

## AZRJC's Proposed Amendments to Ariz. R. Crim. P. 17.4, 38.1, 38.2, & 38.3

### (Proposed) Rule 17.4. Plea Negotiations and Agreements

#### (a) Plea Negotiations.

(1) *Generally.* The parties may negotiate and reach agreement on any aspect of a case.

(2) *Judicial Participation.* At either party's request or on its own, a court may order counsel with settlement authority to participate in good faith discussions to resolve the case in a manner that serves the interests of justice. The assigned trial judge may participate in this discussion only if the parties consent. In all other cases, the discussion must be before another judge. If settlement discussions do not result in an agreement, the case must be returned to the trial judge.

(3) Restorative Justice Victim-Defendant Conference. If both the victim and defendant consent to participate, the court must hold a victim-defendant conference. The victim-defendant conference must:

(i.) Permit a third-party facilitator familiar with restorative justice mediation principles to conduct the victim-defendant conference if the victim and defendant agree on the selection of the facilitator. Otherwise the victim-defendant conference must be conducted by the court pursuant to Rule 17.4(a)(2) or a designee of the court.

(ii.) Permit the participation of the victim and up to three representatives of the victim's choosing. The victim must provide notice to the defendant and the court of the identity of the victim's representatives, including a description of the relationship of each representative to the victim.

(iii.) Permit the participation of the defendant and up to three representatives of the defendant's choosing. The defendant must provide notice to the victim and the court of the identity of the defendant's representatives, including a description of the relationship of each representative to the defendant.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

(iv.) Permit the participation of up to four representatives from the community. The community representatives must be chosen by the facilitator of the conference. In choosing the community representatives, the facilitator must apply criteria that identifies a diverse selection of representatives who understand the impacts of the circumstances on the community, victim, and the defendant.

(v.) Prior to the victim-defendant conference, the facilitator must:

(aa.) Meet with the defendant and the defendant's attorney to discuss the goals of the conference, identify the questions that will be discussed, explore the defendant's concerns, and prepare the defendant for participating in the conference. At the end of the pre-conference meeting, the facilitator must confirm that the defendant still wishes to participate in the conference.

(bb.) After meeting with the defendant, meet with the victim, the victim's counsel or the prosecutor to discuss the goals of the conference, identify the questions that will be discussed, explore the victim's concerns, and prepare the victim for participating in the conference. At the end of the pre-conference meeting, the facilitator must confirm that the victim still wishes to participate. The victim may choose a surrogate to participate in the conference on the victim's behalf.

(vi.) The victim-defendant conference procedures must include:

(aa.) Opening statements of the facilitator explaining the purpose of the conference, the procedures, and the requirements for participation.

(bb.) Introductions of the facilitator and the participants.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

(cc.) Circle dialogue that respects the views of each participant and is conducted in a respectful manner.

(dd.) If possible through the circle dialogue, the creation of a restorative agreement.

(ee.) Clarification of the next steps with the restorative agreement that includes confirmation that both the victim and defendant agree to the conditions set forth in the restorative agreement.

(vii.) Revocation of consent to participate may be asserted by the victim or defendant at any time prior to the adoption of a restorative agreement. The facilitator must terminate victim-defendant conference proceedings if consent to participate is revoked by either the victim or the defendant.

(viii.) If a restorative agreement is established, and the prosecutor does not object to the terms of the restorative agreement, the court may:

(aa.) Dismiss the case pursuant to the terms of the restorative agreement;

(bb.) Dismiss the case pursuant to a deferred prosecution agreement under Rule 38.1 and the terms of the restorative agreement, or;

(cc.) Accept a plea agreement pursuant to Rule 17.4 and the terms of the restorative agreement.

(ix.) If a restorative agreement is not reached, any evidence developed through the victim-defendant conference process may not be used against the defendant for any purpose.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

(x.) Confidentiality of the victim-defendant conference: Any communications made exclusively during or for the victim-defendant conference process will be confidential except as to the provisions indicated in this section. Exceptions to confidentiality are limited to:

(aa) Disclosure agreed upon by the defendant and victim. The defendant and victim may disclose information to their respective attorneys.

(bb) Disclosure relevant to a claim or defense made by a party against a participant or facilitator for a breach of a legal obligation.

(cc) Disclosure of threatened or actual violence during the restorative process and evidence derived thereof that is related to the threatened or actual violence disclosure.

(dd) Disclosure required statute, including information about abuse or neglect of a child or vulnerable adult per A.R.S. § 13-3620 and A.R.S. § 13-3623.

(ee) No partner, including the responsible person, may disclose any information about the program process in a particular case, communications, or participants to anyone except program partners unless the court, the victim, and defendant agree, or it is otherwise required by law.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

(bb.)Victim-defendant conference participants (other than the victim and defendant) will not be inquired of or called as a witness or deponent or compelled to produce documents in any proceeding, criminal or civil, related to the communications or proceedings of the victim-defendant conference. However, participants may be called as a witness or deponent or compelled to produce documents for criminal and civil violations which occur during the program itself.

