

Rosemarie Peña-Lynch
Bar No 023400
Mcpa. Cnty. Ofc. of Public Defense Svc.
620 W. Jackson, Suite 3076
Phoenix, AZ 85003
(602) 506-7228
Rosemarie.Pena-Lynch@maricopa.gov

Gary Kula
Bar No. 012507
Mcpa. Cnty. Public Defenders Ofc.
620 W. Jackson, Suite 4015
Phoenix, AZ 85003
(602) 506-7711
Gary.Kula@maricopa.gov

Steve Koestner
Bar No. 011566
Mcpa. Cnty. Ofc. of Legal Advocate
222 N. Central, Suite 154
Phoenix, AZ 85004
(602) 506-4111
Steve.Koestner@maricopa.gov

Shannon Burns
Bar No. 015976
Mcpa. Cnty. Ofc. of Public Advocate
106 E. Baseline Rd.
Mesa, AZ 85210
(602) 372-2815
Shannon.Burns@maricopa.gov

Sherri McGuire Lawson
Bar No. 013605
Mcpa. Cnty. Ofc. of Legal Defender
222 N. Central, Suite 8100
Phoenix, AZ 85004
(602) 506-8800
Sherri.Mcguire@maricopa.gov

ARIZONA SUPREME COURT

In the Matter of:

Petition to Amend Rule 39(b)(12) of the
Rules of Criminal Procedure

Supreme Court No. R-25-0035

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

The Maricopa County indigent representation offices (IR) collectively handle most cases filed in Maricopa County in which there has been a finding of indigency. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate

(OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly submit this comment supporting the proposal to amend Rule 39(b)(12) of the Rules of Criminal Procedure. Although we recommend changes to the amendment, we support the proposed amendments.

I. Respecting victims’ rights without violating the First Amendment: the case for permissive language in Rule 39.

Since 1990, the Arizona Constitution and implementing statutes have explicitly protected certain rights for crime victims, including rights relating to privacy and safety. Among these constitutional rights is 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. art. II, § 2.1(A)(5). The Arizona Constitution also provides the Legislature with “authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section.” *Id.* at § 2.1(D).

Pursuant to that authority, the Legislature in 1991 enacted Arizona Revised Statutes (“A.R.S.”) § 13-4433(B), which provides 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.” The Statute further provides that “[t]he 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 2017, the Arizona Supreme Court added Rule 39 to the Arizona Rules of Criminal Procedure. Rule 39 was amended in 2019 and 2022. The current Rule reads in relevant

part, a victim has “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 request must be communicated through the prosecutor[.]” Ariz. R. Crim. 39(b)(12)(A)–(B).

In 2018, Arizona Attorneys for Criminal Justice (“AACJ”) sued the Arizona Attorney General (among others) over the constitutionality of A.R.S. § 13-4433(B). After a trial on the merits, the Arizona District Court found the victim-contact provision of the statute unconstitutional because it imposes unjustified restrictions on the speech of criminal defense lawyers and others working on the defense team. *AACJ v. Ducey*, 638 F.Supp.3d 1048, 1086 (D. Ariz. 2022). The Ninth Circuit disagreed, reversing the District Court decision. *AACJ v. Mayes*, 127 F.4th 105 (9th Cir. 2025). Under current case law, A.R.S. § 13-4433(B) does not violate the First Amendment rights of the defense team and is constitutional. The constitutionality of Rule 39(b)(12) was not challenged.

We continue to believe requiring attorneys to submit victim interview requests exclusively through the prosecutor is an unconstitutional limit on free speech. However, at present, A.R.S. § 134433(B) has been found constitutional and requires all defense-victim contact to be directed through the prosecutor. We recommend that the Court adopt the recommended rule change but make the language in the rule permissive, not mandatory.

Rule 39(b)(12)(A): to request an interview with a victim, the defense *may* file a notice of a request for a victim interview with the court.

This prevents any First Amendment violations and prevents the need for future

amendments if the statutory prohibition on defense-victim contact is later removed or found unconstitutional. Under the permissive formulation, while A.R.S. § 13-4433(B) is in effect, all victim interview requests must be made through the State. If A.R.S. § 13-4433(B) is repealed, amended, or held unconstitutional, the defense may contact victims for interviews or continue to use the new Rule 39 request process.

If the Court is not inclined to use permissive language in the amendment, given the current state of the law and the restrictions on defense-victim contact, we believe the proposed amendments to Rule 39, as written, create a better system for victim interview requests than the one that currently exists.

II. The proposed amendments enhance transparency and timeliness in victim interview requests.

We support the proposed rule change to Ariz. R. Crim. Pro. 39(b)(12)(A). The proposed change achieves two goals of the criminal justice system: transparency and timeliness.

The proposal first achieves transparency because it requires the parties to file with the court both the request for victim interview and the victim response. Any issue concerning this request or response will now be in the record, and any subsequent problem can be addressed with what is in the record.

Currently, there is no obligation on either defense counsel, the prosecutor, or victim's counsel to file the request or response with the court. This creates ambiguity in appellate records and when cases head towards trial. It can result in neither party being aware of the victim's interest or lack of interest in doing an interview on the eve of trial.

