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ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND RULE
39(b)(12) RULES OF CRIMINAL
PROCEDURE

Supreme Court No. R-22-0045

Joint Comment by the Directors of the
Maricopa County Indigent Defense
Agencies

Pursuant to Rule 28(e) of the Arizona Rules of the Supreme Court, the Maricopa County Indigent Representation Offices (collectively “IR”) respectfully submit this comment in support of Petition R-22-0045 filed by Arizona Attorneys for Criminal Justice (“AACJ”) to amend Rule 39(b)(12) of the Arizona Rules of Criminal Procedure.

I. Statement of Interest

Collectively, the staffed IR offices are appointed by the courts to represent most indigent individuals accused of crimes that occurred within Maricopa County. IR operates under a constitutional mandate and the offices are committed to providing quality legal representation to our clients, protecting the fundamental rights of each member of the community, and upholding the ethical and professional obligations of each member of our defense teams.

II. Following the District Court’s injunction against enforcement of A.R.S. § 13-4433(B), Rule 39(b)(12)(A) creates uncertainty about permissible attorney conduct with respect to the requirement for a defense lawyer to communicate an interview request with a victim through the prosecutor.

A recent federal lawsuit recognized that defense teams have a First Amendment right to communicate with victims, and that no compelling State interest is furthered by prohibiting defense teams from initiating contact and communicating with victims. Accordingly, the United States District Court found unconstitutional A.R.S. § 13-4433(B), the statutory analogue to Rule 39(b)(12), and permanently enjoined enforcement of the statute against criminal defense attorneys and their agents (“defense team”). *See Ariz. Attys for Crim Justice (“AACJ”) v. Ducey*, No. CV-17-01422, 2022 WL 16631088 (D. Ariz. Nov. 22, 2022). Because the District Court did not enjoin the enforcement of Rule 39(b)(12), defense team members nonetheless may be subject to discipline and sanctions for communicating an interview request directly to a victim, even though such request reasonably can be understood to fall within the recognized right to communicate directly with victims. This ambiguity has resulted in confusion in the courts and the Defense Offices. Even if defense teams are allowed to make direct contact for non-interview purposes under the District Court’s order, it is unclear what constitutes an “interview request”, which could subject the defense team to disciplinary action and sanctions.

Because “interview” is not further defined in the rules, compliance with Rule 39(b)(12)(A) could mean that a defense lawyer is prohibited from asking the victim if they

are willing to partake in a structured, discovery driven conversation about the crime itself, or it could mean that a defense attorney is not permitted to ask a victim any questions at all no matter how tangentially related to the alleged offense. This is a particularly important distinction because statutory victims are not always witnesses to the alleged offense and do not always possess information relevant to prove or disprove elements of the crime but nonetheless have an interest in, for example, what terms the defense is seeking in a plea agreement, whether the defendant has expressed remorse, what the defendant's motivations were, how the defendant is fairing while incarcerated, and other case-related issues that do not fall squarely within the scope of Rule 15 discovery. A defense attorney may wish to both ask and answer questions, during a consensual conversation with a victim, about those types of case related issues even when the victim does not have information that would be relevant to the guilt phase of a trial. Similarly, an attorney may wish to speak to a victim about such matters and, during that consensual conversation, a victim might wish to discuss the crime itself, leading to one or both parties asking and answering questions about what happened. Despite the District Court's injunction, attorneys continue to be concerned that such conduct would be viewed as a violation of Rule 39(b)(12)(A).

To resolve this ambiguity in favor of free speech, victim agency, and the fair administration of justice, the Maricopa County IR offices urge the Court to adopt the proposed modifications to Rule 39(b)(12) and strike the language prohibiting defense teams from contacting victims to request an interview.

III. Rule 39(b)(12)(A) and (B) are not necessary to protect victims against harassment, intimidation, abuse, or unwanted contact with defense teams.

In 1989, this Court promulgated “the first Victims’ Rights rule.” *State v. Roscoe*, 185 Ariz. 68, 70, 912 P.2d 1297, 1299 (1996); Ariz. R. Crim. P. 39. At that time, the rule’s comment reflects the Court’s intent to “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 ... and constraints against governmental action that the founders of this country believed were fundamental to liberty.” *Id.* The former

Rule 39 balanced these interests and provided victims the right to refuse an interview, to set reasonable conditions on the time, location, duration, and manner of the interview, and to terminate the interview if not conducted in a dignified or professional manner. *Id.* (b)(9)-11).

