are released or escape from custody before trial. In the case of an escape, prompt notice should also be given of any subsequent re-arrest.

Comment

Although our Rules recommendations generally place the responsibility of victim notification upon the prosecutor after charges are filed, the Committee believes that notification of escape or release from custody prior to trial should be given directly to the victim with as little delay as possible.

3. Separate Courtroom Waiting Areas.

The Committee recommends the enactment of legislation requiring that courts provide separate waiting areas or the equivalent for victim-witnesses.

13-4463 pp. 32-33

Comment

Some victims find it uncomfortable or worse to have to await court proceedings in the company of relatives of or witnesses for the defendant. This recommended legislation would address that problem. Since funds might be required to comply with a separate waiting areas requirement, the Committee suggests that this requirement be implemented through legislation rather than rule of court.

This recommendation was adopted by a Committee vote of 11 to 5. Those who oppose the recommendation believe that it would require an unnecessary expenditure of public funds. One Committee member favored handling this by court rule.

4. Judicial Remedies for Violations of Victims' Rights.

The Committee recommends the enactment of legislation:

(a) Giving victims the opportunity to bring special actions to obtain injunctive relief to enforce the provisions of the Victims' Bill of Rights or implementing rules or legislation when those rights have been, or are being, violated.

13-4413 a? p. 95

(b) ~~Giving victims~~ A victim of crime has the right to recover damages from individuals and governmental units responsible for intentional or grossly negligent violations of the Victims' Bill of Rights or implementing rules or legislation.

13-4491 p. 37

Such legislation should also provide that no appeal from a conviction or sentence should be available on account of a failure to observe the provisions of the Victims' Bill of Rights.

Comment

The authorization of special actions and damage actions by victims would provide additional means of enforcement of the provisions of the Victims' Bill of Rights. The recommendation for legislation permitting the recovery of damages for intentional or grossly negligent violations was adopted by a Committee vote of 9 to 7. The Committee also voted, 9 to 7, not to recommend legislation permitting appeals of decisions regarding sentencing, release of the defendant, or changes of the defendant's plea if the victim's rights were violated in connection with such a decision. Those who opposed this recommendation believe that it would create significant double jeopardy problems.

5. Return of Property to Victims.

The Committee recommends the enactment of legislation requiring a law enforcement agency, upon request, to return property taken during the course of the investigation to the victim as promptly as possible consistent with the needs of the prosecution. If property cannot be returned, the reasons for refusing the request should be given. The legislation should permit the appropriate retention of photographs when property is returned.

Comment

This recommendation would implement § 2.1(A)(1) of the Victims' Bill of Rights, which requires that victims be treated with fairness and respect.

6. Implementation of Victims' Right to Restitution.

The Committee recommends the enactment of legislation

(a) Requiring probation departments to adopt and use standardized forms to gather information about the defendant's financial status insofar as that status is relevant to the payment of restitution.

(b) ~~Requiring~~ The probation departments ~~to~~ shall submit for judicial adoption standardized guidelines for the prompt payment of restitution in light of the amount of restitution due and the defendant's financial condition.

13-804 pp 8-11
13-804 p 11
13-814 pp 11-12

(c) Providing for automatic wage assignments as a means of collecting restitution.

(d) Requiring parole officers or supervisors supervising parole or supervised release to monitor the status of the defendant's restitution payments and, when payments are delinquent, to report that fact to the Parole Board or issue an administration violation.

Comment

This legislation would help effectuate the victim's right to prompt restitution, which has often not been enforced appropriately. Standardized forms and guidelines will increase the chances of payment as promptly as possible in light of the defendant's ability to pay. Parole officers and those supervising supervised release would help insure the payment of restitution obligations through recommendation (d).

7. Notification to Victims of Release of Convicted Defendants. The Committee recommends the enactment of legislation requiring the Department of Corrections or sheriff, if notified by the prosecutor that the victim has requested notification, to:

(a) Give the victim written notice of the Department of Corrections' calculation of the defendant's earliest release eligibility date if the sentence of incarceration exceeds six months.

13-4415 p. 24-25

(b) Give the victim written notice at least 15 days prior to any post-conviction discharge or release from custody.

13-1418 p. 24

(c) Give the victim immediate notice of any escape and subsequent re-arrest of the defendant.

(d) Give the victim written notice within 15 days of the death of the defendant.

