ADVISORY COMMITTEE ON CRIMINAL RULES

Hearing on Proposed Amendments to Rule 17

January 22, 2026

ADVISORY COMMITTEE ON CRIMINAL RULES
January 22, 2026
11:00 a.m. – 12:00 p.m. (Eastern)

Hearing Schedule & Order of Witnesses

Please note that all times are Eastern. Timing is approximate and subject to change. Each witness will have 15 minutes total. Please keep your remarks brief (10 minutes or so) so there will be ample time for questions from committee members. Each witness should be prepared to start after the previous witness concludes and the Chair calls the next witness. Committee members may have additional questions for the witnesses in the last 15 minutes, so witnesses should be prepared to stay for the full hour.

	Time Slot	**Name**	**Organization**	**Rule**
Chair's Welcome and Opening Remarks at 11:00				
1	11:05–11:20	Paul Cassell	S.J. Quinney College of Law	Rule 17
2	11:20–11:35	Kristin Eliason	Volare (formerly Network for Victim Recovery of DC)	Rule 17
3	11:35–11:50	Meg Garvin	National Crime Victim Law Institute at Lewis & Clark Law School	Rule 17
Final Questions & Closing Remarks at 11:50 (estimated)				

TAB 1

STATEMENT

OF

PAUL G. CASSELL

RONALD N. BOYCE PRESIDENTIAL PROFESSOR OF CRIMINAL LAW

S.J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH

BEFORE

THE JUDICIAL COFERENCE ADVISORY COMMITTEE

ON CRIMINAL RULES

REGARDING

PROPOSED AMENDMENTS TO

FEDERAL RULE OF CRIMINAL PROCEDURE 17

ON

JANUARY 22, 2026

(VIRTUAL HEARING)

I. INTRODUCTION

Members of the Committee,

Thank you for allowing me to testify and share concerns that I and other crime victims' rights advocates have about the proposed amendment to Federal Rule of Criminal Procedure regarding procedures for issuing subpoenas in criminal cases.

In a nutshell, the fundamental problem with the proposed changes is that they seem to have been crafted with mainly sophisticated white-collar fraud cases in mind. In such cases, when subpoenas are issued, the recipients will often be able to retain their own legal counsel or otherwise protect their own interests. But the proposed changes, as currently drafted, apply to *all* federal crimes—including violent crimes and other victim-sensitive cases. In such cases, crime victims will likely lack legal counsel and will often be unable to defend their privacy and other interests against sophisticated defense attorneys raising complex legal arguments. Accordingly, the Committee should be cautious in making changes that apply to the broad swath of federal crimes.

My analysis of the proposed changes proceeds in six parts. In Part I, I explain the unfortunate reality that many victims of crimes—including federal crimes—will lack legal counsel. Accordingly, any change to the Federal Rules of Criminal Procedure affecting crime victims' rights needs to take that reality into account.

In Part II, I explain how the proposed changes dramatically expand the *scope* of permissible subpoenas. While the existing rule permits subpoenas directed to crime victims for trial purposes only, the proposed rule expands subpoenas to include detention, suppression, sentencing, revocation, and (with permission of the court) all other hearings. This exposes victims to potential subpoenas for all sorts of hearings that were never involved before. For example, a defense attorney could argue, at a detention hearing, that the extent of any injuries (or lack of injuries) to a victim was relevant to the dangerousness assessment of their client and subpoena all medical records of a victim just a few days after the crime. Under the current rule, defense subpoenas were limited to trial situations—effectively meaning that in approximately 95% of all cases where pleas resulted, no victim subpoenas were possible. The new rule thus expands the possible situations where victims could be subpoenaed by something like 20-fold. There also appears to be drafting error in the way this expansion operates: the expansion provides certain protections for subpoenas directed to third-party custodians of victims' records, but not for subpoenas directed to the victims themselves.

In Part III, I explain how the problem of expanding the scope of permissible subpoenas to crime victims is compounded by simultaneously lowering the *standard* for granting subpoenas. The proposed rule changes the standard from the previous *Nixon* standard of "are evidentiary and relevant" to a mere "likely to be admissible". That lower standard could lead to many more subpoenas to victims. For example, the lower standard could potentially mean that anything that a crime victim possesses (that can be reasonably identified) could be potential impeachment material is subject to subpoena. And this lower standard is likely to be impossible to apply (or, alternatively, always will be satisfied) for hearings where the Rules of Evidence do not apply. For example, for bail/detention hearings, under Fed. R. Evid. 1101(d), the rules of evidence—including the rules on

relevance—do not apply. So it seems to be the case that a defendant could make a "fishing expedition" demand of a victim, and (despite promise in notes to rules) there would be no effective way to defeat a "likely to be admissible" claim by the defense since there are no limits on admissibility.

In Part IV, I raise concerns about the new rule allowing production to be ordered directly to defense attorneys. The previous rule seemed to be restricted to production to a trial court. Because production goes straight to defense attorneys—rather than to trial courts for inspection in contemplation of trial—it appears that the new rule creates a significant risk that it will be used for discovery purposes against victims rather than trial preparation purposes preparing to defend against prosecutors … a dramatic expansion. As a practical matter, because many victims will be without legal counsel and cannot effectively litigate these issues, turning documents over to defense counsel means, almost inevitably, turning them over to the defendant. This will be a serious problem in domestic violence, sexual assault, and other cases where victims have significant privacy issues at stake.

In Part V, I explain why the Committee should reconsider its decision from 2008—much expanded in the proposed changes—to allow disclosure to the defense without notifying in "exceptional circumstances." That ill-defined exception allows defense attorneys to avoid notice to victims by raising nebulous concerns about revealing "trial strategy." Indeed, the Committee has apparently already heard testimony raising concerns about this language. Revealing victims' confidential records to a defendant without notification raises both constitutional right to privacy concerns and statutory concerns under the Crime Victims' Rights Act (CVRA) rights to "fair treatment" and "dignity and respect."[1] The solution to this problem is to eliminate any nebulous or "trial strategy" exception to the requirement that notice go to the victim. The defendant has no constitutional or statutory right to avoid disclosing strategy. Moreover, there is no good policy argument for allowing a defendant to shield such alleged "strategy" considerations. Essentially the arguments rests on premises justifying "ambush" tactics that should not be endorsed in this Committee.

In Part VI, I explain some potential drafting answers to these concerns. In light of these concerns, the Committee should focus on victim-related concerns more specifically. Whatever the Committee does for situations that do not involve the personal or confidential information of victims, for those specific situations it should continue to limit Rule 17 subpoenas to trials only. Any subpoenas to unrepresented victims should also be served through prosecutors and contain clear directions about how a victim can challenge the subpoena. Subpoenas to victims should also be adjudicated under the long-settled *Nixon* standards. And any production from crime victims should be automatically routed through the court. An example of how to draft such a rule comes from my home state of Utah—which I explain below. The Committee should also consider promulgating rules—or urging the enactment of statutes—that will assist in the appointment of legal counsel to crime victims who might otherwise be forced to litigate complicated privacy and other issues pro se.

For background purposes, I am the Ronald N. Boyce Presidential Professor of Criminal Law from the S.J. Quinney College of Law at the University of Utah and a former U.S. District

[1] 18 U.S.C. § 3771(a)(8).

Court Judge for the District of Utah (2002 to 2007). While I was a district court judge, I also served as the Chair of the Judicial Conference's Committee on Criminal Law (2005-07). More recently, I have been actively involved in representing crime victims on a pro bono basis in federal and state courts.[2] I am an actively engaged scholar on crime victims' rights issues and have published numerous articles related to victims' rights.[3] I am a co-author of the law school casebook *Victims in Criminal Procedure*.[4] In 2005, I proposed changes to Rule 17 to reflect victims' rights contained in the CVRA, and my suggestions helped to start the discussion about what later became the 2008 amendment and current Rule 17(c).[5]

I very much appreciate the assistance of one of my students at the College of Law, Lex Magnusson, in preparing this testimony. This testimony subject to revision up until the final deadline the Committee has set for public comment.

I. Most Victims of Crime Lack Legal Counsel to Litigate Rule 17 Issues.

The proposed rule changes have their origins in white collar crime cases. The Advisory Committee's work on Rule 17 began in the spring of 2022, when the White Collar Crime Committee of the New York City Bar Association submitted a proposal.[6] Their concerns centered on situations familiar to white-collar defense practice: obtaining corporate emails, business records, or financial documents that might establish an alibi or expose other culpable parties.[7] In such settings, modifications to Rule 17 may be needed—and my testimony takes no position on whether the proposed amendments appropriately address those concerns.

Instead, my testimony focuses on situations that white-collar defense attorneys were apparently not focusing on: subpoenas for personal or confidential information of *individual* crime victims. These are not sophisticated corporations with general counsel on retainer. They are sexual assault survivors, domestic violence victims, and others who typically lack legal representation, possess limited resources to litigate complex procedural issues, and have far more significant privacy and confidentiality interests at stake in their medical records, counseling notes, and other deeply personal materials. The Committee has recognized meaningful distinctions among types of

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[2] *See, e.g., In re Wild*, 955 F.3d 1196, 1207 (11th Cir.), *reh'g en banc granted, opinion vacated*, 967 F.3d 1285 (11th Cir. 2020), and *on reh'g en banc*, 994 F.3d 1244 (11th Cir. 2021) (citing me as "one of the nation's foremost authorities on victims' rights issues in general").

[3] *See, e.g.,* Paul G. Cassell, *The Victims' Rights Movement: Historical Foundations, Present Ascendancy, and Future Aspirations*, 56 U. Pac. L. Rev. 387 (2025) (keynote address for the *University of Pacific Law Review* symposium 2025); Paul G. Cassell, *Listening to Crime Victims … Merciful and Otherwise*, 102 TEX. L. REV. 1381 (2024).

[4] VICTIMS IN CRIMINAL PROCEDURE (5th ed. Carolina Academic Press 2025) (co-author with Douglas Beloof, Steven J. Twist, Margaret Garvin, William Montgomery, and Mariam El-menshawi).

[5] *See* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835 (2005); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861.

[6] Report of the Advisory Comm. on Criminal Rules, at II.A (May 15, 2025).

[7] Advisory Comm. on Criminal Rules, Draft Minutes, at 17 (Oct. 27, 2022) (testimony from white-collar defense practitioners focused on obtaining corporate emails, financial records, and business documents in fraud cases).

defense practice and case contexts[8] but may not have fully considered how those distinctions apply when the subpoena target is not a sophisticated corporation with in-house counsel, but an individual crime victim—often unrepresented—whose most personal records are at stake.

