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7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 In the Matter of:

10 **PETITION TO AMEND THE**  
11 **ARIZONA RULES OF CRIMINAL**  
12 **PROCEDURE**

Supreme Court No. R-19-0016

13 **COMMENT OF THE**  
14 **STATE BAR OF ARIZONA**

15 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar  
16 of Arizona (the “State Bar”) hereby submits the following as its Comment to the  
17 above-captioned Petition.

18 The analysis and details for this Comment are substantially the product of the  
19 State Bar’s Criminal Practice and Procedure Committee, composed of a balance of  
20 prosecution and defense practitioners, and judicial members.

21 **BACKGROUND OF PETITION R-19-0016**

22 More than two years ago, the Supreme Court Task Force on the Arizona  
23 Rules of Criminal Procedure completed a global restyling of the Rules of Criminal  
24 Procedure and Submitted Rule Change Petition R-17-0002. The revisions proposed  
25 in R-17-0002 were approved by this Court. During the Task Force review process,

1 representatives of victim's rights organizations suggested that Rule 39 be deleted,  
2 and other criminal rules be modified to add language regarding victims' rights. The  
3 committee charged with revising the Rules of Criminal Procedure declined to adopt  
4 the suggested modifications.  
5

6 This same Petitioner filed Petition R-18-0001 which sought to delete Rule 39,  
7 Ariz. Rules Crim. Pro., and amend dozens of criminal rules in the process. Rule  
8 Petition R-18-0001 was not adopted. In the instant petition, R-19-0016, the proposal  
9 again seeks to accomplish what was not accomplished via the Supreme Court Task  
10 Force on the Arizona Rules of Criminal Procedure or via Petition R-18-0001.  
11

## 12 **DISCUSSION**

13  
14 A comparison between Petition R-18-001 and Petition R-19-0016 shows that  
15 the majority of proposed modifications contained in the new petition are virtually  
16 identical to the former petition. Some aspects of this Petition utilize slightly  
17 different language than previously proposed, where others utilize identical language  
18 but in a different subsection of the same rule. Consequently, much of this comment  
19 is similar to the State Bar's Comment on R-18-0001. There are, however, some  
20 newly proposed rule changes in R-19-0016 that were not in the prior petition.  
21

22  
23 Like Petition R-18-0001, many of the proposed modifications seek to raise  
24 crime victims to the status of parties, permitting them to file pleadings and otherwise  
25 be heard on matters which do not pertain exclusively to victims' rights. But victims

1 are not parties to criminal proceedings and may not challenge the legal rulings of trial  
2 judges pertaining to the merits of a criminal case.

3 Article 2, Section 2.1(A) of the Arizona Constitution, otherwise referred to as  
4 the Victims' Bill of Rights (VBR), provides that victims have a right to have "all rules  
5 governing criminal procedure and the admissibility of evidence" protect victims. (*Id.*  
6 at Section 2.1(A)(11)). However, this court has held that this provision is to be  
7 "narrowly construed" to "deal [] with procedural rules *pertaining to victims* and not  
8 with the substantive general subject of the [Supreme Court's] rule making power."  
9 *Slayton v. Shumway*, 166 Ariz. 87, 92 (1990)(emphasis added).

10 Since *Slayton* was decided, Arizona has consistently reaffirmed its holding:

11 [The] 'scope of legislative rulemaking power under [the]  
12 VBR extends to those rules that define, implement, preserve  
13 and protect *the specific rights unique* and particular to crime  
14 victims, as guaranteed and *created by* [the] VBR.'

15 *State v. Brown*, 194 Ariz. 340, 343 (1999) (emphasis added); *See also, Champlin v.*  
16 *Sargeant*, 192 Ariz. 371, 373 n. 2 (1998) (rulemaking power under VBR "extends  
17 only so far as necessary to protect rights created by the [VBR] and not beyond.");  
18 *State v. Hansen*, 215 Ariz. 287, 290 (2007) (same).

19 *Slayton* and its progeny make it clear that the VBR, Article 2, Section  
20 2.1(A)(11), cannot and does not require consideration of victim rights in connection  
21 with *all* evidentiary matters and *all* Arizona Rules of Criminal Procedure. *Slayton*,  
22 166 Ariz. at 89, 92.