Comment

The Committee believes that these notification obligations are more appropriately placed with those who have custody of the defendant than with the prosecutor. Pursuant to our recommended amendments to Rule 39 of the Rules of Criminal Procedure, the prosecutor will give the victim an opportunity to request this information. If the victim makes such a request, the custodian should be notified of that fact, and of how to communicate with the victim, by the prosecutor.

8. Notification to Victims of Parole Hearings.

The Committee recommends the enactment of legislation requiring the Board of Pardons and Paroles, if notified that the victim has so requested, to:

(a) Notify the victim, at least 15 days prior to a parole hearing, of the time, date and place of the hearing and the victim's right to be present and be heard.

13-4420 p. 25

(b) Notify the victim of the decision of the Board within 15 days of such decision.

Comment

See the comment to legislative recommendation #7, above.

9. Notification of Victims when Defendants are Placed in Mental Health Treatment Agencies.

13-4422 pp 25-26

The Committee recommends the enactment of legislation requiring a mental health treatment agency to give victims

(a) Written notice at least 15 days before the release or discharge of a patient placed by court order in a mental health treatment agency.

(b) Immediate notice of the escape and subsequent re-admission of a patient placed by court order in a mental health treatment agency.

Comment

See the comment to legislative recommendation #7, above.

10. Victim's Exercise of Right to be Heard at Post-Conviction Proceedings.

The Committee recommends the enactment of legislation providing that:

(a) Except for hearings to determine restitution, a victim's right to be heard at post-conviction proceedings, may be exercised, at the victim's discretion, through an oral statement, submission of a written statement, or submission of a statement through audio or video tape.

(b) "Post conviction release," for the purposes of § 2.1.9 of the Victims' Bill of Rights, means any discharge, whether permanent, conditional or temporary, from confinement in the custody of the Department of Corrections, or sheriff, or from confinement in a municipal jail or secure mental health facility.

Comment

The first of these recommendations is designed to make it more convenient for victims to exercise their right to be heard when opportunity for cross examination is not required. The second recommendation is designed to give a relatively broad definition to "post-conviction release."

## III. RECOMMENDATIONS FOR FURTHER STUDY

### Introductory Comment

There are two areas where the Committee believes further study is needed before implementation measures are recommended, adopted or enacted. These are briefly described in this part of the Report.

The Committee unanimously recommends that further study be given to the following subjects before implementation measures are recommended, adopted or enacted:

1. The changes, if any, that would be appropriate to implement further the victim's right, under § 2.1(A)(10) of the Victims' Bill of Rights, to "prompt and final conclusion of the case after the conviction and sentence."

2. Possible extension of victim's rights to juvenile proceedings.

### Comment

The subject of post-conviction relief is enormously technical in nature. Although victims have a justifiable desire for finality in the criminal process, and a right to such finality when it is consistent with the constitutional rights of the defendant, limitations on post-conviction relief may adversely affect state and federal constitutional rights of defendants in some circumstances. The Committee does not believe that it has had the opportunity to study these problems adequately in the time available to us. We recommend that a group of people with expertise in this area, representing various experience and points of view, be asked to study and make recommendations on this difficult subject.

Section 2.1(D) of the Victims' Bill of Rights gives the legislature authority to extend victims' rights to juvenile proceedings. The Committee is inclined to believe that such extension would be appropriate. However, we lack the specific knowledge of juvenile proceedings necessary in order to make appropriate recommendations in this regard. We recommend the appointment of a study group with relevant experience and diversity of viewpoint to make recommendations on this subject.

# IV. INDIVIDUAL STATEMENTS OF COMMITTEE MEMBERS

## A. STATEMENT OF CAROL McFADDEN AND KAREN DUFFY

This minority report is submitted to more fully explain the dissenting opinion to recommendations of the State Bar 104 Implementation Committee.

### Implementation: Legislation vs. Court Rule

The minority wishes to make an argument as to why the implementation of the Victims' Bill of Rights, passed by the voters in November, 1990 should be in legislation rather than court rules.

Prior to the passage of the Victims' Bill of Rights, Arizona had very few statutory provisions for victims who were participating in the criminal justice system. Unlike 45 other state legislatures who have enacted comprehensive victims' rights statutes, Arizona laws relating to victims are few and scattered throughout the law books. In 1989, the Arizona Supreme Court took the very unusual step to extend certain rights to victims of crime through court rule. According to the National Organization for Victim Assistance, no other state has used this avenue to address the needs of victims of crime.