(cc.)Documents and information otherwise discoverable under the Arizona Rules of Civil Procedure will not be shielded from discovery merely because they are submitted or referred to in the program.

**(b) Plea Agreement.** The terms of a plea agreement must be in writing and be signed by the defendant, defense counsel (if any), and the prosecutor. The parties must file the agreement with the court. Any party may withdraw from an agreement before the court accepts it.

**(c) Determining Accuracy, Voluntariness, and Intelligent Acceptance of the Agreement.** Before accepting the plea agreement, the court must address the defendant and confirm that the written plea agreement contains all the agreement's terms and that the defendant understands and agrees to the terms.

**(d) Accepting the Plea.** After making the determinations required by (c) and considering the victim's comments under (v)(2), the court must either accept or reject the submitted plea. The court is not bound by any provision in the plea agreement regarding the sentence or probation terms and conditions if, after accepting the agreement and reviewing a presentence report, the court rejects the provision as inappropriate.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

**(e) Rejecting the Plea.** If the court rejects a plea agreement or any provision in the agreement, it must give the defendant an opportunity to withdraw the plea. The court must inform the defendant that if the plea is not withdrawn, the disposition of the case may be less favorable to the defendant than what the agreement provided.

**(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Arizona Rule of Evidence 410 governs the admissibility of a plea, a plea discussion, and any related statement.

**(g) Change of Judge if Plea Withdrawn.** A defendant who withdraws a plea after a presentence report is submitted may exercise a change of judge as a matter of right under Rule 10.2 if the defendant has not previously exercised that right.

**(v) Victims' Rights.**

(1) *Victim Participation During Plea Discussions.* The victim must have an opportunity to confer with the prosecutor, if they have not already conferred, before any case resolution. The prosecutor or the victim's representative must inform the court and defense counsel of the victim's position. If the defendant is present during settlement discussions, the victim also must have the opportunity to be present and to be heard regarding settlement.

(2) *Before the Court Accepts or Rejects a Plea Agreement.* Before the court makes the determinations required by (c) and accepts or rejects the plea agreement, it must afford the victim the opportunity to be heard and consider any comments expressed by the victim.

### **(Proposed) Rule 38.1. Application for a Suspension Order**

- (a) Generally.** After filing a complaint, indictment, or information, but before adjudication, the State may file a motion requesting that the court suspend further proceedings to allow a defendant to participate in a deferred prosecution program.
- (b) Motion's Content.** The motion must state facts establishing that the defendant is legally eligible for participation in a deferred prosecution program. The motion must be accompanied by the defendant's signed consent agreeing to participate in the program. The consent also must be signed by defense counsel, if any. If the defendant's consent is predicated upon a restorative justice agreement entered pursuant to Rule 17.4(a)(3), the motion must avow that the restorative agreement governs the terms of the deferred prosecution program.
- (c) Suspension Order.** After reviewing the motion and the defendant's signed consent, and upon finding the defendant legally eligible for a deferred prosecution program, the court must suspend further proceedings for the period specified in the motion, not exceeding two years. If the defendant is in custody, the court may order the defendant's release.

## **(Proposed) Rule 38.2. Resuming Prosecution**

- (a) Notice of Failure to Fulfill Deferred Prosecution Conditions.** If the State is not satisfied that the defendant has fulfilled the conditions of the deferred prosecution program, it may file a written notice to that effect and request that the court vacate its order suspending prosecution. The State must serve a copy of the notice on the defendant. If the deferred prosecution program is governed by the terms of a restorative agreement entered pursuant to Rule 17.4(a)(3), the victim or a victim's representative must also agree that the defendant has not fulfilled the conditions of the deferred prosecution program before the court may vacate its order suspending prosecution.
- (b) Order to Resume Prosecution.** After receiving a notice of the defendant's failure to fulfill the deferred prosecution conditions, the court must vacate the suspension order and order that the prosecution resume. The court must mail a copy of the order to the defendant and defense counsel, if any.
- (c) Time for Trial.** Subject to Rule 8.4 and irrespective of the phase of the case when the prosecution was suspended, the defendant must be tried no later than 90 days after the filing of the order to resume prosecution.

### (Proposed) Rule 38.3. Dismissal of Prosecution

- (a) **At the End of Two Years.** Two years after an order suspending prosecution is filed, the court may order the prosecution dismissed without prejudice.
- (b) **On Successful Completion.** If the State notifies the court that the defendant has satisfactorily completed the terms of the deferred prosecution program, the court must order a dismissal of the charges. If the State or the victim provides notice that the defendant has successfully completed the terms of a restorative justice agreement entered pursuant to Rule 17.4(a)(3), the court must dismiss the case with prejudice. If the defendant provides notice of successful completion of restorative justice agreement entered pursuant to Rule 17.4(a)(3), the court may dismiss the case with prejudice upon finding that the defendant has completed the terms of the restorative agreement. Before dismissing the case on a defendant's motion, the court must provide the victim and the State an opportunity to be heard.