The Committee should consider its revisions to Rule 17 against this backdrop of the sad fact that many crime victims will lack legal counsel.[9] In America today, a serious obstacle to victims' rights enforcement, even in states with strong victims' rights protections, is the difficulty victims have in securing legal counsel. Indigent criminal defendants have been promised legal assistance ever since the Supreme Court's 1963 decision in *Gideon v. Wainwright*.[10] In contrast, crime victims are generally not provided legal counsel at state expense. Indeed, many state enactments specifically exclude such a possibility, presumably because of political compromises by victims' advocates to move victims' enactments forward.[11]

Lack of legal counsel for victims has long been a problem.[12] Writing in 2002, John Gillis and Douglas Beloof attempted to locate a lawyer enforcing victims' rights in California, the most populous state in the union. They were unable to identify even a single one.[13] At the same time, roundtable discussions with victims' advocates around the country identified the need for legal counsel as a major obstacle to enforcing victims' rights.[14] A 2012 report in California continued to identify the need for legal counsel as a significant unmet need.[15]

More recently, an analysis of California caselaw on the victim's right to attend trials reported that formal motions seeking to allow victims to remain in the courtroom were "rare."[16] While, in theory, prosecutors could advocate for victims, as a practical matter, such advocacy was very limited. Judges were also reluctant to intercede to enforce victims' rights.[17] The result of this lack of advocacy for victims was that California's provision concerning victims attending trial was hardly ever considered in court cases.[18]

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[8] Advisory Comm. on Criminal Rules, Draft Minutes (Apr. 8, 2024) ("One important point is the difference between the white collar practitioner and the CJA defense lawyer.").
[9] *See generally* Cassell, *The Victims' Rights Movement*, *supra* note 3, at 508-09.
[10] 372 U.S. 335 (1963).
[11] *See, e.g.,* Utah Const. art. I, § 28(2) (nothing in the amendment "shall be construed as creating a cause of action for . . . attorney's fees . . . .").
[12] *See generally* Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN'S J. LEGAL COMMENT. 177 (1992).
[13] *See* John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts,* 33 MCGEORGE L. REV. 689, 691 (2002).
[14] *See id.* at 692.
[15] *See* Heather Warnken, Real Justice: Victims' Rights Delivered: Report and Recommendations July 2012) (summarizing recommendations that emerged from a statewide conference on Marsy's law), https://www.courts.ca.gov/documents/BTB_XXII_IIIE_4.pdf [https://perma.cc/T8V6-MAXS].
[16] *See* Comment, Kathryn Merrill, *Shielding Crime Victims from the Witness Exclusion Rule's Sword: Amending California's Constitution to Protect Crime Victim-Witnesses' Right to be Present*, 55 U. PAC. L. REV. 55, 65 (2023).
[17] *Id.*
[18] *Id.*

The same lack of legal counsel generally exists in federal criminal proceedings. To be sure, lawyers occasionally step in to represent victims in high-profile cases. [19] But for most crime victims, legal representation remains elusive—a problem that scholars have increasingly recognized. [20] Law professors Margaret Garvin and Douglas Beloof, for example, have written an important article about the need to provide legal representation for victims. They reviewed an innovation in the military justice system (a specialized federal context, of course), where the Special Victim Counsel (SVC) program was created to provide lawyers for sexual assault victims.[21] Garvin and Beloof explained that, under the program, victims received detailed advice on how to navigate the challenges of the military's criminal justice process. They concluded that sexual assault victims in the civilian criminal justice system must likewise "have independent lawyers representing them in exercising and enforcing their legal options. The alternative, leaving protection of victims' rights to the parties, gives only the parties control over the existence and the scope of victims' rights and utterly eviscerates victim agency."[22]

Given the complexity of modern criminal justice processes—and particularly complexities relating to subpoenas—victims will often need legal advocacy to effectively protect their rights. While counsel may step in to represent victims in certain high profile criminal cases,[23] in many day-to-day criminal justice in America, representation often remains elusive.

Finally, a significant subset of federal criminal prosecutions involves individual crime victims rather than abstract public harms or solely governmental interests. Federal offenses that involve force or threats against the person—including homicide, assault, kidnapping, and robbery—regularly bring before federal courts cases in which identifiable individuals have been directly harmed. According to recent data from the U.S. Sentencing Commission,[24] in fiscal year 2023, there were 3,697 federal cases with identifiable victims in force-or-threat-based offenses, and in 2,722 of those cases at least one perso*n* was the victim; the Commission identified 6,671 individual victims across such federal violent crimes.[25] Moreover, many other federal offenses can involve direct impacts on individual victims, even though they might not be immediately categorized as "violent" or victim-related crimes.[26]

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[19] *See, e.g.,* Ksenia Matthews, *Who Tells Their Stories? Examining the Role, Duties, and Ethical Constraints of the Victim's Attorney Under Model Rule 3.6*, 90 FORD. L. REV. 1317, 1319–20 (2021) (discussing victims' counsel in "celebrity" criminal cases).

[20] *See, e.g.,* Note, Madelyn Hayward, *A Right to Be Heard: A Proposal for Independent Victim's Counsel for Sexual Assault Survivors*, 49 S. ILL. U. L.J. 101 (2024).

[21] *See* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67 (2015).

[22] *Id.* at 85.

[23] *See, e.g.,* Ksenia Matthews, *Who Tells Their Stories? Examining the Role, Duties, and Ethical Constraints of the Victim's Attorney Under Model Rule 3.6*, 90 FORD. L. REV. 1317, 1319–20 (2021) (discussing victims' counsel in "celebrity" criminal cases).

[24] *See* U.S. Sentencing Comm., Federal Offenses Involving Force or Threat Against the Person (Aug. 2025), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/crime-victims-fact-sheets/2025_force-threat.pdf.

[25] *Id.* at 1.

[26] *See, e.g.*, U.S. v. Boeing, 2022 WL 13829875 (N.D. Tex. 2022) (concluding that 346 Boeing 737 MAX crash victims were "victims" under the CVRA of Boeing's crime to defraud the FAA) (discussed in Cassell, *The Victims' Rights Movement*, *supra* note 3, at 509-10).

II. The Proposed Amendment Dramatically Expand 17(c)'s Scope Beyond Trials to Many Other Hearings.

A. The Extension of Rule 17(c) Beyond Trials Dramatically Increases the Effect of the Rules on Crime Victims.

Proposed new Rule 17(c) dramatically expands the scope of subpoenas from only trials to detention, suppression, sentencing, revocation, and (with permission of the court) any other hearing. This exposes victims to potential subpoenas for all sorts of hearings that were never involved before. The current proposal reads:

> *When Available.* A non-grand-jury subpoena is available for a trial; for a hearing on detention, suppression, sentencing, or revocation; or—with the court's permission in an individual case—for any additional evidentiary hearing.[27]

The Advisory Committee Memorandum summarizing the rule changes (hereinafter referred to as "The Committee Memo"[28]) indicates that significant expansion of the new rule is intentional. The Committee Memo explains the intent to extend subpoenas to documents and other items beyond trial-related situations:

> Some courts had interpreted the existing language in Rule 17(c)(1), which refers only to "trial," as barring subpoenas for all proceedings other than trial. This interpretation leaves the defense with no mechanism to obtain evidence from third parties for proceedings other than trial, and drastically limits the government's options. To fix this, new Rule 17(c)(2)(A) expressly authorizes the use of subpoenas at sentencing and suppression hearings (where these subpoenas are already used regularly in many districts), as well as detention and revocation hearings, where there is statutory or rule authority for parties to present evidence and the need for third party evidence arises on occasion.[29]

There may be situations not involving the personal and confidential information of crime victims where an expansion of the rule beyond trials is appropriate. My testimony is limited to situations involving subpoenas directed to the personal or confidential of crime victims. And it is important for the Committee to understand the vast expansion of authority for defendants to subpoena materials from victims that this amendment would entail.

Under the previous rule, as suggested in the Committee memo, defense subpoenas were often limited to trial situations—effectively meaning that in more than 95% of all cases where pleas resulted,[30] no victim subpoenas were commonly issued. The new rule thus expands the

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[27] Proposed New Crim. Pro. R. 17(c)(2)(A).

[28] *See* Committee Memo., in Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and the Federal Rules of Evidence (Aug. 2025), available at: https://www.uscourts.gov/forms-rules/proposed-amendments-published-public-comment.

[29] Committee Memo, *supra* note 28, at 74.

[30] *See* Sam J. Merchant, *Plea Agreements and Suspending Disbelief*, 37 FED. SENT'G. RPTR. 15 (2025) (estimating that around 98 of federal cases are resolved through guilty pleas).

possible situations where victims could be subpoenaed by something like 20-fold—i.e., around 2000%.

As an illustration of the expansion, consider the first new hearing listed—detention hearings. As noted in the Committee Memo, under the current rules, subpoenas for detention hearings "have seldom been used."[31] Under the new proposed rule, that seems likely to change.

Under the plain language of the proposed new rule, in any violent crime case, it would seem that a defense attorney could argue that the extent of any injuries (or lack of injuries) to a victim was relevant to the dangerousness assessment of the defendant that is necessarily involved in detention and related decisions.[32] Accordingly, the defense counsel might automatically and routinely issue a subpoena for all medical and psychological records of a victim a few days after the crime—arguing that it would help him show that the level of dangerousness alleged by the government is (potentially) undercut by the medical records.[33] Such a subpoena would likely be a fishing expedition, designed for nothing other than discovery purposes. But there would be no real check on seeking such subpoenas.[34]

The Committee Memo may rest on the premise that, because detention hearings often happen swiftly, it may not be feasible for defense counsel to seek issuance of a subpoena to a victim in a few days. But as the Committee Memo notes—quite correctly—even after the initial detention decision, it is always possible for a defendant to seek reconsideration of the earlier ruling.[35]

Moreover, the Committee Memo can be read as suggesting that subpoenas to victims for such sensitive records are within the ambit of the new rules. The Committee Memo explains that the Committee had heard concerns about the need for subpoenas for "treatment" records.[36] It is unclear whether the Committee had in mind the defendant's own "treatment" records (such as a history of seeking drug treatment) or "treatment" records of a victim (such as medical or counseling records of a sexual assault victim). But whatever the Committee had in mind, the new rule now clearly would allow defense counsel to seek issuance of a subpoena for a confidential records of, for example, a sexual assault victim for use at the detention hearing.

