

IN THE ARIZONA SUPREME COURT

In the Matter of:	) Supreme Court No. R-25-0035
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	)
	)
PETITION TO AMEND	)
RULE 39(b)(12) OF THE RULES	)
OF CRIMINAL PROCEDURE	)
_____	)

**Comment of Arizona Attorneys for Criminal Justice and
American Civil Liberties Union Foundation of Arizona**

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Pursuant to Rule 28(D), Rules of the Arizona Supreme Court, Arizona Attorneys for Criminal Justice (AACJ) and the American Civil Liberties Union Foundation of Arizona (ACLU of Arizona) submit this Comment in response to the State Bar of Arizona’s Petition to Amend Rule 39(b)(12) of the Arizona Rules of Criminal Procedure.

I. Introduction

Arizona is unique among U.S. jurisdictions in prohibiting lawyers and other members of the criminal defense team—and only members of the criminal defense team—from initiating contact with statutory crime victims. In the three decades that the restriction has been in place in the form of Rule 39(b)(12) and A.R.S. § 13-4433(B), practice has shown that the statute and rule work together to prevent virtually all communications between the criminal defense team and crime victims. *Ariz. Att’ys for Crim. Just. v. Ducey*, 638 F. Supp. 3d 1048, 1063 (D. Ariz. 2022) (“*AACJ II*”).¹ In contrast, prosecutors are allowed unfettered communication with crime victims, despite evidence that a victim’s contact with participants in the criminal legal system can be traumatizing regardless of who contacts them. *Id.* at

¹ During the federal litigation, the Ninth Circuit issued a memorandum decision prior to *AACJ II*, which found standing against all defendants and disposing defendants’ other jurisdictional and procedural defenses and noting that the speech restrictions in A.R.S. § 13-4433(B) are “broader” than the speech restrictions in Rule 39(b)(12). *Att’ys for Crim. Just. v. Brnovich*, 2021 WL 3743888, *5 (9th Cir. Aug. 24, 2021) (“*AACJ I*”).

1068-69. This unequal speech prohibition by statute and rule unfairly skews the adversarial system in criminal cases in Arizona by “inhibiting the defense team’s ability to investigate the relevant facts,” thereby undermining the truth-seeking function of the criminal legal system, while preventing crime victims from receiving helpful information from the defense. *Id.* at 1062; 1067.

By prohibiting defense team speech, both A.R.S. § 13-4433(B) and Rule 39(b)(12) violate the First Amendment to the U.S. Constitution and Article II, section 6 of the Arizona Constitution. While the statute prohibits all speech initiated by the defense team; the Rule is limited, requiring that “the defense must communicate requests to interview a victim to the prosecutor, not the victim” and, similarly, that “a victim’s response to such requests must be communicated through the prosecutor.” But even the rule’s more limited restriction on speech is unconstitutional.

On its face, the rule is limited to “interviews,” which are part of the formal discovery process under the Arizona Rules of Criminal Procedure. *J.D. v. Hegyi*, 236 Ariz. 39, 40 ¶ 1 (2014). In *J.D.*, the court explained that, in Arizona, “[p]arties in criminal cases generally are allowed to **request interviews** from witnesses other than the defendant.” *Id.* at 41 ¶ 11 (citing Ariz. R. Crim. P. 15.3(a)) (emphasis added). “In some circumstances [under Rule 15.3], 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.* (emphasis added). Consistent with understanding an “interview” under Rule 39(b)(12) to mean an interview that is part of the formal discovery process in Arizona criminal cases, the provision in the Arizona Victims’ Bill of Rights that provides the constitutional underpinnings for both the statute and the rule states that “a victim of crime has a right: . . . To refuse an interview, deposition, or **other discovery request** by . . . the defendant’s attorney, or other person acting on behalf of the defendant.” Ariz. Const. art. II, § 2.1(A)(5) (emphasis added); *see also State v. Draper*, 162 Ariz. 433, 437 (1989) (in case predating Arizona Victims’ Bill of Rights stating: “If a victim refuses to cooperate with the defense’s request for an interview, the defendant may file a motion to depose the victim, pursuant to rule 15.3.”). The Ninth Circuit’s fundamental misunderstanding of the Arizona Rules of Criminal Procedure has injected further uncertainty into what constitutes a “requests to interview” or even what constitutes an “interview” in the pretrial context, *See Ariz. Att’ys for Crim. Just. v. Mayes (“AACJ III”)*, 127 F.4th 105, 111, n. 2 (9th Cir. 2025). This uncertainty necessitates action from this Court.

The State Bar of Arizona is correct that its proposed rule change “would advance transparency, accountability, and timeliness” under the rule “requiring interview requests be made part of the record.” R-25-0035 at 8. Even under the proposed rule, however, members of the defense team would continue to face discriminatory and unconstitutional restrictions on their speech because the rule

would restrict their speech but not prosecutors’ speech, perpetuating the unfair skewing of the adversarial system in criminal cases. In contrast, AACJ’s competing rule change petition, R-22-0045, proposes to amend Rule 39 in a way that is constitutional. As argued previously, this Court should adopt R-22-0045 to uphold the free-speech rights of criminal defense attorneys and others on the defense team, correct the unfair skewing of our criminal legal system under current law, and avoid further time-consuming and costly litigation over the rule’s constitutionality.