1 As before, the Petition seeks to abrogate Rule 39. (See, Appendix A of the  
2 Petition at pp. 63-68). The Petition asserts that abrogating Rule 39 and integrating  
3 its provisions into the remaining Rules of Criminal Procedure will not create new  
4 victims' rights. (Petition at 6, l. 6-7). However, many of the proposed modifications  
5 discussed in Exhibit A, below, clearly attempt to create victim rights where no such  
6 right exists in either Article 2, Section 2.1 of the Arizona Constitution, Rule 39 of  
7 the Rules of Criminal Procedure, or the implementing statutes, A.R.S. §§13-4401,  
8  
9 *et. seq.*

11 Like last year's petition, the changes sought by R-19-0016 are too numerous  
12 to address in a memorandum format. Attached to this Comment as Exhibit A is an  
13 analysis of many of the proposals contained within Petition R-19-0016.

### 15 CONCLUSION

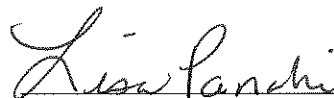
16 Victims' rights are already succinctly stated in Rule 39, Ariz. Rules of Crim.  
17 Pro., and many are duplicated in the Arizona statutes. The Petition seeks to abrogate  
18 Rule 39 and redistribute the enumerated victims' rights throughout virtually every  
19 other Rule of Criminal Procedure. Such an overhaul and redistribution of Rule 39's  
20 protections remove from the rules an easily accessible, comprehensive listing of all  
21 victims' rights. In addition to creating rights where none currently exist, this petition  
22 will not provide attorneys and judges with a better understanding of victims' rights.  
23  
24 It will have the opposite result, making it more difficult for Victims, the Courts, the  
25

1 State, and the Defense, to understand the scope of victims' rights, to access the  
2 rights, and to determine how to apply the law to victims' rights.

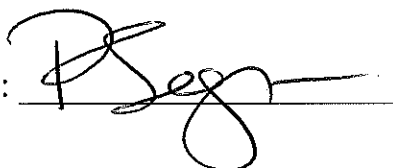
3  
4 Modification and/or expansion of Victims' Rights coupled with a substantial  
5 overhaul of the newly modified Rules of Criminal Procedure should proceed through  
6 consultation, review, and discussion with other interested members of the criminal  
7 justice system such as State, County, and Municipal Prosecution Agencies, the  
8 Defense Bar, and members of the State, County, and Municipal Judiciary.

9  
10 For the above-stated reasons, the State Bar of Arizona respectfully requests  
11 that the Arizona Supreme Court not amend the Criminal Rules as requested in the  
12 Petition.

13  
14  
15 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May, 2019.

16  
17   
18 Lisa M. Panahi  
19 General Counsel

20  
21 Electronic copy filed with the  
22 Clerk of the Supreme Court of Arizona  
23 this 1<sup>st</sup> day of May, 2019.

24 by:   
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## Exhibit A

### **Rule 1.3 (a)(5) Computation of Time.**

The petition seeks to modify subsection (a)(5) of the rule to include crime victims in the rule's time computation. Subtle as it is, the proposed modification is works to sanction the filing of pleadings by crime victims or their counsel. While victims have a right to be heard in limited, delineated circumstances, only *parties* may file pleadings. *Lynn v. Reinstein*, 205 Ariz. 186, ¶ 15 (2003); *State v. Lamberton*, 183 Ariz. 47 (1995). The rule should not be modified as requested.

### **Rule 1.5(c)(3) Defendant's Appearance by Videoconference.**

The rule provides for a defendant's appearance in certain proceedings by "interactive audiovisual system" when the parties so stipulate. The Petition seeks to amend the rule to preclude such an appearance by stipulation *unless* the interactive audiovisual system "will allow a victim means to view and participate in the proceedings and ensure compliance with all victims' rights laws." (Appendix A of Petition at 7).

In-custody defendants have no control over the system utilized by the court and jail. And while out-of-custody defendants may (with the approval of the court) appear through Skype, criminal defendants have no way to ensure victims are conferenced in to the interactive audiovisual system utilized. Because proceedings employing an interactive audiovisual system take place in open court, victims are

free to appear in court to exercise any right specifically afforded by the VBR. Modifying the rule to make use of the methodology contingent upon the victim's participation in *the interactive system* will effectively nullify the authorized process. The rule should not be modified as requested.