Nonetheless, the Committee asserted that "everyone agreed" that "it would be rare to use a 17(c) subpoena at an initial detention [hearing]…."[37] It is interesting to think about who was

[31] Committee Memo, *supra* note 28, at 74.
[32] *See* 18 U.S.C. § 3142(c) (generally requiring judicial officer to consider whether release of a defendant "will endanger the safety of any other person or the community …."); *see also* 18 U.S.C. § 3142(g) (listing factors to be considered as including "the nature and circumstances of the offense charged" and "the nature and serious of the danger to any person or the community that would be posed by the person's release").
[33] As discussed in the next section, *infra*, the rules of evidence do not apply at a detention hearing, so that traditional rules of "relevancy' may not be in play.
[34] *See* Testimony of Kristin Eliason, Head of Services, Volare, Before the Judicial Conference Advisory Comm. on Criminal Rules, at 9 (Jan. 22, 2026) (providing examples of "fishing expedition" requests in sexual assault cases, even under the current rule).
[35] Committee Memo, *supra* note 28, at 74.
[36] *Id.*
[37] *Id.*

represented among the "everyone" in this agreement. The Advisory Committee on Criminal Rules currently includes representation for judges, prosecutors, and defense counsel—but not crime victims. While the Committee heard from some victims' advocates, it is difficult to characterize their earlier testimony as agreement on how this expansion would work in practice

More broadly, the problem here boils down to a should/would problem. It appears that there is general agreement that subpoenas at detention hearings *should* be "rare." But it is hard to understand why anyone believes that they *would* be rare—under the proposed, expansive new rule that allows defense counsel to seek subpoenas a detention hearings.

Under the new rule, there is no reason for a defense attorney in a violent crime case not to make a motion to issue a subpoena to any victim for all medical and psychological treatment records. Given recent automation technology, such subpoenas could be automatically prepared with minimal expenditure of time. Nor is it clear that the rule's "particularity" requirement—that the defense "describe each designated item with particularity"[38]—provides much of a safeguard. A subpoena seeking "all medical or psychological treatment records connected with the charged crime" might well satisfy this requirement. Even if the victim believes the particularity requirement is not satisfied, it is hard to see how an unrepresented crime victim will be able to effectively litigate such issues.

Moreover, in significant ways, litigating such issues is the harm itself. A sexual assault victim, for example, may be seeking psychological counseling dealing with the aftermath of an attack … while simultaneously having to defend against a defense subpoena seeking to review (and, perhaps, turn over to the victim's attacker) sensitive and confidential counseling records. In such cases, the litigation process itself becomes another source of harm, compounding the victim's trauma through what scholars term "secondary victimization."[39]

The other requirements in the rule are also unlikely to provide much protection to victims. The first requirement—that the materials "are likely to be possessed by the subpoena's recipient"[40]—seems likely to be satisfied when the subpoena seeks the victim's own records. The victim likely has electronic copies of such records sent automatically by new computerized record-keeping systems. And, of course, the victim could be deemed to be in "possession" of such records, because the victim could request copies from her medical and mental health providers. Second, the requirement that the records "are, or contain information that is, likely to be admissible as evidence in the designated proceeding"[41] offers little help at detention hearings. At detention hearings, "[t]he rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing."[42]

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[38] Proposed Rule 17(c)(2)(D).

[39] *Cf.* BELOOF, CASSELL ET AL., *supra* note 4, at 4 (discussing "secondary victimization" in criminal proceedings); Tali Gal & Ruthy Lowenstein Lazar, *Sounds of Silence: A Thematic Analysis of Victim Impact Statements*, 27 LEWIS & CLARK L. REV. 147, 180 (2023) ("Every direct interaction with the criminal process creates secondary victimization, whether it is … the encounter with the defendants in court[] or other acts that are part of the routine of the criminal proceedings").

[40] Proposed Rule 17(c)(2)(B)(i).

[41] Proposed Rule 17(c)(2)(B)(iii).

[42] 18 U.S.C. § 3142(f)(2)(B).

That leaves only the last requirement—"not reasonably available to the party from another source."[43] Presumably defense attorneys might, at least initially, target their subpoena to the government. But the government might not have all the medical records. If the government then contacts the victim, asking for the medical records, the victim still bears the same burden she would have faced with a direct subpoena from the defense.

To be sure, the Committee has properly ensured that such subpoenas to third parties will require a motion, which will then trigger "notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object."[44] But this is where the proposed rule appears to rest on unsupportable assumptions about the ability of crime victims to "move to quash" or "modify" the subpoena. Given that most crime victims lack legal counsel, it is uncertain how this would work in the real world.

Similar concerns arise with the new rule making a sentencing hearing fair game for routine defense subpoenas, as defense attorneys could now automatically subpoena victim records connected to victim impact statements. It is important to recognize that federal cases generally do not extend full confrontation rights to sentencing hearings, a rule that implicitly blocks cross-examination of victims at federal sentencing hearings.[45] Notably, this federal rule is consistent with the weight of authority in the states.[46] The United States Supreme Court has long held that a defendant's due process rights are not violated by a court's refusal to allow cross-examination of a victim at sentencing.[47]

But under the new proposed rule, defense counsel would seek—in effect—the functional equivalent of cross-examining victims by subpoenaing their confidential records. For the reasons explained above in connection with detention hearings, the requirements for moving for such a subpoena are unlikely to prevent such motions. And, as before, crime victims who lack legal counsel will be poorly situated to litigate any such motion. Indeed, it seems quite possible the defense attorneys might serve a subpoena for records on any victim who expresses an intention of delivering a victim impact statement at trial, making the "price of admission" for exercising a CVRA to be heard at sentencing[48] the need to defend against a defense subpoena.

To be sure, there is one aspect of a sentencing hearing—restitution—where victim records may be relevant. For example, if a victim has made an application for restitution from the

[43] Proposed Rule 17(c)(B)
[44] Proposed Rule 17(c)(3)(B).
[45] *See* Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 169 (2011) (citing, e.g., U.S. v. Navarro, 169 F.3d 228 at p. 236 (5th Cir. 1999); U.S. v. Kirby, 418 F.3d 621 at p. 627-28 (6th Cir. 2005); Szabo v. Walls, 313 F.3d 392 at p. 398 (7th Cir. 2002); U.S. v. Fleck, 413 F.3d 883 at p. 894 (8th Cir. 2005); *U.S. v. Powell*, 973 F.2d 885 at p. 893 (10th Cir. 1992); U.S. v. Cantellano, 430 F.3d 1142 at p. 1146 (11th Cir. 2005).
[46] *See* Cassell & Erez, *supra* note 45, at 168 ("the weight of authority in [the] United States weighs against a right to cross-examine victims who give victim impact statements at sentencing").
[47] *See* Williams v. People of State of N.Y., 337 U.S. 241 at p. 246 (1949) (finding defendant does not have a due process right to cross-examine witnesses in a sentencing hearing), discussed in Cassell & Erez, *supra* note 45, at 170.
[48] 18 U.S.C. § 3771(a)(4).

defendant, then some information about the victim's losses may become relevant. But expanding the scope of Rule 17 subpoenas is unnecessary for such situations. The current rule (limited to trials) has been in effect for decades without (to my knowledge) significant reports of problems. This is apparently because of existing procedures regarding restitution, which are spelled out (appropriately enough) in Rule 32—which specifically covers sentencing procedures.

Under Rule 32, the probation officer is directed to collect information relevant to restitution issues.[49] The federal restitution procedures statute requires the probation officer to obtain a "complete accounting of the losses to each victim" for the court's restitution decision.[50] This accounting can include information from the prosecutor, the defense, or the victim. Thereafter, the defense (and the prosecution) receive notice of the report. Then the defense and the prosecution both have an opportunity to object to any aspects of the report.[51] Thereafter, the parties meet and confer, attempting to resolve any objections. Ultimately, if there remain objections to the report, then the district judge must make a ruling on the objections.[52]

The reason defense subpoenas have presumably been rare or perhaps even non-existent at sentencing proceedings regarding restitution issues is that the government on behalf of the victim bears the burden of proving any loss. The federal restitution procedures statute expressly provides: "The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."[53] The defense has no obligation at all, and thus does not generally need to subpoena records and the like.[54] And Rule 32 already contains discretionary rules giving district judges authority to handle evidentiary issues as necessary at sentencing hearings.[55] To the extent that there is any deficiency in the existing Rule 32 sentencing procedures for restitution—which has yet to be established—then those deficiencies should be addressed directly in those sentencing procedures.

B. The Proposed Rule Contains a Significant Apparent Drafting Error That Reduces Protections for Crime Victims

In addition, the Advisory Committee's proposed amendment appears to contain a significant drafting error, as a result of maintaining legacy language from the earlier (2008) amendments to the rule. Specifically, the new proposal contains protections for subpoenas served on third parties for victim records—but does not maintain the same protections for subpoenas served directly on victims.

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[49] Fed. R. Crim. P. 32(c)(1)(B).
[50] 18 U.S.C. § 3664(a).
[51] Fed. R. Crim. P. 32(f).
[52] Fed. R. Crim. P. 32(i)(3).
[53] 18 U.S.C. § 3664(e). *See, e.g.,* United States v. Coulter, 133 F.4th 1083 (2025) ("the government must prove those losses, and the amount of such losses, by a preponderance of the evidence").
[54] *See, e.g.,* United States v. Anthony, 22 F.4th 943, 953 (10th Cir. 2022) ("the Government bore the burden of proving that but for [the defendant's offenses], [the victim] would not have suffered the losses for which the Government sought restitution. The Government failed to meet its burden, so [the defendant] did not need to present evidence.").
[55] *See* Fed. R. Crim. P. 32(i)(2).

As the rule currently stands based on the 2008 amendments, Rule 17(c)(3) provides special protection against trial subpoenas directed to third parties:

> (3) *Subpoena for Personal or Confidential Information About a Victim*.
>
> After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about *a victim may be served **on a third party*** only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.[56]

The Committee's new proposed expansion of Rule 17 requires a motion to be made for issuance of a subpoena that is directed to a "third party" as follows:

> (A) Motion and Order Required. After a complaint, indictment, or information is filed, a non-grand-jury subpoena requiring the production of personal or confidential information *about a victim may be served **on a third party*** only by court order upon motion.[57]

Under this proposed rule, then, a subpoena for medical records of a sexual assault victim to a hospital is covered by the new rule and a motion is required—but a subpoena for those same medical records to the victim herself is not. Perhaps the victim could argue that the reference to a "third party" covers the victim—who is a third party to the criminal proceedings. But it appears that the "third party" language is a legacy of the earlier rule, which seemed to differentiate between the victim and the "third party" from whom the victim's information was being sought.[58]

This differentiation may have made some sense under the earlier rule, which was restricted to trials where the victim might be expected to testify. But the apparent drafting error has important ramifications given the way the new proposed rule is structured. An earlier section in the proposed rule indicates that a motion and order "are not required before service of a non-grand jury subpoena unless (3) or (4), a local rule, or a court order requires them."[59] As a result of this language, item (3)—subpoenas to "third parties" about crime victims records—would require a motion and then an order upon that motion. But subpoenas to the crime victim herself for those same records does not! This seemingly means that the protections found elsewhere in the proposed rule—regarding the necessary showing in a "required motion"—do not apply to subpoenas going directly to victims. And the new proposed rule heads further in the direction of cutting out prosecutors from proceedings concerning victim subpoenas, as the defense subpoena can go directly to victims without triggering a motion requirement that would provide notice to the prosecution. Indeed, the proposed rule states that "[w]hen no motion is required, a party need not disclose to any other party that it is seeking or has served the subpoena, unless a local rule or court order provides

[56] Fed. R. Crim. P. 17(c)(3).
[57] Proposed Rule 17(c)(3).
[58] *See* Fed. R. Crim. 17 Adv. Comm. Notes (2008 Amendment) (referring to seeking "personal or confidential information about a victim from a third-party).
[59] Proposed Rule 17(c)(2)(C).

otherwise."[60] Thus, the rule as drafted perversely incentivizes defense attorneys not to alert prosecutors to subpoenas directed to crime victims, who may be uncertain how to proceed.