One-year later, Arizona voters approved the Victims' Bill of Rights ("VBR") and granted the legislature statutory implementation powers. Ariz. Const. art. 2, §2.1(D); *Roscoe*, 185 Ariz. at 70, 912 P.2d at 1299. In 1991, the Legislature enacted the Victims' Rights Implementation Act. *Id.* See also A.R.S. §§ 13-4401–4438. Although not enumerated in the VBR, the Act required that "[t]he defendant, 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).

Prior to the VBR and § 13-4433(B), unwilling victims could be compelled to submit to a pretrial interview or deposition under Rule 15 of the Arizona Rules of Criminal Procedure. Significantly, the VBR abrogated this right, and victims can no longer be "compelled to submit to an interview ... that is conducted by the defendant, the defendant's attorney or an agent of the defendant." *State v. Warner*, 168 Ariz. 261, 263 (App. 1990); Gessner H. Harrison, *The Good, the Bad, and the Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 Ariz. St. L.J. 531, (2002).

Much has changed since 1991, when the VBR sought to protect unwilling victims from a defense interview and provided victims the right "[t]o 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. § 2.1(A)(5). This right is now an accepted and integral part of our criminal justice culture and practice. See, e.g., *State v. O'Neil*, 172 Ariz. 80, 82 836 P.2d 393, 395 (App. 1992)("After *Warner*, it should be clear that the Victims' Bill of Rights abrogated a defendant's right under Rule 15 of the Arizona Rules of Criminal Procedure to interview or otherwise seek discovery from an unwilling victim."); *Day v. Superior Court*, 170 Ariz. 215, 217, 823 P.2d 82, 84 (App. 1991)(VBR "precludes the trial court from ordering the deposition of a victim who has indicated an

unwillingness to be interviewed.”); *State ex rel. Romley v. Hutt*, 195 Ariz. 256, 259, 987 P.2d 218, 221 (App. 1999)(“Arizona appellate courts have considered the victim’s right to decline a defense interview “absolute” unless in direct conflict with a defendant’s federal constitutional rights); *Knapp v. Martone*, 170 Ariz. 237, 239, 823 P.2d 685, 687 (1992)(acknowledging that after adoption of VBR, victims have a constitutional right to refuse a defense interview); *J.D. v. Hegyi*, 236 Ariz. 39, 42 ¶ 16, 335 P.3d 1118 (2014)(“[T]he right to refuse a defense interview allows a victim to avoid contact with the defendant before trial.”)(citing *State v. Riggs*, 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997)).

A. Arizona stands alone in prohibiting defense teams from contacting victims to request an interview and communicate about the case.

Despite 30 years of victims’ rights expansion across the county, Arizona stands alone in adopting Court rules and legislation that prohibit defense attorneys from communicating directly with victims. The regulations on attorney and victim communications in Rule 39(b)(12)(A) and (B) were controversial when adopted in 1992 and, while all states now have statutory or constitutional provisions that enumerate rights and protections for victims of crime, the restrictions on defense attorney communication with victims have not been incorporated into victim’s rights provisions in any other jurisdiction. Rule 39(b)(12)(A) and (B) continue to hinder the ability of defense counsel to communicate about important matters related to justice and the pursuit of the truth. It is also unnecessary to protect a victim’s right to be treated with fairness, respect, and dignity and to refuse an interview request with the defense team.

As recognized by the District Court, “[a] majority of states give victims a constitutional right to be treatment with fairness, dignity, and respect and/or to be free from intimidation, harassment, and abuse by the criminal justice system ... But no other jurisdiction limits the defense’s ability to initiate contact with crime victims in the first place.” *AACJ v. Ducey*, at 28-29 ¶7 & fn. 13-16.

B. Rule 39(b)(12)(A) and (B) are not necessary to ensure that victims are aware of their right to refuse an interview.

Arizona law and practice amply inform victims of their 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.” Ariz. Const. art. 2, § 2.1(A)(5); Ariz. Crim. R. Pro. (b)(12). *See also* A.R.S. § 13-4433 (A) (absent consent, “the victim shall not be compelled to submit to an interview on any matter ... that is conducted by the defendant, the defendant’s attorney, or an agent of the defendant”).