This is also why the proposal assists with timeliness. The parties now have a mechanism to timely consider whether the victim will consent to an interview request and how that may impact the case. Defendants and their counsel will now know, earlier in proceedings, which will assist defendants in their decision regarding going to trial or taking a plea offer. Requiring the state to respond within 30 days will also prevent defendants and their counsel from waiting, months in some instances, for an answer that is critical to deciding between trial and a plea offer.

This proposal increases transparency and timeliness to the proceedings while placing only a small onus on state counsel. The Arizona Constitution requires victims be treated with respect and be free from intimidation and harassment. The proposed rule change does not permit any unwarranted contact with victims, nor does the proposal change who is allowed to contact victims. If adopted, the prosecutor would still be responsible for requesting an interview with the victim. If the victim does not consent to an interview nothing changes for the victim, but the state's timely follow up will allow for increased transparency and the opportunity for an informed decision by the defendant.

III. Rule 39 should not create different procedures for represented victims.

We disagree with creating different procedures depending on whether a victim is represented. We propose the following changes: (*Indigent Defense Agency changes in italics*)

Rule 39. Victims' Rights

(a) [No change]

(b) Victims' Rights

(1)–(11) [No change]

(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~~ to request an interview with ~~an~~ *unrepresented* victim, the defense ~~must~~ *may* file a notice of a request for a victim interview with the court;

(i) unless the court grants an objection by the prosecutor raised on the grounds that the notice of request for interview violates a victim's constitutional or statutory rights, the prosecutor must diligently convey a written or electronic copy of the filed request to the victim *or the victim's counsel*;

(ii) no later than 30 days after the notice of request is filed or the court overrules an objection to the interview request, the prosecutor must file a notice of the victim's response, or of the prosecutor's attempt to obtain a response, with the court that includes:

(aa) the date(s) the prosecutor conveyed or attempted to convey the request,

(bb) the means by which the prosecutor conveyed or attempted to convey the request,

(cc) whether the victim wants the prosecutor to be present at the defense interview, and

(dd) the date the victim *or the victim's counsel* responded to the request;

(iii) if ~~an~~ *unrepresented* victim consents to or declines an interview after the prosecutor files the notice described in (12)(A)(ii), the prosecutor must promptly file a subsequent notice in accord with (12)(A)(ii);

~~(B) a victim's response to such requests must be communicated through the prosecutor to request an interview with a represented victim, the defense must request an interview with the victim's counsel;~~

~~(i) the defense must file the request with the court;~~

~~(ii) victim's counsel must promptly convey the victim's answer by filing the victim's position in a response with the court;~~

(EB) if the defense requests an interview, among other rights, the victim must be advised prior to the start of the interview that the victim maintains:

(i) the right to refuse an interview,

(ii) the right to be treated with fairness, respect, and dignity,

(iii) the right to terminate the contact or interview at any time for any reason,

(iv) the right to confer the prosecutor, and

(v) all other statutory and constitutional rights;

(CD) [No change in text]

(13)–(18) [No changes]

(c)–(h) [No changes]

The above changes would shift the onus to contact the victim's counsel to the prosecutor. *See* ER 4.2. There should not be a different procedure based on whether a victim is represented because such a distinction undermines consistency, transparency, and fairness in the victim interview request process. Rule 39(b)(12) is designed to ensure that victims' rights are respected while also affording the defense a clear and constitutional method for requesting interviews. Differentiating procedures based on representation status introduces unnecessary complexity and potential confusion. Maintaining a uniform process, including the 30-day deadline for a response, encourages timely communication from the prosecutor to the victim or victim's counsel. This deadline is especially important

because it prompts early outreach, reduces delay, and helps keep cases moving through the system efficiently. The ethical obligations of victim counsel do not obviate the need for structured timelines that promote accountability and avoid confusion. A uniform procedure—where all interview requests are filed with the court and followed by timely responses from the State—promotes procedural clarity and respects all parties’ rights.

IV. Conclusion

For the above reasons, the Maricopa County indigent representation offices support the proposed amendment to Rule 39(b)(12) of the Arizona Rules of Criminal Procedure. We believe the proposed changes will improve transparency, enhance timeliness, and provide a clear process for victim interview requests. While we recommend that the Court adopt permissive rather than mandatory language and establish a uniform procedure regardless of victim representation, we ultimately support the amendment as a meaningful step forward. We appreciate the opportunity to comment and urge the Court to adopt the proposed changes, with the suggested modifications.

Respectfully submitted this day of April 30, 2025.

By /s/ Rosemarie Peña-Lynch
Rosemarie Peña-Lynch, Director
Mcpa. Cnty. Ofc. of Public Defense Svc.

By /s/ Gary Kula
Gary Kula, Director
Mcpa. Cnty. Public Defenders Ofc.

By /s/ Steve Koestner
Steve Koestner, Director
Mcpa. Cnty. Ofc. of Legal Advocate

By /s/ Shannon Burns
Shannon Burns, Director
Mcpa. Cnty. Ofc. of Public Advocate

By /s/ Sherri McGuire Lawson
Sherri McGuire Lawson, Director
Mcpa. Cnty. Ofc. of Legal Defender