If my understanding is correct, then this drafting error should be corrected—and I suggest language to that effect in the last section of this testimony.

III. Lowering the Standard for Issuing Subpoenas from the Previous *Nixon* Standard Significantly Expands the Range of Subpoenas to Crime Victims.

The next point of concern about the proposed new rule change is that it would lower the standard for issuing the subpoena from the long-standing *Nixon* standard—i.e., that materials sought "are evidentiary and relevant"—to a mere "likely to be admissible". Here again, I emphasize that I am speaking only about subpoenas directed to victims for their personal and confidential information. I am also aware that the Committee has considered this issue at length over the three years in the run-up to the rule change. But it is unclear to me whether the Committee has fully considered how such a change might operate in connection with defense subpoenas directed to crime victims.

It may be useful to consider how the defense might deploy the new rule in a sexual assault case at a detention hearing. As discussed in the previous section, the defense might quickly issue a subpoena to a sexual assault victim for all of her medical and counseling records. Under the *Nixon* standard, to obtain issuance of the subpoena, the defense as the moving party would need to show:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."[61]

Under the proposed rule, the defense is relieved of trial-related restrictions (as discussed in the proceeding section) and now need only show that the requested materials "are, or contain information that is, likely to be admissible as evidence in the designated proceeding."[62] But at a detention hearing, the rules of evidence are not enforced. As the detention hearing statute provides: "The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing."[63] That means, potentially, that *anything* is "likely to be admissible as evidence" at the hearing.

Nor is the requirement that a defendant "state facts showing that each item satisfied (2)(B)(i)-(iii)" likely to be of much use. Here again, a sexual assault victim will likely possess (or

[60] Proposed Rule 17(c)(2)(F).
[61] United States v. Nixon, 418 U.S. 683, 699-700 (citing United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)). *See generally* Cassell, *Treating Crime Victims Fairly*, *supra* note 5, at 911-13.
[62] Proposed Rule 17(c)(2)(B)(iii).
[63] 18 U.S.C. § 3142(f)(2)(B).

have access to) her own records—item (i). The sexual assault victim's confidential records may "not reasonably available to the [defendant] from another source—item (ii).[64] And, as just explained, the limitation that the records are "likely to be admissible as evidence in the designated proceeding" is effectively nullified, since the rules of "admissibility" are inapplicable.

Moreover, if I understand the proposed rule change correctly, it will dispense with the *Nixon* requirement that a party show that the application was "made in good faith" and was "not intended as a general 'fishing expedition.'" That important requirement—explicitly made part of the *Nixon* standard—is now erased through lowering the burden from the *Nixon* standard. Instead of a direct safeguard against fishing expeditions, other aspects of the rule are supposed to serve as fallback, secondary safeguards to prevent fishing expeditions.[65]

Count me skeptical. The "particularity" requirement is of little use, because defendants will presumably seek specific records—such as "the victim's mental health counseling records arising from the alleged sexual assault by [name of defendant] on [date] and [place]." Whether that is truly enough particularity could, of course, be litigated. But—again—that possibility is unrealistic in contemporary American criminal justice where most crime victims lack legal counsel.[66] The Committee Notes seem to be reassured that particularity and other requirements will be surfaced before a judge and serve as necessary checks when defense counsel are "defending a subpoena against a motion to quash."[67] But most crime victims will never be able to effectively file such a motion, which requires access to the federal court's electronic filing systems and understanding of how to draft a motion to quash.[68]

To be sure, many courts have tried to put in place jerry-rigged systems for assisting pro se litigants. But those systems often revolve around pro se litigants seeking to affirmatively use the federal court system, by filing lawsuits seeking damages and the like. In such circumstances, it may well be appropriate to force the pro se litigant to navigate a complicated process and work with the clerk's office to make appropriate filings and deliver appropriate notices before obtaining hearings and other relief that they seek. But none of that is true for, for example, a sexual assault victim who has been traumatized a few days earlier and is now trying to defend against a defense subpoena for confidential counseling and medical records. The potential for "secondary victimization" is tremendous, particularly because it appears that the crime victim—as the movant challenging a subpoena—would apparently have to bear the burden of proving unreasonableness.[69]

Nor is it immediately clear how helpful government prosecutors can be in such circumstances. Under the Crime Victims' Rights Act, prosecutors are allowed to "assert" for the

[64] The Government may possess the records in question, in which case the defendant should be required to try and obtain them from the Government first. But appears that many situations will exist where the Government does not have all the "confidential and personal" material of a crime victim, meaning that a defense subpoena will satisfy item (2).
[65] Committee Memo, *supra* note 28, at 74.
[66] *See* Part I, *supra*.
[67] Committee Memo, *supra* note 28, at 75.
[68] As a partial corrective to this problem, the rule should be drafted to provide clear and easy-to-understand information for how *pro se* crime victims can file a motion to quash. *See* Part VI, *infra.*
[69] *See, e.g.,* In re Grand Jury, 478 F.3d 581, 585 (4th Cir. 2007).

victim the rights listed in the CVRA.[70] Notably in this context, these rights include the CVRA for a victim "to be treated with fairness and with respect for the victim's dignity and privacy."[71] So perhaps some prosecutors will file motions seeking to quash (or modify) overbroad subpoenas as violating these statutory commands.

But, here again, the process becomes the punishment. For the prosecutor to file such a motion, presumably the prosecutor would need to confer[72] about the subpoena to obtain information relevant to the motion to quash. But the prosecutor's discussion with the victim would not, itself, be confidential or otherwise privileged, raising complex issues of how the prosecutor would interact with the victim. More fundamentally, it is not immediately clear that the prosecutor would have "standing" to raise a particularity objection to an overbroad subpoena served on a sexual assault victim. The prosecutor, famously, represents the government and not the victim. The government may lack "standing" to file such a motion to quash a subpoena directed at a third party. And so, at most, the prosecutor could perhaps assist the sexual assault victim in navigating pro se filing mechanisms for filing a motion to quash—and then, perhaps, file an amicus brief in support.

It also must be noted that it is possible that prosecutors—seeking to avoid appeal issues—may not have the same interests in the matter as the crime victim. It may be simpler for a prosecutor to simply have every record turned over to the defense—even when rules of privilege and confidentiality provide otherwise.[73]

Similar problems arise at sentencing hearings. As with detention hearings, the Federal Rules of Evidence are inapplicable, by their own terms.[74] So, here again, it is hard to see how the new "likely to be admissible" standard would operate. *Everything* is *likely* to be admissible—indeed, *is* admissible, because no limitations can be placed on what a defendant wants to present to a judge. By federal statute, "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[75] And courts have noted that restricting the information district judge use in determining a sentence "would conflict with federal law and improperly hinder district courts' pursuit of the ultimate goal: imposing an appropriate sentence."[76]

The Advisory Committee appears to have believed that this standard was, de facto, the operating rule in some districts now where these issues are litigated. But here again, it is important to emphasize that the existing rule—and the incorporated *Nixon* standard— was tethered to trials. By specifically expanding the rule to many other proceedings without the same evidentiary

[70] 18 U.S.C. § 3771(d)(1).
[71] 18 U.S.C. § 3771(a)(8).
[72] 18 U.S.C. § 3771(a)(5).
[73] *Cf.* United States v. Ray, 585 F.Supp.3d 445 (S.D.N.Y 2022) (complicated proceedings involving the psychotherapist-patient privilege connected to crime victims' records).
[74] Fed. R. Evid. 1101(d) ("These rules—except for those on privilege—do not apply to the following: … sentencing ….").
[75] 18 U.S.C. § 366.
[76] United States v. Ellington, 2025 WL 2793737 at *3 n.3 (6th Cir. 2025).

restrictions associated with a trial (e.g., detention and sentencing hearings), the proposed rule clearly begins to resemble an anything-goes approach.

Nor can many of these issues be resolved via the government's *Brady* obligations—i.e., its obligations to turn over exculpatory evidence. Sexual assault victims, for example, often rely on confidential psychological counseling to overcome the harmful effects of the assault. Counseling records of that nature will not be turned over to prosecutors—because doing so would destroy the very confidentiality that is required for the counseling to work. This, in turn, means that the victim will be forced to assert privileges on her own, often without legal counsel and under a new and uncertain "likely to be admissible" framework. This is recipe for harassing victims and traumatizing them further.

IV. Direct Production to Defense Attorneys of Confidential and Potentially Privileged Materials from (Often Unrepresented) Crime Victims Is Inappropriate.

An additional concern is that the new proposed rule also allows production to be ordered, via motion, directly to defense attorneys.[77] The previous rule seemed to be restricted to production to a trial court. In situations where victims are concerned about retaliation or harassment by defendants, direct production to defense attorneys will allow defendants ready access to the materials. Additionally, because production goes straight to defense attorneys—rather than to trial courts for inspection in contemplation of trial—it appears that the new rule will be used for discovery purposes rather than trial preparation purposes … a dramatic expansion.

The proposed rule change appears to violate the CVRA, by cutting the district court out of its statutorily required role of protecting crime victims. The CVRA specifically "places responsibility on the [district] court for its implementation, requiring that '*the court shall ensure* that the crime victim is afforded [those] rights.'"[78] Allowing a subpoena process to operate directly between defense counsel and often unrepresented crime victims means that the courts will not be "ensuring" fair treatment and other CVRA rights in that process. And, in addition, because the new proposed process can exclude prosecutors, they too are cut out of any ability to discharge their CVRA responsibilities—to use their "best efforts" "to see that crime victims are notified of, and accorded, the rights described [in the CVRA]."[79]

To be sure, federal district courts are extremely busy and understandably do not want to have unnecessary work thrust upon them. But so far as I have been able to determine, the common process of requiring production to be made to courts under the current rules has not generated undue work. Indeed, the Advisory Committee Note to the proposed new rule explains that "[t]he rule places no restrictions on the court's discretion to vary from these default rules. For example, when a subpoena is likely to produce private or privileged information, it is common practice for

[77] *See* Proposed Rule 17(c)(5) ("A non-grand jury subpoena requested by a represented party may require the recipient to produce the designated items to that party's counsel.").
[78] United States v. Atl. States Cast Iron Pipe C*o.,* 612 F. Supp. 2d 453, 458 (D.N.J. 2009) (emphasis added) (*citing* 18 U.S.C. § 3771(b)(1)); *see also* United States v. Stevens, 239 F. Supp. 3d at 421 (explaining that "the CVRA imposes no less than an *affirmative* obligation on [district] judges to ensure that the victim's rights are respected" (emphasis in original)).
[79] 18 U.S.C. § 3771(d)(1).

courts to order in camera review before disclosure to anyone."[80] This "common practice" needs to be made universal for situations where a subpoena directs production of personal or confidential information about a victim. Otherwise, the courts are not discharging *their* obligations to "ensure" that crime victims are treated "fairly" and are "free from harassment and abuse" in the process.[81] Making a "common practice" part of the new rule is required by the CVRA.