Additionally, Arizona law requires that the prosecutors inform victims of their rights under the VBR within seven days after a crime is charged and the defendant is taken into custody or served with a summons. A.R.S. § 13-4408(A)(1). Further, trial courts must “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. A.R.S. § 13-4405.

The District Court found that “victims already receive ample notice of the right to refuse an interview by the defense, and § 13-4433(B) is not necessary to protect that right.” *AACJ v. Ducey*, at 18 ¶ 55. This reasoning is similarly applicable to Rule 39(b)(12)(A). Arizona law clearly spells out a prosecutor’s obligation to inform victims of their right to refuse an interview, and experience has shown that victims routinely are informed of their rights.

C. Rule 39(b)(12)(A) and (B) are not necessary to ensure that victims are treated with respect, fairness, and dignity, and are not subject to harassment, abuse, or intimidation.

Arizona law also empowers victims with the right to impose conditions on an interview, to terminate the interview at any time, or to refuse to answer any question.

A.R.S. § 13-4433 (A), (D). Additionally, if requested by the victim, prosecutors have standing to seek “any appropriate protective court order” “to protect the victim from harassment, intimidation, or abuse. A.R.S. § 13-4433(D).

Protecting victims from intimidation, harassment, and abuse is a legitimate and important aspect of the VBR. However, Rule 39(b)(12)(A) and (B) are not necessary to achieve this objective. As found by the District Court, “[t]here is no evidence ... that members of the defense team were contacting victims in a disrespectful, harassing, or abusive manner before [§ 13-4433(B)] was enacted.” *AACJ v. Ducey*, at 18 ¶57. Further, “[t]here is no reason to believe that members of the defense team will act inconsistently with their professional obligations or law in the absence of [§ 13-4433(B)].” *Id.*, at 19 ¶ 20. To the contrary, defense teams have “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.” *Id.*

At times, communication with a victim may further the goals of a family. Rule 39 governs victim’s rights in Juvenile Court through the application of Rule of Procedure for Juvenile Court 214 (a). Parents of juveniles are often either victim representatives or victims themselves. Defense counsel have vested interests in helping children charged with crimes maintaining, or improving, familial relations. The delinquency system moves much more quickly than the criminal system, and most children charged with delinquency offenses either remain in, or return to, the home. Rule 39 also imposes barriers to communicating with child clients because counsel must often use victims or victim representatives as intermediaries to communicate with their clients.

While there is always a risk that an individual will treat another individual in a disrespectful manner, the following statutory and ethical provisions prohibit harassing or disrespectful conduct and adequately regulate the professional conduct of defense teams:

- A.R.S. § 13-4433(D) allowing the prosecutor to seek a protective court order to protect victims from harassment, intimidation, or abuse.

- A.R.S. § 13-2921 defining the criminal offense of harassment.
- A.R.S. § 32-2457 providing grounds for disciplinary action that may be taken against a defense team investigator for harassing or abusive behavior, including the suspension or revocation of their professional license.
- Arizona Rule of Professional Conduct 4.4(a) subjecting a lawyer to disciplinary action for using “means that have no substantial purpose other than to embarrass, delay, or burden any person, or use methods of obtaining evidence that violate the legal rights of such a person.”
- Arizona Rule of Professional Conduct 8.4(d) defining that “[i]t is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice.”
- Arizona Rule of Professional Conduct 5.5 requiring lawyers to make reasonable efforts to ensure that nonlawyers employed by or associated with the lawyer act consistently with the lawyer’s professional obligations, and subjecting lawyers to disciplinary action for the conduct of employed or associated nonlawyers whose conduct would violate professional obligations.

D. Rule 39(b)(12)(A) and (B) have an unnecessary chilling effect on the speech of defense teams and interferes with the pursuit of justice and the truth-seeking function of the criminal justice system

Defense teams seek to speak to victims for many reasons, including investigation of the case and mitigation, to provide information about the court and criminal justice process, and to listen to any concerns raised by the victim. The inability to speak directly with victims prevents the defense from communicating the reason for the contact and to assure the victim that the defense team will honor any refusal or limitation on the contact or an interview. If the victim declines to speak with the defense team, this will end any communication with the victim, and the defense team will fully respect and honor the victim’s decision not to communicate further.