**Rule 1.9 Motions, Oral Argument, and Proposed Orders.**

Petitioner seeks to amend subsection (b) of Rule 1.9 to add this sentence: “When addressing matters that impact any victim's rights, a victim may file motions, responses, and replies that comply with these rules.” (Appendix A of Petition at 10). While victims clearly have a right to be heard concerning issues implicating the rights enumerated in the Constitution, neither the Constitution, the statutes nor Rule 39 grants any victim (or their counsel) the right to file pleadings. Only *parties* may file pleadings, and victims are not *parties* to the criminal action. They may not be heard on purely legal matters divorced from those *unique, peculiar rights created by VBR. Lynn v. Reinstein, 205 Ariz. 186, 191 (2003) (“ . . . [V]ictims are not parties to a defendant’s criminal case.”)*. *See, also, State v. Lamberton, 183 Ariz. 47, 49 (1995)* (The VBR provides “victims the right to participate and be notified of certain criminal proceedings. This is not the same as making victims ‘parties.’”).

Despite this clearly established case law, the Petition asserts:

It is important to point out that in seeking integration, AVCV is not asserting that victims are parties to a criminal

case not is AVCV seeking to elevate victims to party status.

*Petition at 6.*

But the proposed amendment to subsection (b) accomplishes exactly what the petition asserts it does not seek to accomplish – elevate victims to party status with the right to file motions, responses, and replies on “*matters that impact any victim’s rights.*” It is the Petitioner’s position that *all criminal and evidentiary rules in all criminal proceedings* impact victim’s rights. (Petition at 5). As such, the proposed language invites additional litigation over the legal positions of a victim or differing positions of multiple victims which would require written responses or argument to preserve the record. The workload for the State, the Defense, and the Trial Courts and Appellate Courts will increase significantly.

Notably, the former petition proposed this modification, but with different language. (*See*, Petition R-18-0001, Appendix A to R-18-0001 at p. 5). A victim’s “right to be heard” does not expressly include the right to file pleadings. Were it otherwise, Article 2, Section 2.1 of the Constitution, Rule 39, and/or the implementing statutes would have provided for it. Despite claiming otherwise, the Petition seeks to create a right which does not currently exist. The proposed modification should be rejected.

**Rule 4.2(c) Combining an Initial Appearance with an Arraignment.**

The Petition seeks to modify the provision allowing for a combined Initial Appearance with an Arraignment to require “if requested, the victim has been given notice and an opportunity to be present and heard.” (Appendix A at 15). A victim’s right to be heard in this situation already exists. *See*, Article 2, Section 2.1(A)(4) of the Arizona Constitution.

**Rule 5.1(c)(2) Preliminary Hearings/Continuance.** The proposed modification seeks to limit a magistrate’s authority to continue a preliminary hearing by conditioning such an order upon the magistrate’s “consideration of the victim’s right to a speedy trial . . . .” (Appendix A at 16).

The right to a speedy trial, however, was not created by the VBR. Paragraph 10 of Article 2, Section 2.1(A)<sup>1</sup> of the Arizona Constitution, “which addresses a general ‘speedy trial’ right, neither create[d] a right nor define[d] a right peculiar and unique to victims.” *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 343 ¶12 (1999). Further, when in conflict, a criminal defendant’s Sixth and Fourteenth Amendment rights trump a victim’s desire for a speedy trial. *State ex rel. Romley v. Superior Court/Roper (RPI)*, 172 Ariz. 232, 236, (App.1992) (“We therefore hold that when the defendant’s constitutional right to due process conflicts with the

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<sup>1</sup> The codification of the Victims’ Bill of Rights.

Victim’s Bill of Rights in a direct manner, . . . then [defendant’s] due process is the superior right.”).

As proposed, the revision runs afoul of established case law by rendering the defendant’s constitutional rights subservient to those of the victim. The proposal should be rejected.