Finally, the Committee should consider the extent to which its proposed rule conflicts with state law on similar issues. Some states have added provisions to their victims' rights laws requiring criminal defense attorneys and their agents to initiate any contact with victims only through the prosecutor's office.[82] The Committee's approach directly conflicts with the policy goals behind such laws, which include "leveling the playing field between victims with counsel and those without counsel" and the concern that "[i]t is possible that some victims may experience a negative reaction if contacted directly by the defense team."[83]

V. The "Exceptional Circumstances" Exception in the Proposed Amendment Is an Unjustifiable Erosion of Victim Rights

The proposed expansion of Rule 17 also creates significant concerns about how the ill-defined "exceptional circumstances" exception to victim notice requirements would operate. Indeed, the exceptional circumstances exception likely conflicts with constitutional and statutory requirements. The Advisory Committee should simply eliminate that exception from the proposed rule or narrow it to apply to only destruction-of-evidence situations.

A. Crime Victims' Rights Advocates Have Long Been Concerned About the "Exceptional Circumstances" Exception.

Some drafting background will be helpful here, as crime victims' rights advocates have long been concerned about how exceptions to the notice requirements of Rule 17 operate. The proposed expansions in the rule compound problems previously identified.

In 2005 through 2008, this Committee considered changes to the Federal Rules of Criminal Procedure to reflect the newly enacted Crime Victims' Rights Act. I was involved in that process,[84] including making a detailed proposal to this Committee for requiring notice to victims and a requirement that the Court make a finding of relevance and reasonableness before any victim could be served with such a subpoena. I proposed the following proposed rule:

> [Cassell Proposed] Rule 17(h)(2). Victim Information.
>
> After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that

[80] Committee Memo, *supra* note 28, at 19.
[81] 18 U.S.C. § 3771(a)(8).
[82] *See, e.g.,* Ariz. Rev. Stat. Ann. 13-4433(B), upheld against constitutional attack in Arizona Attorneys for Criminal Justice v. Mayes, 127 F.4th 105 (9th Cir. 2025).
[83] *Id.* at 109.
[84] *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure*, *supra* note 5.

> the information is relevant to trial and that compliance appears to be reasonable. If the court makes such a finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.[85]

The Committee, however, did not fully adopt my proposal. While adding in special protections for subpoenas for personal or confidential information of victims, it also included a provision allowing ex parte subpoenas in certain situations.

> [Advisory Committee Publicly Circulated Proposed Rule 17(c)(3)—Subpoena for Personal or Confidential Information About Victim.
>
> After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte. Before entering the order, the court may require that notice be given to the victim so that the victim has an opportunity to move to quash or modify the subpoena.[86]

When that proposal was publicly circulated allowing "ex parte" issuance of subpoenas for personal and confidential information, I and others (such as the American Bar Association) raised concerns.[87] In testimony to the Committee—republished later in a law review article—I explained those concerns. What follows in the next few pages is a summary of my (and others') arguments at the time..

In my view, subpoenas issued ex parte are plainly unfair to victims. When a victim's personal or confidential information is at stake, it is truly hard to understand how anyone could argue that allowing it to be turned over to the defense without any opportunity to be heard treats victims "fairly," as the CVRA requires.

I further argued that the Advisory Committee had not clearly explained when a court should proceed ex parte and when it should follow the standard practice of giving notice to the victim as the affected party. The only justification the Advisory Committee gave for the extraordinary step of allowing ex parte procedures is to avoid forcing "premature disclosure of defense strategy to the government."[88] But when a victim's confidential information is at stake, some interest in concealing "strategy" from the opposing party can hardly be sufficient grounds for ex parte issuance of a subpoena. As the Supreme Court has bluntly explained, our adversary system is not

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[85] *Id.* at 835.
[86] *Id.*
[87] *See* Cassell, *Treating Victims Fairly*, *supra* note 5, at 904-05.
[88] *See* Proposed Amendments, Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure (Aug. 2006), www.uscourts.gov/rules/newrules1.html [hereinafter Proposed Amendments], Rule 17, at 8 (emphasis added).

"a poker game in which players enjoy an absolute right always to conceal their cards until played."[89]

I also argued that allowing ex parte procedures violated basic principles of fairness. I noted that the American Bar Association raised this point quite effectively in its comments to the Advisory Committee on Proposed Rule 17.[90] The ABA explained that Canon 3(B)(7) of the Model Code of Judicial Conduct provides in pertinent part that "[a] judge shall accord to every person who has a legal interest in the proceedings, or that person's lawyer, the right to be heard according to law."[91] The Proposed (2007) Rule 17 would allow that precept to be violated by denying some victims a chance to be heard before compromising their legal rights to confidentiality in personal and confidential information. Similarly, the ABA noted that its Model Code of Judicial Conduct generally forbids courts from considering ex parte communications.[92] The (2007) Proposed Rule 17, of course, flew in the face of that well-established prohibition. While the Model Code of Judicial Conduct is not binding on federal courts, its principles have generally been viewed as instructive.[93]

In 2007, I also argued that defense attorneys would be treading on ethical thin ice under the proposed Rule 17. The Model Rules of Professional Conduct and the ABA Criminal Justice Standards both provide that "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violates the legal rights of . . . a [third] person."[94] When defense attorneys obtain ex parte subpoenas for a victim's confidential information, they may very well violate the rights of the victim, such as the right to confidentiality preserved in the doctor-patient privilege or psychotherapist privilege.

I further explained in 2007, that for reasons such as these, the federal rape shield rule (among other examples) properly requires defendants to *always* provide notice to the court—and to the victim—before seeking to introduce evidence about a rape victim's prior sexual history.[95] The rape shield rule does not create any exception for situations that might lead to disclosure of defense "strategy." Rule 17 should follow the same approach and ensure that victims always have an opportunity to contest disclosure of their personal and confidential information in court.

I also stated that any defense interest in withholding strategy must give way to facially neutral rules. Both my 2005 proposed amendment (which required notice to always be given to victims) and the Advisory Committee's proposed (2007) amendment applied evenhandedly to both

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[89] Williams v. Florida, 399 U.S. 78, 82 (1970) (citing William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 292).

[90] Letter from Robert M.A. Johnson, Chair, ABA Criminal Justice Section, to Hon. Peter G. McCabe, Sec'y of the Comm. on Rules of Practice and Procedure (Feb. 1, 2007), available at www.uscourts.gov/rules/CR%20Comments% 202006/06-CR-028.pdf. At the time the ABA was commenting, it was unclear when notice to victims was going to be required.

[91] *Id.* (citing Model Code of Jud. Conduct Canon 3(B)(7) (2004)).

[92] *Id.*

[93] *See* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 678-79 (2005) (citing United States v. Will, 449 U.S. 200, 211-12 & n.12 (1980); Hanrahan v. Hampton, 446 U.S. 1301, 1301 (1980)).

[94] Model R. Prof'l Conduct 4.4(a) (2007); see also ABA Criminal Justice Study, Standard 4-4.3 (1993).

[95] *See* Fed. R. Evid. 412(c)(1)(B).

the prosecution and the defense. Thus, the amendments are not designed to force disclosure of defense strategy, as they might also force disclosure of prosecution strategy if it is the prosecution who subpoenas confidential victim information. Due process is satisfied as long as the prosecution and the defense have reciprocal rights and courts apply the Rules consistently.[96]

Even if there is some tangential defense interest in concealing its strategy, the Advisory Committee proposal addresses it in the most haphazard way. The interest the Advisory Committee purports to protect (concealing defense trial strategy) would be protected only when the third party, for whatever reason, chose not to reveal the subpoena. In my view, there was no rhyme or reason to a procedure that is supposed to protect defense strategy but that actually turned on the happenstance of whether third parties choose to notify crime victims or the public about subpoenas they receive.

The haphazardness of the Advisory Committee's approach becomes even clearer when one realizes that defense "strategy" can be protected only where the confidential information happens to rest in the hands of a third party rather than the victim herself. Consider, for example, a rape victim who has talked to a rape crisis counselor, who takes notes of the meeting. A defendant might attempt to subpoena those notes from the counselor *ex parte*. But if the counselor had previously transferred the notes back to the rape victim, then the subpoena would have to be directed to the victim herself—and the victim could then move to quash the subpoena. This is not some academic hypothetical, as rape counselors in Pennsylvania in the 1980s used precisely this procedure to protect their clients against abusive defense subpoenas.[97] Moreover, rape counselors—and, indeed, most third parties involved in maintaining the personal and confidential information of victims—will probably have very strong incentives for disclosing the fact of the subpoena to the victim, because of both ethical and legal considerations.[98] Thus, I argued that the Advisory Committee's use of ex parte procedures will only randomly protect defense strategy from disclosure.

I also explained why the impossibility of truly ex parte procedures for Rule 17 subpoenas to third parties has been recognized by several court decisions. For example, in *United States v. Urlacher,* the defendant sought to use Rule 17 to subpoena financial, family, and employment

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[96] *See* Wardius v. Oregon, 412 U.S. 470, 475-76 (1973); United States v. Bahamonde, 445 F.3d 1225, 1229 (9th Cir. 2006); Newman v. Hopkins, 192 F.3d 1132, 1135 (8th Cir. 1999), vacated 529 U.S. 1084 (2000); United States ex rel. Veal v. DeRobertis, 693 F.2d 642, 646-47 (7th Cir. 1982). Indeed, such reciprocity may not even be required if "significant governmental interests" support its omission. *See* Wardius, 412 U.S. at 476.

[97] The Pennsylvania Supreme Court initially found that records held by rape counseling centers were subject to only limited protection from defense subpoenas. *See* In re Pittsburgh Action Against Rape, 428 A.2d 126, 132 (Pa. 1981). The results of that unfortunate decision were swift. Rape victims requested the return of their records from the center and, in some cases, even requested termination of the counseling relationship. Commonwealth v. Wilson, 602 A.2d 1290, 1294 n.6 (Pa. 1992); Tera Jckowski Peterson, Comment, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah*, 2001 UTAH L. REV. 695; Beth Stouder, Note, *Pennsylvania Establishes New Privilege for Communications Made to a Rape Crisis Center Counselor--In re Pittsburgh Action Against Rape*, 55 Temp. L.Q. 1124, 1146 (1982). In light of this serious problem, the Pennsylvania legislature enacted a new, absolute privilege protecting communications to rape crisis counselors from any disclosure without the consent of the victim. *See* 42 Pa. Cons. Stat. § 5945.1(b) (2000) (upheld against constitutional attack in *Wilson*, 602 A.2d at 1297).