Rule 39(b)(12)(A) and (B) are insufficient to convey individualized and case-specific information to the victim about the reason for the interview request or the scope of information the defense team would be seeking from the victim. When relaying a defense request to interview the victim, the prosecutor is not required to include any information or correspondence forwarded to the prosecutor by the defense team. For example, the Arizona Attorney General’s Office uses a standard template to notify victims of a defense request for an interview. *AACJ v. Ducey* at 9, ¶ 35. This template informs the victim of their right to refuse a defense-requested interview, explaining 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 trial, you just need to tell this office and we will communicate your wishes to the defense attorneys.” *Id.* at 10, ¶36. The victim is asked to mark one of two options: “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.” *Id.* This suggests that victims must take an all or nothing approach to providing information to the defense team and that victims are not able to decide for themselves what information they would like to provide to the defense and what topics they would choose not to discuss.

Victims may also believe, in part because of the way prosecutor’s offices communicate defense requests to victims, that they will be subjected to an uncomfortable, intimidating, and formal court proceeding if an interview is granted. If allowed to talk with the defense team directly, victims could ask questions about the process and the scope of information sought and make a more informed decision about whether the victim would feel comfortable communicating with the defense team.

In capital cases, defense-initiated victim outreach (DIVO) is conducted in many jurisdictions. In this type of victim contact, the defense team works with a trained third-party to reach out to the victim and “to identify questions, concerns and needs that can be uniquely addressed by the defense and communicates those issues to them.” See e.g. *Defense-Initiated Victim Outreach, Bureau of Justice*, available at

<https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/divo.pdf>.

Such communication may provide information to the victim about the proceedings, the length of time it takes to pursue a death sentence, or the client's willingness to accept a plea to a term of natural life in prison. This information may be helpful for some victims as they navigate the criminal justice process. Past experiences, and the current practice in other states, show that victims and their family members do not always wish to shut off contact with the defense team; and they sometimes welcome this contact.

In some capital cases, the crime involves intrafamilial violence, and the defense team wishes to speak with the defendant's family members, who are often statutory victims. *See* A.R.S. § 13-4401(19) ("victim" includes any person related to the person against whom a criminal offense was committed "by consanguinity or affinity to the second degree"). If the defense team is hindered in speaking with the statutory victims in this circumstance, important mitigation may not be uncovered. As offered by criminal defense attorney John Canby at the federal bench trial:

[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 [§ 13-4433(B).

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.

AACJ v. Ducey, at 11-12 ¶ 39(b) (citations omitted).

E. Prosecutorial agencies are not uniquely qualified to communicate with victims.

There is nothing inherently intimidating, abusive, or harassing about a defense team contact with a victim to inquire whether that victim will consent to an interview. It is the practice of the IR offices to treat victims, and all case-involved persons, with respect, fairness, and dignity. This practice extends to counsel, as well as mitigation specialists and other team members who have specialized training and experience in communicating with individuals who have experienced traumatic events. Our clients are often victims themselves, sometimes of horrific abuses and other serious crimes. Public defense attorneys and staff recognize that compassion is always appropriate for individuals who have suffered as the result of another person's criminal actions. Prosecutors do not have any greater skill or training than defense attorneys in victim communication. At the district court hearing, a former prosecutor who is now a defense attorney testified that he never received training in victim outreach during his eight years as a county attorney. There is simply no logical reason to assert that a defense team's communication with a victim would be any less professional than a prosecutor's communication with a victim. "Taking all of the evidence together," concluded the District Court "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." *AACJ v. Ducey*, at 24, ¶67 (citation omitted).

IV. Conclusion

The Defense Offices respectfully request this Court amend Rule 39(b)(12) as requested in the Petition. The provisions in the current Rule are unnecessary to protect the rights of victims, interfere in the proper administration of justice, and undermine the rights of lawyers and victims to communicate with each other. To protect important interests as discussed in this comment and found by the District Court, Rule 39(b)(12)(A) and (B) should be abrogated.

Respectfully submitted this 30th day of April, 2023.

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