**Proposed Rule 6.3(c)(1) Duties of Counsel; Withdrawal.**

The proposed modification seeks to limit a magistrate’s authority to grant a motion by counsel to withdraw by conditioning such an order upon the magistrate’s “consider[ation of] the victim’s right to a speedy trial.” (Appendix A at 18). As mentioned above, the right to a speedy trial was not created by the VBR. Paragraph 10 of Article 2, Section 2.1(A) of the Arizona Constitution, “neither create[d] a right nor define[d] a right peculiar and unique to victims.” *State ex rel. Napolitano v. Brown, supra*, at 343, ¶12. Further, when in conflict, a criminal defendant’s Sixth and Fourteenth Amendment rights trump a victim’s desire for a speedy trial. *State ex rel. Romley v. Superior Court/Roper (RPI), supra*. As proposed, the revision runs afoul of established case law by rendering the defendant’s constitutional rights subservient to those of the victim. The proposal should be rejected.

**Rule 6.7(a) Appointment of Investigators / Experts for Indigent Defendants.**

The rule as written addresses the court’s obligation to appoint investigators, experts and mitigation specialists necessary for a defendant’s case. The Petition

seeks to require the court to impose work deadlines on each appointed investigator/expert based on a consideration of “the victim’s right to a speedy trial.” (Appendix A at 19).

Such an advisory is unproductive and unnecessary under the circumstances since defense investigators and experts work for the defense attorney, and the defense attorney is charged with complying with speedy trial rules. Moreover, as mentioned in the two preceding sections, the right to a speedy trial was not created by the VBR. Paragraph 10 of Article 2, Section 2.1(A) of the Arizona Constitution, “neither create[d] a right nor define[d] a right peculiar and unique to victims.” *State ex rel. Napolitano v. Brown, supra*, at 343, ¶12. The proposed modification should be rejected.

**Rule 7.4(b) Bail Eligibility Hearing.**

The Petition proposes to strike the current Subsection (b)(2), which states: “Notwithstanding the time limits of Rule 39(g)(1), a victim must be afforded the rights provided in Rule 39(g).” Rule 39(g) covers Court enforcement of victim notice requirements. The Petition proposes to replace the above quoted language with a lengthy paragraph regarding Victim participation in Bail Eligibility Hearings. The majority of the proposed language comes from Rule 39(b)(7), Ariz. Rules of Crim. Pro., so this part of the proposal is already addressed in Rule 39.

However, the third sentence of the proposed language reads:

*If a victim objects to being called as a witness in a bail eligibility hearing the Court must require the party wishing to present the victim's testimony to make an offer of proof and the Court may require a victim to testify only if the Court finds that the evidence in the offer of proof would likely impact the Court's decision. . . . If the opposing party stipulates to the information in the offer of proof, the victim will not be required to testify.*

Proposed Rule 7.4(b)(2).

Again, the Petition attempts to create a right where none exists. This Court and the Court of Appeals have recognized that victims do not have a right to refuse to testify at trial or in any criminal pre-trial proceeding. *See, State v. Riggs*, 189 Ariz. 327, 330-331 (1997); *State v. Brown*, 233 Ariz. 153, ¶26 (App. 2013); *P.M. v. Gould*, 212 Ariz. 541, ¶16 (App. 2006); *S.A. v. Superior Court*, 171 Ariz. 529, 531 (App.1992); *Benton v. Superior Court*, 182 Ariz. 466 (App. 1995); and *State ex rel Dean v. City Court, City of Tucson*, 173 Ariz. 515 (App. 1993).

The proposal should be rejected.

**Rule 8.1(e) Suspension of Rule 8.**

The rule authorizes either party to move for a hearing to establish extraordinary circumstances requiring a suspension of Arizona's speedy trial provisions. Petitioner seeks a rule change compelling an opportunity to be heard on any such motion, as well as compelling the court's consideration of "the victim's right to speedy trial" before ruling on the motion. (Appendix A at pp. 31-32).

As to this proposed revision and other proposed revisions to Rule 8, this modification is unnecessary because Rule 39 already addresses a victim's speedy trial issues. Victims already have the right to be heard on suspension of Rule 8 and speedy trial issues. Rule 39(b)(7)(C). Ariz. Rules Crim. Pro.