[98] *Cf.* 42 U.S.C. § 254b(k)(3)(B) (2006) (enforcing confidentiality of medical records).

information concerning an individual believed by the defendant to be the government's main witness at trial.[99] The court declined to approve the subpoena ex parte, explaining that the custodian of the records "has a Rule 17(c) motion to quash or modify, and one cannot easily imagine that such a motion should be heard and decided in secret . . . and hidden from the opposing party and the public."[100] The court went on to explain the constitutional difficulties presented by such an approach, given that the First Amendment creates a general public right of access to court proceedings.[101]

Even if there is some arguable defense interest in not disclosing "strategy," that interest must be subordinated to the compelling victim interests that are at stake. My proposal (and the Advisory Committee's (2007) proposal) covered third-party subpoenas directed to the victim's personal or confidential information. Congress has commanded that victims must not only be treated with "fairness," but also "with respect for the victim's dignity and privacy."[102] Protecting dignity and privacy requires a hearing when confidential information is at stake.

The Advisory Committee Note on its (2007) proposal did obliquely deal with this issue in a way that, in my view, misstated the relevant legal landscape created by the CVRA. The 2007 Note accompanying the proposed Rule 17 amendment stated generally that, "[i]n exercising its discretion [about whether to give notice of a request for a subpoena], the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim."[103] In my view, this was an imprecise listing of discretionary factors that misstated the requirements of the CVRA. A court is not required to "consider" some victim-related factors and then make a discretionary decision. The CVRA commands that victims have "the right" to "be treated . . . with respect for the victim's dignity and privacy."[104] Thus, if withholding notice to a victim fails to respect the victim's dignity and privacy (as I believe it invariably will), then the court must give notice—end of story.[105] The CVRA flatly directs: "In any court proceedings involving an offense against a crime victim, the court shall *ensure* that the crime victim is afforded the rights described [in the CVRA]."[106]

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[99] 136 F.R.D. 55, 551-57 (W.D.N.Y. 1991).
[100] *Id.* at 556.
[101] *Id.* at 556-57. *But cf.* United States v. Beckford, 994 F. Supp. 1010, 1027 (E.D. Va. 1997) (noting that *Urlacher* states the majority rule but concluding that ex parte procedures should be permitted in "exceptional circumstances").
[102] 18 U.S.C. § 3771(a)(8).
[103] *See* Proposed 2007 Amendments, Proposed Rule 17, at 8. As discussed below, the Advisory Committee later changed this comment.
[104] *See* 18 U.S.C. § 3771(a)(8).
[105] In theory, the Advisory Committee could argue that the CVRA is unconstitutional in this respect and therefore must give way. But the CVRA is presumed to be constitutional and the caselaw strongly supports the Act. See, e.g., Wardius v. Oregon, 412 U.S. 470, 475 (1973) (finding no constitutional barrier to reciprocal discovery rules that act as a "two-way street"); *cf.* Forsythe v. Walters, 38 F. App'x 734, 737 (3d Cir. 2002) (finding that "application of the CVRA does not exact a punishment and therefore the CVRA can not violate the Ex Post Facto Clause").
[106] 18 U.S.C. § 3771(b)(1) (emphasis added).

In 2007, I also argued that the Advisory Committee Note was an incomplete listing of the victim's rights that are implicated in decisions about issuing subpoenas. From a procedural perspective, if the court holds a hearing on whether to issue the subpoena, the CVRA entitles a crime victim to notice of that proceeding[107] and to an opportunity to attend that hearing, unless the victim's testimony would clearly be materially affected from attending the hearing.[108] From a substantive perspective, subpoenas for personal or confidential materials are often outside the scope of legitimate discovery, as will be explained below. Such subpoenas can also implicate a victim's right to "be reasonably protected from the accused."[109] For example, a defense subpoena to the Department of Motor Vehicles for address information could very directly jeopardize a victim's safety. Yet the Advisory Committee Note made no mention of such legitimate factors—factors the CVRA requires courts to consider.

In 2007, after I drafted my article raising these concerns, I sent it to the Advisory Committee and also alerted interested members of Congress to my concern. Senator Jon Kyl, one of the two the Senate co-sponsors of the CVRA, then wrote to the Committee to express his "strong concerns" about the very limited amendments that the Committee was proposing to adopt to implement the CVRA. In a February 15, 2007, letter, Senator Kyl explained:

> As a sponsor of the Act, I believe that passage by overwhelming majorities in both the House and the Senate signifies Congress's intent to provide crime victims with substantive rights and protections in federal court. But the proposed amendments do little more than reiterate limited parts of the statute. Crime victims have been mistreated by the federal criminal justice system for far too long. To comply with Congress's intent, the Advisory Committee must take decisive and . . . comprehensive action to thoroughly amend the rules and fully ensure that crime victims are protected in federal courts.[110]

Senator Kyl went on to say he "fully endorse[d]" my specific proposals, indicating that they were, however, in some areas "too cautious."[111]

Based on my article and the concerns expressed by others, this Committee modified Proposed Rule 17(c). At its April 16, 2007, meeting, the Advisory Committee revised its proposed rule on subpoenas for confidential information to read: "Before entering the order and unless there are exceptional circumstances, the court must require that notice be given to the victim so that the victim can move to quash or modify the subpoena or otherwise object." This change responded to objections from the American Bar Association, other groups, and me that the earlier rule encouraged ex parte issuance of subpoenas for confidential information and thus violated important due process principles. These changes were an improvement because they limited ex parte procedures to "exceptional circumstances." The accompanying Advisory Committee note then offered two illustrations of exceptional circumstances. One was narrowly cabined and

[107] 18 U.S.C. § 3771(a)(2).
[108] 18 U.S.C. § 3771(a)(3).
[109] 18 U.S.C. § 3771(a)(1).
[110] Letter from Senator Jon Kyl to Hon. David F. Levi, Chairman, Comm. on Rules of Practice and Procedure 1 (Feb. 16, 2007), quoted in Cassell, *Treating Victims' Fairly*, *supra* note 5, at 966.
[111] *Id.*

straightforward to understand—where "evidence . . . might be lost or destroyed if the subpoena were delayed"—an unusual exigent circumstance that justifies moving rapidly. But the other illustration—"a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy"—remained quite problematic, for reasons will discuss below.

The Advisory Committee also changed the Advisory Committee notes describing the background legal landscape, perhaps in response to my concern that it failed to fully recognize the mandatory nature of the CVRA. The Advisory Committee note to the 2008 amendments was changed to read (and still reads):

> The Committee leaves to the judge of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.[112]

B. The Exceptional Circumstances Exception Since 2008.

Since the 2008 amendments, I have been interested in evaluating how the exceptional circumstances exception has played out. Perhaps others who work in the crime victims' rights field will be able to shed more light on what has happened. From my vantage as a law professor, it is difficult to determine exactly how the "exceptional circumstances" provision has been deployed since 2008. Scant caselaw exists on the breadth of Rule 17(c)'s "exceptional circumstances" provision. Presumably this is because, with the current Rule 17(c) restricted (primarily) to trials, the situations where a victim is subject to a subpoena are confined. As discussed above, more than 95% of federal cases never go to trial.

In addition, however, there are significant reasons for believing that the reason for scant caselaw in this area is because crime victims lack the ability to effectively litigate overbroad subpoenas. For the reasons explained above,[113] crime victims typically will not have legal counsel—and thus situations where they will have the ability to effectively file a motion to quash or modify a subpoena will be rare.

Even in the rare case where victims can afford to retain legal counsel, the ability to generate published appeals—that is, develop caselaw in this area—is limited. It appears that there are some appellate courts that will require a subpoenaed party to refuse to comply with a subpoena and generate a contempt citation in order to appeal.[114] While this approach may work for sophisticated corporate entities, whether it works well for, for example, sexual assault victims appearing as witnesses in criminal cases is uncertain.

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[112] Fed. R. Crim. P. 17(c)(3), Adv. Comm. Note (2008 Amendment).
[113] *See* Part I, *supra*.
[114] *See, e.g.,* U.S. v. Krane, 625 F.3d 568, 572-73 (9th Cir. 2010) ("In general, interlocutory appellate review of an order compelling compliance with a subpoena is available only when the subpoenaed party has refused to comply and appeals from the resulting contempt citation.").

Under the CVRA, there is an appellate mechanism for obtaining review of district court decisions—filing a petition for a writ of mandamus.[115] But those petitions must link directly to a CVRA violation.[116] Exactly how issues of the overbreadth of Rule 17(c) subpoenas interact with CVRA rights (such as the rights to be free from harassment and abuse and to be treated with fairness, dignity, and respect) remains to be established.

C. The Exceptional Circumstances Exception Should Be Eliminated or Narrowed to an Exigent Circumstances Exception.

Rule 17(c)(3) requires courts to give notice to the victim before authorizing subpoenas for personal or confidential information.[117] However, the 2008 Advisory Committee Notes allowed an exception for "exceptional circumstances," including where "the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy."[118] Victims' advocates accurately characterize this exception as a hole so large that a truck can drive through. The proposed changes to Rule 17 will dramatically expand the opportunities to use this exception for defense subpoenas while lowering the evidentiary standard necessary to obtain victims' confidential records. This exception violates constitutional and statutory protections, rests on no legitimate foundation, and should be eliminated.

The CVRA guarantees victims "the right to be treated with fairness and with respect for the victim's dignity and privacy."[119] Senator Kyl, one of the co-sponsors of the CVRA explained, "The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. As previously mentioned, victims of crime experience a secondary victimization at the hands of the criminal justice system."[120] As the Supreme Court has noted, due process requires that "parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified."[121] Yet the "exceptional circumstances" exception does precisely what both the Constitution and the CVRA forbid. When courts grant ex parte subpoenas under this provision, victims never learn their information was obtained.[122] Without notice, victims cannot challenge the subpoena or seek protective orders limiting disclosure of sensitive details that may be irrelevant to the defense.[123] Victims are denied any opportunity to protect their interests, to explain why certain information is deeply personal or private, or to participate in proceedings involving their own confidential records. This is secondary victimization by the very system meant to protect them.