II. Procedural History and Update on *AACJ v. Mayes* and the Competing Rule Change Petitions.

On November 2, 2022, the Federal District Court for the District of Arizona enjoined enforcement of A.R.S. § 13-4433(B) on First Amendment grounds. *AACJ II*, 638 F. Supp. 3d 1048. Following that ruling, AACJ filed a rule change petition proposing to amend Rule 39(b)(12) based upon the same constitutional principles relied upon in *AACJ II*.

In a letter dated August 31, 2023, regarding AACJ’s “Rule Petition R-22-0045,” then Chief Justice Brutinel wrote to the Executive Director of the State Bar of Arizona requesting that the Bar’s Criminal Practice and Procedure Committee consider several proposed improvements related to Rule 39(b)(12).² The letter indicated that this Court “does not favor” amending Rule 39 as requested by AACJ

² Neither AACJ nor its counsel of record were copied on Justice Brutinel’s letter.

and asked the Committee to “evaluate approaches to improving Rule 39(b)(12).” Notably, the considerations enumerated in Justice Brutinel’s letter **did not** include ensuring the protection of constitutional free-speech rights of defense lawyers and others on the defense team or that our adversarial system operates fairly and in furtherance of the truth-seeking function of the courts. As explained in AACJ’s Rule Change Petition, R-22-0045, such concerns were raised by the drafters of Rule 39 and should not be ignored by this Court. 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.”)

On January 23, 2025, the Ninth Circuit reversed the District Court without reaching the merits of the Plaintiffs’ First Amendment claims. *AACJ III*, 127 F.4th at 113. Instead, the Ninth Circuit held Plaintiffs mis-framed their lawsuit as a facial rather than an as-applied challenge. *Id.* (“[i]n rejecting [Plaintiffs]’ facial challenge under the Speech Clause, we do not reach the constitutionality of the Victim Contact Limit”).³ Importantly, neither the parties to the litigation nor the Ninth Circuit

³ The Directors of the Maricopa County Indigent Defense Agencies claim that “at present, A.R.S. § 13-4433(B) has been found constitutional” is inaccurate. The Ninth Circuit explicitly declined to address the constitutionality of the statute. *AACJ III*,

indicated any error in the District Court’s detailed findings of fact after trial on the merits. As such, new litigation is anticipated that will challenge both A.R.S. § 13-4433(B) and Rule 39(b)(12) to vindicate the speech rights of criminal defense attorneys and others working with them.

III. The State Bar’s Proposed Rule Change May Provide Transparency and Accountability to the Process of Seeking a Defense Interview with a Statutory Crime Victim.

The State Bar’s proposed rule change attempts to improve Rule 39(b)(12) in three ways. First, the proposed rule attempts to provide transparency regarding a prosecutor’s diligence in conveying interview requests, by “helping to ensure the [defense] request is not forgotten or overlooked” and “the court is alerted to it.” R-25-0035 at 8. By requiring the prosecutor to diligently convey the request to interview unrepresented victims and file notice of the victims’ response or the prosecutors failed efforts to obtain a response within 30 days, the proposed rule amendment creates process where none existed before. Such a change may alleviate the concerns of defense counsel who “do not believe that prosecutors always communicate their requests for victim contact to the victim.” *AACJ*, 638 F. Supp. 3d at 1060. & n.3.

127 F.4th at 113. The only court to address the constitutional merits – the Federal District Court for the District of Arizona – found that A.R.S. § 13-4433(B) “violates the constitution.” *AACJ II*, 638 F. Supp. 3d at 1086.

Second, the proposed rule attempts to increase transparency in the prosecutor's communications with victims when conveying interview requests. By requiring that the prosecutor convey the defense request to the victim "in full," R-25-0035 at 10, the State Bar's proposed amendments should end the existing practice of prosecutors using "a standard template when sending a letter notifying a victim of a request for an interview." 638 F. Supp. 3d at 1060. The use of these form letters forces criminal defense lawyers and their agents to "speak a particular message" in the form of a "government-drafted script" in violation of the First Amendment. *Nat'l Inst. Of Fam. & Life Advoc. v. Becerra* ("NIFLA"), 585 U.S. 755, 766 (2018). The State Bar's proposed rule changes should, at a minimum, allow the defense to know that the content of their message was delivered to a victim.

Finally, the proposed rule attempts to increase government accountability by requiring court notice of defense interview requests and setting concrete deadlines for the prosecutor to fulfill their duties. R-25-0035 at 8. The court and parties, including any "successor counsel," would be able to "determine whether a request has been made," when it was made, whether the prosecutor diligently conveyed the request to the victim, and whether the prosecutor timely provided notice of the victim's response or lack thereof. R-25-0035 at 8.