**Rule 8.5(b) Continuing a Trial Date/Grounds.**

The rule sets forth the procedure for a party's motion to continue a trial. The rule states that a continuance may be ordered "only on a showing that extraordinary circumstances exist, and that delay is indispensable to the interests of justice, and only for so long as is necessary to serve the interests of justice." The Petition seeks to modify the requisite showing to include consideration of the victim's right to a speedy trial. (Appendix A at 32).

The proposed modification is unnecessary because Rule 39 already provides Victims the right to be heard on trial continuances. Rule 39(b)(7)(C). Ariz. Rules Crim. Pro. Further, this proposed revision potentially conflicts with a defendant's due process rights.

**Rule 10.3 Changing the Place of Trial.**

Subsection (c) of the rule permits a party to seek a change of the place of trial if the party demonstrates that a fair and impartial trial cannot be had in the current location. A defendant's right to a fair and impartial trial is guaranteed by the Sixth

Amendment of the United States Constitution, and Article 2, Sections 4, 23, and 24 of the Arizona Constitution.

A victim's right to be heard already exists. But the Petition goes even farther by requiring the court's consideration of "the victim's right to be present" as well as directing the Court to "consider alternatives to moving the trial that will . . . reasonably allow[] the victim to exercise the right to be present." (Appendix A at 34). The proposed modification can be read to suggest a victim's right to argue the *legal* justification warranting a change of venue thus making a victim a party to the proceedings with the right to present legal arguments. But victims have no right to make legal arguments.

Courts already consider the inconvenience to witnesses when ruling on change of venue motions. Such consideration necessarily includes both testifying and non-testifying crime victims. The rule should not be modified as requested.

**Rule 15.2(h)(i)(B) Defense Additional Disclosure in Capital Cases.**

Subsection 15.2(h)(i)(B) addresses extensions of time for disclosure and/or amendment of disclosure on a showing of good cause. The Petition proposes to augment the rule by requiring consideration of "the victim's right to a speedy trial." (Appendix A at 43). This revision again conflicts with a defendant's due process rights and is unnecessary in light of the existence of paragraph 10 of Article 2,

Section 2.1(A) of the Arizona Constitution, as well as Rule 39(b)(7)(C) of the Arizona Rules of Criminal Procedure.

**Proposed Rule 15.3 Depositions; Victims' Right to Refuse.**

In addition to amending the current heading of Rule 15.3, the Petition proposes an entirely new subsection (g) – consisting of 4 subparts. Most of the content in proposed subsection (g) is already covered by Rule 39 and is duplicated by the statutes. However, under proposed subpart (1), entitled, “Communication,” the petitioner proposes to add: “A defendant, a defendant's attorney, or any person acting on the defendant's behalf may not contact the victim.”

The sentence invites problems for several reasons. First, any no-contact order existing between the defendant and the victim is, when appropriate, issued by the court, typically during an initial appearance or arraignment. As A.R.S. §13-4431 states, the goal of victim provisions is “minimizing victim contact” with the accused. Contact between a victim and an accused is an issue reserved for the court on a case-by-case basis.

Second, there is nothing in Article 2, Section 2.1 of the Arizona Constitution, Rule 39, or the implementing statutes that prohibit any and all contact between a defense attorney and a victim. *See, e.g., State ex rel Dean v. City Court, City of Tucson*, 173 Ariz. 515, 516 (App. 1993) (“[W]e find nothing in [Article 2, Section 2.1], either express or implied, which supports the state’s argument that victims have

an absolute right not to be exposed to contact with defendants or their attorneys until the time of trial.”). Rule 39(b)(12)(A) & (B) does, however, prohibit defense lawyers from contacting victims concerning discovery, depositions, requests for interviews. Victims who have not opted-in are still “victims” by definition. *A.R.S. §13-4401(19)*. As currently written, Rule 39 avoids problems arising from this important distinction.

Third, the sentence at issue precludes contact with the victim “by any person acting on the defendant's behalf.” As an extension, if a relative or friend or acquaintance of the defendant, *acting on their own accord* (as opposed to the direction of the accused) contacts the victim “on the defendant's behalf,” nothing in the Constitution, statutes or Rule 39 prohibits that contact. More importantly, Arizona has approved of “contact” by those authorized to serve subpoenas upon victims, which of course is contact by a “person acting on the defendant's behalf.” *See, State ex rel Dean v. City Court, City of Tucson*, 173 Ariz. 515 (App. 1993). In light of the foregoing, the proposed language should be rejected as overbroad.