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[115] *See* 18 U.S.C. § 3771(d)(3).
[116] *See, e.g.,* In re J.H., 138 F.4th 1347, 1349 (9th Cir. 2025) (the CVRA "does not permit victims to challenge—and does not empower a court of appeals to address—matters other than a district court's denial of the rights enumerated in that statute.").
[117] Fed. R. Crim. P. 17(c)(3).
[118] Fed. R. Crim. P. 17(c)(3) advisory committee's note (2008 amendment).
[119] 18 U.S.C. § 3771(a)(8).
[120] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).
[121] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (internal citations omitted).
[122] United States v. McClure, 2009 U.S. Dist. LEXIS 29247 (E.D. Cal. Apr. 6, 2009).
[123] *Id*.

The CVRA's privacy protections rest on constitutional foundations. As the Supreme Court recognized, "if the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person" as the most intimate aspects of their lives.[124] Against that backdrop, "federal constitutional law recognizes a 'right to informational privacy' stemming from 'the individual interest in avoiding disclosure of personal matters.'"[125] To be sure, the right of privacy is "notoriously nebulous."[126] But the existence of the right is recognized in many cases.[127]

These protections become critical when Rule 17(c) subpoenas invoke the compulsory authority of a federal court for defense counsel to access victims' most sensitive and confidential information. For many victims, "privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot."[128] Allowing defense attorneys to obtain victims' most private records—without even notification and an opportunity to object—retraumatizes victims, betrays their trust in the justice system, and deters other victims from seeking the medical and counseling services necessary for healing.

These compelling victim interests cannot be outweighed by concern about "premature disclosure of a sensitive defense strategy." Federal criminal defendants have no constitutional or other recognized right to hide trial "strategy." Indeed, rule immediately preceding Rule 17—Rule 16 entitled "Discovery and Inspection"—requires most criminal defendants to disclose to the prosecution such things as documents and objects, reports of examinations and texts, and expert witnesses[129]—without regard to whether doing so discloses defense "strategy." On top of those general disclosure requirements, defendants are also required to disclose in advance of trial other specific strategies—such as alibi defenses, insanity defenses, and public authority defenses.[130]

The Supreme Court long ago rejected constitutional challenges to such disclosure requirements, endorsing "the move away from the 'sporting contest' idea of criminal justice."[131] Allowing the exceptional circumstances exception to shield "trial strategy" while invading victims' privacy rests on discredited notions of trial-by-ambush that modern criminal procedure has abandoned. If defendants can be required to disclose their *actual* trial strategies (such as an alibi strategy) without violating the Constitution, then they certainly should be required to provide

[124] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
[125] A.C. by & through Park v. Cortez, 34 F.4th 783, 787 (9th Cir. 2022) (citing Endy v. County of Los Angeles, 975 F.3d 757, 768 (9th Cir. 2020) (quoting In re Crawford, 194 F.3d 954, 958 (9th Cir. 1999)).
[126] Varo v. Los Angeles Cnty. Dist. Attorney's Off., 473 F. Supp. 3d 1066, 1072 (C.D. Cal. 2019).
[127] *See, e.g.,* In re Crawford, 194 F.3d 954, 958 (9th Cir. 1999) ("the 'zone of privacy['s]' "existence is firmly established"); Planned Parenthood of S. Arizona v. Lawall, 307 F.3d 783, 789–90 (9th Cir. 2002) ("This interest, often referred to as the right to informational privacy, applies" in two scenarios.) (internal citations and quotations omitted); James v. City of Douglas, Ga., 941 F.2d 1539, 1544 (11th Cir. 1991); Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996); *see also* Varo v. Los Angeles Cnty. Dist. Attorney's Off., 473 F. Supp. 3d 1066, 1072–73 (C.D. Cal. 2019).
[128] Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 473 (2005).
[129] *See* Fed. R. Crim. P. 16(b).
[130] *See* Fed. R. Crim. P 12.1, 12.2, and 12.3.
[131] *See* Williams v. Florida, 399 U.S. 78, 106 (1970) (Burger, C.J., concurring).

notice before obtaining a victim's confidential records, particularly when victims possess countervailing constitutional and statutory rights to privacy.

The "exceptional circumstances" exception, especially alongside the proposed changes broadening the scope of Rule 17, represents precisely the kind of judicial erosion Senator Kyl, co-sponsor of the CVRA, warned against: "It is not the intent of this bill [i.e., the CVRA] that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process."[132] The Committee should therefore eliminate the exceptional circumstances exception entirely. An exception that prevents victims from learning when their intimate information is disclosed likely violates their constitutional and statutory rights and rests on no legitimate foundation. It also could very well violate the Rules Enabling Act, which provides that court promulgated rules shall not "abridge, enlarge or modify any substantive right."[133]

At the same time, it would be possible for the Advisory Committee to retain a very narrow, "exigent circumstances" requirement for certain *ex parte* subpoenas. The Advisory Committee note accompanying Rule 17 refers to "evidence that might be lost or destroyed if the subpoena were delayed …."[134] These circumstances seem to be extraordinarily unusual, presumably arising in situations of third-party subpoenas where time is of the essence and prior notice to the victim is impractical. But if they were to arise, the Court could grant the motion for issuance of a Rule 17 subpoena, but require that production be made to the Court under seal. At that point, the victim could be notified and could then raise any appropriate objections to further disclosure. Such an approach protects both the defendant's need to rapidly secure the evidence while at the same time preserving the victim's privacy interests by providing an opportunity to challenge any further disclosures.

An example of how to draft such a rule is provided in the next section of this testimony.

VI. Proposed Language for a More Narrowly Drafted Rule 17(c).

A. Preserving Protections for Crime Victims' Personal and Confidential Information

In light of the concerns I raise about crime victims' issues, the Committee should focus on victim-related concerns more specifically. The Committee could move forward with new rule changes in situations that do not involve victims, while subpoenas for personal or confidential information from victims should continue to be limited for trials only. Subpoenas to unrepresented victims should be routed through prosecutors and should contain clear instructions for *pro se* victims as to how to file motions to quash or narrow the subpoenas. Subpoenas to victims should also be adjudicated under the long-settled *Nixon* standards. And any production from crime victims should be automatically routed through the court—without any exception for protection disclosure of "defense strategy."

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[132] 150 Cong. Rec. S10911 (Apr. 22, 2024) (statement of Sen. Kyl).
[133] 28 U.S.C. § 2072(b).
277 Proposed Amendments,
[134] Fed. R. Crim. P. 17 Adv. Comm. Note (2008 Amendments).

An example of how to begin draft such a rule comes from my home state of Utah. The Utah Rule arose out of a widely publicized case—the Elizabeth Smart case involving state and federal criminal proceeding against those who kidnapped Elizabeth from her home. Attorneys for Elizabeth's kidnapper subpoenaed class records from her high school (including class and teacher lists, report cards, and disciplinary and attendance records) and medical records from her hospital. The school chose not to reveal the defense "strategy"[135] because it simply handed the materials over to the defense—in possible contravention of the Family Educational Rights and Privacy Act.[136] But the hospital refused to hand over Elizabeth's records and contacted the Smart family, which ultimately led to a public outcry over the subpoenas. When Elizabeth's father learned that her school records had been turned over to defense counsel, he filed a motion to have the records returned to the school. Prosecutors in the case also objected that they were not given an opportunity to file a motion to quash prior to the production of the records.[137] The matter lingered under review in the state courts, but ultimately the Smart family succeeded in quashing the subpoenas. Later, the Utah Rules of Criminal Procedure (Rule 14(b)) were modified to require that a court must *always* provide notice to a victim:

> (b) Subpoenas for the production of records of victim.
> (b)(1) No subpoena or court order compelling the production of medical, mental health, school, or other privileged records pertaining to a victim shall be issued by or at the request of any party unless the court finds after a hearing, upon notice as provided below, that the records are material and the party is entitled to production of the records sought under applicable rules of privilege, and state and federal law.
> (b)(2) The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.
> (b)(3) The request for the subpoena or court order shall be filed with the court as soon as practicable, but no later than 28 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the opposing party. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the request for the subpoena to the victim or victim's representative within 14 days of receiving it.
> (b)(4) If the court makes the required findings under subsection (b)(1), it must issue a subpoena or order requiring the production of the records to the court. The court will then conduct an in camera review of the records and disclose to the defense and prosecution only those portions that the requesting party has demonstrated a right to inspect.
> (b)(5) Any party issuing a subpoena for non-privileged records, papers or other objects pertaining to a victim must serve a copy of the subpoena upon the victim or victim's representative. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the subpoena to the victim within 14 days of receiving it. The subpoena

[135] Such as it was—apparently the only reason for the subpoenas was to try and dig up some dirt on the young kidnapping victim. *See* Stephen Hunt, *Defense Blasted for Obtaining Smart's School Records*, SALT LAKE TRIB., Jan. 14, 2005, at B2.
[136] 20 U.S.C. § 1232g(b) (2006).
[137] Cassell, *Treating Victims' Fairly*, *supra* note 5, at 904.

> may not require compliance in less than 14 days after service on the prosecutor or victim's representative.
> (b)(6) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.
> (b)(7) For purposes of this rule, "victim" and "victim's representative" are used as defined in Utah Code § 77-38-2.
> (b)(8) Nothing in this rule alters or supersedes other rules, privileges, statutes or caselaw pertaining to the release or admissibility of an individual's medical, psychological, school or other records.[138]

The Utah Rule contains several features that are useful innovations that the Committee should consider. First, the Utah rule differentiates between privileged and non-privileged materials, requiring more extensive protections in cases where privileged material could be at issue. I understand that the Committee has reviewed this issue and decided that a "bifurcated approach to protected and unprotected information" could create "burdensome litigation."[139] But a result of that decision is that defense subpoenas to crime victims (and third parties hold crime victims' records) will now, seemingly inevitably, cover "protected" information. And the Committee does not appear to have analyzed carefully how often unrepresented crime victims are supposed to proceed when their "protected" materials are subpoenaed.

Second, recognizing the reality that most crime victims lack legal counsel, the Utah rule requires notices to be routed through the prosecutor. This eliminates any burden on the courts. It is also most efficient, since the prosecutor's office is typically the office that has the most recent contact information for victims. Also, looping prosecutors in help to facilitate prosecutors in discharging their obligations under Utah's crime victims' rights enactments.