The question facing Arizona at this time is how best to implement the constitutional rights of victims. The people of Arizona voted for the Victims' Bill of Rights, which included subsection (D):

> "the legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings."

It is the clear mandate of the people of the state of Arizona that the implementation of the Victims' Bill of Rights be done by the legislature. The legislature, as opposed to the Arizona Supreme Court through court rules, is capable of enacting a comprehensive set of statutes that will address the entire constitutional amendment. As it noted in its commentary to Rule 39 of the Arizona Rules of Criminal Procedure, the Supreme Court can only address limited areas of the amendment. The court stated:

> "... the Court is well aware that it generally has no jurisdiction except over lawyers, personnel in the judicial department, and those who are neither lawyers nor employees of the judicial department but are parties to litigation

before the court."

Historically, rules of court have addressed narrow issues relating to the day to day administration of the court. It is not appropriate for the judicial branch of government to direct the executive branch of government (the prosecutor's office) to perform tasks that do not directly impact the administration of the court. This is the purview of the legislature.

If the Committee recommendations are adopted and the legislature is convinced to delay pending legislation (as the Committee chairman has recommended) the implementation of the Victims' Bill of Rights will be exceptionally fragmented and Arizona will not have a clear direction.

To follow the recommendations of the State Bar Committee through to a final form it would appear that the committee is recommending that the legislature address procedures for law enforcement departments, sheriffs, the Department of Corrections, the Parole Board and nothing else - leaving procedures for prosecutors, probation department and restitution to be addressed in court rule.

The decision to implement something as important as the Victims' Bill of Rights in this manner is irresponsible. It would ensure that there would be ignorance, confusion, and omissions. Average citizens who become victims will be ignorant of their rights if they are unable to determine - on their own- what rights they have and the responsible agency. Most people do not understand the interplay between statute and court rule. They would look to the statutes and find only limited rights and assume that they have no other rights. Members of the committee have argued that this outcome would be tolerable because the rules would require agencies to inform victims of their rights. It is not good public policy to promote dependence on someone or some agency to provide information about constitutional rights while intentionally making self education inaccessible.

Secondly, confusion will result when there are differences between court rule and statute. When there are differences or conflicts the question will repeatedly arise - what takes precedent? This will result in unnecessary litigation.

Thirdly, procedural or substantive laws that implement the rights of victims may be omitted when the legislature or the Supreme Court presume the other body will address the issue or if they disagree. For example, the court may believe that the sheriff is the best agency to inform a victim of a defendant's release from pre-trial custody. Because the court cannot direct the sheriff's office through court rule, the court would ask the legislature to pass this in legislation. The legislature, on the other hand, may believe that the court is the best agency to inform the victim of the defendant's pre-trial release from custody and ask the court to promulgate rules. In this example,

the victim would be denied an important constitutional right.

Lastly, the State Bar Committee has recommended that areas that require funding, such as separate waiting rooms for victims in courthouses and standardized probation forms, be implemented through legislation rather than rule of court. If a fiscal impact is the standard for recommending legislative action as opposed to rule of court, the majority of the committee has violated its own standard when it recommended that victim notification by prosecutor's office be implemented by court rule.

The successful implementation of the Victims' Bill of Rights requires a systemic approach with law enforcement, prosecutors offices, sheriffs, probation, the Department of Corrections and the Parole Board having responsibilities to the victim. The only rational method to successfully achieve this is through a legislative approach.

## Rule 9.3
## Rules of Criminal Procedure

The Victims' Bill of Rights provides for victims to be present at all criminal proceedings where the defendant has the right to be present. While the State Bar Committee recommendation to amend Rule 9.3 of the Rules of Criminal Procedure would conform with this right the last sentence could unconstitutionally infringe on the manner in which the prosecution presented its case. The presence of the victim in the courtroom does not infringe on the defendant's constitutional right to a fair trial. Nor does the victim's presence risk a danger that the victim's testimony might be influenced by the testimony of other witnesses any more than the parties in a civil suit or the defendant who are permitted to remain in court.

## Rule 39
## Rules of Criminal Procedure

The majority of the members of the State Bar Committee have recommended that the prosecutor provide many notices including:

> 39(c)(1)(v) notice of the custody status of the defendant, and if the defendant has been released from custody, any terms and conditions of the release,
>
> 39(c)(1) notice of court events to all victims without requiring the victim to specifically request such notice, unless the victim declines notice, and

39(c)(1) notice of any proceeding where the court is asked to modify, revoke or terminate probation or intensive probation.