**Rule 15.6 Continuing Duty to Disclose; Final Disclosure Deadline; Extension.**

Subsection (e) of the rule addresses the procedure for extensions of time for disclosure deadlines due to the need to complete testing. The Petition would add that if the Court grants an extension, the Court must consider the Victim’s right to

a speedy trial in determining the new deadlines. (Appendix A at 46). This revision is unnecessary in light of the existence of paragraph 10 of Article 2, Section 2.1(A) of the Arizona Constitution as well as Rule 39(b)(7)(C) of the Arizona Rules of Criminal Procedure.

**Rule 16.3(d) Pretrial Conference/Scope of Proceeding.**

The current rule establishes pretrial conferences for the purpose of accomplishing certain objectives. The rule permits the court to hear motions made at or filed before the conference; set additional conferences and evidentiary hearings; obtain stipulations to relevant facts; and discuss and determine any other matters that will promote a fair and expeditious trial.

The Petition seeks to require a court to *first* “consider the rights and views of the victim,” the “victim’s right to be present at all proceedings,” and victim speedy trial considerations before addressing any matters outlined. (Appendix A at 47). While victims have the right to be heard, victims have no *specific, unique, peculiar* right created by VBR to be heard with respect to any of the issues set forth in Rule 16.3(d), e.g., motions, stipulations, use of juror notebooks, opening statements, jury instructions, etc. The Petition seeks to create new rights elevating victims to the status of a party to the proceedings with the right to address legal issues. The proposed revision should be rejected.

### **Rule 16.4 Dismissal of Prosecution.**

First, subsection (a) of the rule permits dismissal of a prosecution on motion of the State upon a finding of good cause and that the dismissal is not sought to avoid Rule 8 time limits. The Petition seeks to augment this subsection by precluding dismissal absent consideration of the views of the victim. (Appendix A at 48).

Next, subsection (d) of the rule currently provides that dismissal of a prosecution “is without prejudice to commencing another prosecution, unless the court finds that the interests of justice require the dismissal to be with prejudice.” The Petition seeks to insert a requirement that the court first consider the rights of the victim to justice and due process before reaching a decision concerning dismissal with prejudice. (Appendix A at 48).

Whether a dismissal of a criminal prosecution occurs with prejudice is purely a *matter of law* about which VBR creates no right. When the prosecution moves to dismiss due to an insufficiency of evidence necessary to convict, the matter is one of law grounded in the prosecutor’s legal assessment of the case. So too, where a defendant moves for dismissal of a charging document as “insufficient as a matter of law” in accordance with Rule 16.4(b), the decision to grant or deny the motion rests squarely in the law.

A court's decision to dismiss with prejudice is grounded in the law governing the case. For example, where the prosecution is barred by double jeopardy, it is the law that dictates the matter be dismissed with prejudice. Because the Court's decision is governed by law, and because the VBR creates no specific right to be heard on matters of law governing the merits of a prosecution, the proposed rule amendment must be rejected.

**Rule 27.8(b)(2) Probation Revocation/Violation Hearing.**

The current rule provides for a probationer's right to be present during a violation hearing and advises that such hearing may proceed in the probationer's absence in certain circumstances. The Petition seeks to modify the rule to add that the victim also has a right to be present during the violation hearing – about which there is no debate. However, to avoid any confusion, any modification to the rule must also state that the violation hearing may proceed in the absence of the victim.

**Rule 31.3(b) Suspension of an Appeal.**

Subsection (1) of the rule currently provides that an appellate court, on its own motion or on that of a party, may suspend an appeal if a motion under Rule 24 (motion for new trial) or a petition under Rule 32 is pending. The Petition seeks to modify the rule to require the appellate court to first consider “the rights of the victim, including the right to prompt and final conclusion of the case after conviction and sentence,” before suspending an appeal. (Appendix A at 58).

However, victims have no *specific, unique, peculiar* right *created* by the VBR with respect to whether or not an appellate court should suspend an appeal. As previously noted, victims are not afforded the status of a “party” under the VBR, thus the proposed modification should be rejected.