Despite the Committee's attention to detail in crafting an amended rule that improves transparency and accountability into a process that currently has none, the

Arizona Prosecuting Attorneys' Advisory Council (APAAC) nonetheless claims in its Comment that the State Bar's Rule Change Petition "appears to create confusion and will have an unintended negative impact on a victim's right to confer with prosecutor [sic] about all aspects of a case, including the right to refuse interview requests." Such assertions are supported by no authority and should be rejected by this Court.

IV. The State Bar of Arizona's Proposed Rule Change Still Violates Free-Speech Protections and Will Continue to Skew the Adversarial System by Restricting the Speech of Criminal Defense Attorneys While Allowing Prosecutors Unfettered Speech with Statutory Crime Victims.

The State Bar of Arizona's proposed rule does not effectively address the constitutional issues identified in *AACJ II*, the merits of which were left undisturbed by the Ninth Circuit. While it is true, as noted in this Court's August 31, 2023 letter, that "AACJ did not explicitly challenge Rule 39(b)(12) in *AACJ v. Ducey*, CV-17-01422-PHX-SPL, when it challenged the constitutionality of A.R.S. § 13-4433(B)," defendants, including the Arizona Attorney General and the Chief Bar Counsel for the State Bar of Arizona, claimed from the beginning of the litigation that Rule 39 has the same prohibitory effect on criminal defense team speech as the statute. *AACJ II*, 638 F. Supp. 3d at 1060 n. 4. Even with the Bar's proposed amendments, Rule 39 will continue to restrict and prevent a broad range of communications between the criminal defense team and statutory crime victims. Under the Bar's proposed rule, a

prosecutor would continue to convey requests for a defense interview to crime victims, a process that is still likely to make victims feel like they should not talk to the defense. This requirement is a content-based restriction on attorney speech. *AACJ II*, 638 F. Supp. 3d at 1078 (finding A.R.S. § 13-4433(B) is a content-based restriction on speech because “it singles out and disfavors the speech of a category of speakers—members of the criminal defense team”). It also unconstitutionally restricts a victim’s First Amendment right to receive information. *E.g. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982) (recognizing “the Constitution protects the right to receive information and ideas”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Constitution protects right to receive information and ideas regardless of their social worth).

Moreover, the State Bar’s proposed rule is not appropriately tailored to serve any identified government interest. In *AACJ II*, the government asserted four interests to justify restricting speech under A.R.S. § 13-4433: “(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.” *AACJ II*, 638 F. Supp. 3d at 1064–65. Like A.R.S. § 13-4433, Rule 39—in either its current form or as amended by the State Bar’s proposal—is not

adequately tailored to serve these interests.

First, “victims already receive ample notice of the right to refuse an interview by the defense.” *Id.* at 1065. Under 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). 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. A.R.S. § 13-4405(A). As such, the State Bar’s “largely prophylactic provision” in proposed Rule 39(b)(12)(C) is unnecessary and duplicative of other Arizona laws.

Second, there is no evidence that criminal defense attorneys will ignore their ethical duties when contacting statutory crime victims. *AACJII*, 638 F. Supp. at 1065 (“no evidence . . . that members of the defense team were contacting victims in a disrespectful, harassing, or abusive manner” prior to the implementation of A.R.S. § 13-4433). Nor is there evidence that criminal defense attorneys were ignoring their ethical duties when contacting victims for the more-than-one-year when

enforcement of A.R.S. § 13-4433(B) was enjoined (Nov. 2, 2022 – Jan. 23, 2025). As the State Bar’s petition notes: “The Rule 39 Workgroup anticipated that abusive interview requests would be relatively rare.” R-25-0035 at 8–9.

Third, “[t]he bulk of the evidence . . . 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.” *AACJ II*, 638 F. Supp. at 1068. As such, “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.” *Id.* at 1069.

Finally, the proposed rule does not level the playing field between represented and unrepresented victims. As a practical matter, interview requests for victims with counsel are already effectively regulated by ER 4.2, which unlike the proposed 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.” *Id.* at 1067 (citing ABA Model Rules of Professional Conduct 4.2 cmt. 1 and noting that “ABA Model Rule 4.2 is substantively identical to Arizona ER 4.2”). A better way of leveling the playing field would be for the state to provide all victims with state-funded counsel. Such a solution “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.” *Id.* at 1070. Moreover,

this solution “would eliminate the discrepancy between the prosecution and defense in terms of their ability to initiate contact with the victim.” *Id.* While this solution would be costly, it would level the playing field for all victims while not restricting defense attorney speech.

V. Conclusion

The State Bar’s proposed rule change petition is an attempt to improve Rule 39(b)(12) by increasing transparency and accountability in the government-restricted process for the defense team to request pretrial interviews with statutory crime victims. By continuing to treat defense lawyers differently from prosecutors, however, the petition perpetuates the unfair skewing of our adversarial system, while undermining its truth-seeking function. In addition, this Court is duty-bound to protect the right to free speech of everyone, including criminal defense lawyers and others working with the defense team. To do so, this Court must deny the State Bar’s petition and adopt AACJ’s petition R-22-0045.

Respectfully submitted, this 1st day of May 2025.

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