While it is very advantageous for victims to be informed of the defendant's custody status and conditions that the court may have placed on the defendant's release, it is impossible for the prosecutor's office to provide this notice as the court does not inform the prosecutor of court ordered release conditions or bond amounts. Additionally, the committee has not recommended a rule that would require the court to provide this information to the prosecutor. It would be more appropriate for the court to provide this notice.

The committee has also recommended that prosecutors provide notification to all victims without requiring a specific request. This recommendation goes beyond the requirements of the Victims' Bill of Rights, which states:

> "... A victim of crime has a right:
> to be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present."

The State Bar Committee did not address the costs for performing this task, nor did the Committee review funding alternatives. While individual agencies may chose to provide notification to all victims, the implementation of the Victims' Bill of Rights should conform to the constitution and should not be broader than required without due consideration to cost.

Constitutional rights apply to victims of misdemeanors as well as felonies. For the majority of misdemeanors, defendants are cited directly into court without review by the prosecutor's office. If a police officer cites an individual for a misdemeanor offense, the officer completes a short police report which is forwarded to the court. Most prosecutor's offices would not have knowledge of the citation unless the defendant pleads not guilty. If the defendant enters a guilty plea, he/she is sentenced by the court without the involvement of the prosecutor's office. It would be impossible for a prosecutor's office to provide victim notification of court dates and disposition without requiring the victim to specifically request such notification.

The State Bar Committee has recommended that the prosecutor's office provide notification to victims of court proceedings to modify probation. While the committee was unanimous in recommending that victims should be provided this notification, the committee was not unanimous in recommending that the prosecutor's office perform this function. In cases involving felony probation, the recommendation to the court to modify conditions of probation are made by the probation officer. The prosecutor's office does not have an open case and should not

be the agency responsible for notifying the victim. If the case was prosecuted by the Attorney General's Office on conflict from a county prosecutor, the transfer of information from the county probation department to the Attorney General's Office in a consistent and timely manner would be essential. The probation department is in possession of the victim's address at the time that the probation department prepared a presentence report prior to sentencing and would be the most appropriate agency to notify the victim.

**Rule 31**
**Rules of the Supreme Court**

This recommended amendment to Rule 31 was made at the very last meeting of the State Bar Committee and was not given adequate opportunity to review the many issues related to providing a limited practice of law to victim assistance workers. This recommendation should be food for future thought where the many issues can be studied in more depth.

Sincerely,

Carol L. McFadden

Carol L. McFadden
Victim Witness Division Chief
Maricopa County Attorney's Office

I concur with the attached minority report with the exception that I believe victims of felony offenses and misdemeanor offenses involving physical injury, threat of physical injury or sexual offenses should be provided notification without specifically requesting it. Victims should be notified until they inform the responsible agency that they no longer want notification. Victims of all other misdemeanor offenses should be notified only upon request.

Sincerely,

Karen Duffy

Karen Duffy

4-10-91

Date

B. STATEMENT OF DONNA PICKERING, KAREN DUFFY AND SHARON SIKORA

I would like to join and supplement to the minority report filed by Carol McFadden as follows:

In the "final report draft" issued by Paul Bender, he implies on pages 12 and 13 that those of us that sat on this committee believe that the implementation of the "Victims' Bill of Rights" should be done by rules versus legislation, unless specifically noted. That was not my understanding of what the role of this committee was and was not my statement by sitting on it. I believe strongly that since we have Criminal Rules of Procedure that they should reflect victims rights as defined in the constitution. The issue of rules to the exclusion of legislation was never addressed or voted on. I believe that legislation is vital and necessary regardless of the changes to the Criminal Rules of Procedure. The constitution and statutes are where a victim will go to find their rights. The vast majority of people are not even aware of rules of procedure. My position and that of MADD's on this issue was addressed in the attached memo to state representatives dated April 5, 1991.

On page 34, item d, the rule states that "failure to notify the prosecutor of changes in address and telephone number shall be considered as a waiver of notification rights under the rule". It is unclear whether a victim, who has let their address and number lapse can ever again access their victims' rights. I would like to see language that would allow a victim to start or reinstate their rights at any time during the process.

Sincerely,

Donna R Pickering

Donna Pickering
Mothers Against Drunk Driving

4-10-91
Date

Karen Duffy

Karen Duffy

Sharon Sikora

Sharon Sikora
Mothers Against Drunk Driving