I recognize that the Committee has evaluated this issue, explaining its view that "when judges did not allow ex parte motions, defense counsel was left with two untenable options: either risk harming the client by revealing defense strategy or even uncovering inculpatory information the government would otherwise not have known, or forego a subpoena, abandoning pursuit of information that they believe is essential to defend the client."[140] This analysis appears to be incomplete. The premise that disclosing the subpoena to the prosecutor would be improperly "harming the client" rests on the previously discussed—and long discredited—"ambush theory" of litigation.[141] To be sure, if criminal litigation were a poker game where the goal is to collect cards unseen by the opponent, then the premise might be correct. But there are countervailing considerations such as the government's interest in "protecting itself against an eleventh hour

[138] Utah R. Crim. P. 14(b).
[139] Committee Memo., *supra* note 28, at 73.
[140] *Id.*
[141] *See, e.g.,* Clark v. Pennsylvania R. Co., 328 F.2d 591, 594 (2d Cir. 1964) (declaring that "one of the prime objectives of pretrial procedure is to do away with the old sporting theory of justice and substitute a more enlightened policy of putting the cards on the table, so to speak, and keeping surprise tactics down to a minimum.").

defense" that is "both obvious and legitimate."[142] The adversary system, the Supreme Court has instructed, is not "a poker game in which players enjoy an absolute right always to conceal their cards until played."[143] And this Committee, too, has previously stated its view—in implementing reciprocal discovery obligations—that "an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration."[144]

A good illustration of these principles in action comes from the Supreme Court's decision in *Michigan v. Lucas*, involving prior notice provisions under Michigan's "rape-shield" statute. Under these provisions, a defendant was entitled to introduce evidence of his own past sexual conduct with the victim, provided he filed a written motion and offer of proof regarding such evidence. In *Lucas*, the defendant failed to comply with the notice requirements and the trial court refused to allow evidence of his prior sexual relationship with the victim. The Court overturned a lower court decision finding the statute to be unconstitutional, explaining that there was a "valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. The statute also protects against surprise to the prosecution."[145]

In addition, disclosure to the Government of the "defense strategy" must be assessed against the prosecution's well recognized duty to do justice—not just win cases. If the defense strategy is to collect clear information demonstrating the defendant's innocence—and that strategy is well-founded, then disclosure to the prosecution in advance of trial might lead to a dismissal or other pre-trial resolution, significantly reducing the burden on the system.

In its Memorandum, the Committee references information that it received about a case where a sexual assault victim, instead of going to a hospital after an assault, instead went to a casino and spent considerable time there (as recounted by a defense attorney).[146] The Memorandum seems to back the defense attorney's theory that disclosing that subpoena would have improperly "tipped the hand" of the defense[147]—seemingly endorsing the very poker game analogy that the Supreme Court has explicitly rejected. Moreover, if anything, this cited example proves why justice would have been better served by disclosing the subpoenaed information to the prosecution.[148] If the victim's post-assault behavior was clearly inconsistent with a sexual assault, then presumably the Government would have dropped its case. But, on the other hand, there are reasons why sexual assault victims delay in reporting the crimes against them—reasons that are often poorly understood by the general public and may have needed to have been presented by the

[142] Williams v. Florida, 399 U.S. 78, 82 (1973); *see also* Wardius v. Oregon, 412 U.S. 470 (1973) (noting the legitimate goal of "reduc[ing] the possibility of surprise at trial").
[143] *Id.*; *see also* United States v. Catalan Roman, 376 F. Supp. 2d 108, 117 (D.P.R. 2005) (concluding that accelerated disclosure of defense expert witness was "consistent with the promotion of other goals such as minimizing surprise, accelerating the sentencing process and avoiding continuances; *citing* Advisory Committee Notes to 1974 Amendment to Rule 16).
[144] Fed. R. Crim. P. 16, Adv. Comm. Note. (1974 Amendment).
[145] Michigan v. Luca*s*, 500 U.S. 145, 150 (1991).
[146] *See* Committee Memo., *supra* note 28, at 71.
[147] *Id.*
[148] If I understand the case correctly, the subpoenaed information was a third party video of the victim in a public location. This information is not the "personal or confidential" information of a victim and therefore is not the type of subpoena that my testimony focused on.

Government to the jury through expert testimony.[149] This example may well demonstrate why it is tactically advantageous for defense attorneys to covertly obtain information ex parte. But it does not clearly demonstrate that such advantages serve the broader interests of justice.

Third, the Utah rule (tracking existing federal practice) is limited to trials and contains a timeline permitting litigation of issues of overbreadth and privilege. The Committee could consider folding in the Utah innovations into the new federal rule.

One other point that should be included in any new federal rule is a *Miranda*-style warning on the face of any Rule 17(c) subpoena that goes to any unrepresented victim or a third-party for victim records. Many victims and third parties fail to recognize their right to challenge a subpoena. Some mistakenly view it as a binding court order that compels production without opportunity to object or be heard. The rule should therefore mandate clear notice on the face of the subpoena explaining the recipient's actual rights. A clear warning of the recipient's legal rights—and procedures for raising those rights—would help to protect the rights of the recipient without any interference with legitimate defense interests.

Such a warning would not interfere with any legitimate defense concerns. A defendant has no right to obtain production of information from a victim who misunderstands her legal rights in the process. And, as explained throughout this testimony, the fact that so many crime victims lack legal counsel creates clear imbalance that the Committee should address.

The Advisory Committee should consider language along these lines (with additions to the Committee's proposed rule underlined and deleted indicated by strikethrough):

> Proposed Rule 17(c)(3). Non-Grand-Jury Subpoena for Personal or Confidential Information About a Victim.
>
> (A) Motion and Order Required. After a complaint, indictment, or information is filed, a non-grand-jury subpoena requiring the production of personal or confidential information about a victim may be served on <u>a victim or</u> a third party only by court order upon motion <u>and only to obtain information relevant and admissible at trial</u>. ~~Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.~~
>
> (B) Notice to a Victim. ~~Unless there are exceptional circumstances,~~ [T]he court must, before entering the order, require giving notice to the victim <u>of the victim's right to move to quash or modify the subpoena</u> so that the victim can move to quash or modify the subpoena or otherwise object. <u>For exceptional circumstances involving the potential loss or destruction of evidence, the court may direct production of subpoenaed materials to the court under seal for such further proceedings, with notice to a victim, as will protect the victim's right to move to quash or modify the subpoena before release of any subpoenaed materials.</u>

[149] *See, e.g.,* Lauren E. Thompson & Joanna Pozzulo, H*ow Length of and Reason for Delayed Reporting Influence Mock-Jurors' Judgments in a Sexual Assault Trial*, 40 J. POLICE & CRIM. PSYCHOL. 386–397 (2025). *See generally* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1 (2017).

(C) Service of any subpoena on an unrepresented victim must be facilitated through counsel for the attorney for the government. Service of any subpoena on a represented victim must include notice to the attorney for the government.

Consistent with this language, the Advisory Committee should also make appropriate changes in other parts of the rule, indicating that the standard of "relevant and admissible at trial" governs subpoenas for personal or confidential information about a victim. The Committee should also make appropriate changes to the language about "self-represented" parties, where the potential for harassing victims is particularly pronounced.

If the Committee believes that it is, nonetheless, appropriate to move forward with its proposal as currently drafted, the Committee should consider carving out violent crime cases (e.g., sexual assault).[150] As discussed at length here, these cases present special issues. It appears that the main concerns presented to the Committee involved white-collar and other non-violent cases and subpoenas directed at targets other than the personal and confidential information of violence crime victims. It would be consistent with an "incremental" approach for the Committee to expand into the non-violent crime area first and then make a further assessment in light of that experience.

B. Appointing Counsel for Crime Victims.

The Committee should also consider promulgating rules (or urging the enactment of statutes) that will assist in the appointment of legal counsel to crime victims who might otherwise be forced to litigate complicated privacy and other issues pro se. In a perfect world where crime victims had the same guaranteed right to legal counsel that criminal defendants enjoy, many of the concerns I raise here might be mitigated. But in the real world, where defendants always have skilled legal counsel and crime victims rarely do, that structural disparity makes it important to draft rules carefully to avoid giving effect to the imbalance.

In my 2006 testimony to this Committee regarding the CVRA, I proposed that the Advisory Committee add a new provision to the Rules to recognize the court's discretionary authority to appoint counsel for a victim, as follows:

Rule 44.1 Counsel for Victims.
When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising his or her rights.[151]

In the twenty years since I made that recommendation, if anything the need for recognizing the discretionary appointment of counsel for crime victims has only increased—as the discussion of the complex legal issues above serves to demonstrate. Accordingly, it seems useful for me to conclude this testimony with the arguments I presented back in 2006 for adopting such a rule.

[150] *See* Testimony of Kristin Eliason, Head of Services, Volare, Before the Judicial Conference Advisory Comm. on Criminal Rules, at 16 (Jan. 22, 2026) (advocating such a carve out, and also appropriately arguing for a carve out for cases in the District of Columbia).
[151] Cassell, *Recognizing Victims in the Federal Rules*, *supra* note 5, at 912-17.

An argument could be made that the CVRA guarantees crime victims the right to appointed counsel. After all, the CVRA guarantees victims the right to be "treated with fairness" and fairness can be understood as embracing the assistance of counsel.[152] But on closer examination, it becomes clear that nothing in the CVRA directly mandates counsel for victims. As Senator Kyl explained, "This bill does not provide victims with a right to counsel but recognizes that a victim may enlist counsel on their own."[153]

While the CVRA does not require judges to appoint counsel for victims, nothing in it prevents judges from doing so in appropriate cases, particularly under prevailing case law demonstrating that federal courts have inherent authority to make such appointments. Because this authority may not be well known to judges (or to victims), the authority should be clearly laid out in the Federal Rules of Criminal Procedure.

A number of federal courts have recognized inherent judicial authority to appoint lawyers for indigent litigants in both civil and criminal cases.[154] While these cases do not directly involve appointment of counsel for crime victims, their principles clearly apply to victims. Illustrative of these decisions is the thoughtful analysis by the U.S. District Court for the District

[152] *Cf.* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (discussing "fairness" to the defendant as a reason for recognizing a right to appointed counsel).

[153] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[154] *See, e.g.,* Powell v. Alabama, 287 U.S. 45, 73 (1932) (holding, in a capital case, that courts have the power to appoint counsel and that "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment"); United States v. Bertoli, 994 F.2d 1002, 1015-18 (3d Cir. 1993) (holding that the court has inherent power to order defendant's retained law firm to remain as standby counsel at a criminal trial when defendant elects to represent himself *pro se);* United States v. Accetturo, 842 F.2d 1408, 1412-16 (3d Cir. 1988) (holding that courts have inherent power to appoint counsel during a criminal trial proceeding but that the power does not extend to appointing lawyers licensed in other states); United States v. Bowe, 698 F.2d 560, 566-67 (2d Cir. 1983) (noting that a court has inherent authority to appoint counsel for an indigent witness who may incriminate herself during testimony in a criminal case); Williamson v. Vardeman, 674 F.2d 1211, 1212-16 (8th Cir. 1982) (upholding a state court judge's appointment *of pro bono* counsel in criminal case as constitutional although noting that forcing an attorney to advance his own funds may be unconstitutional); Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir. 1973) (noting that in civil rights cases, "representation of indigents upon court order has been a traditional obligation of the lawyer which he assumes when he becomes a member of the bar"); Dolan v. United States, 351 F.2d 671, 672 (5th Cir. 1965) (holding, in a criminal case, that lawyers implicitly consent to be appointed by courts *pro bono* when accepting a license to practice law); United States v. Dillon, 346 F.2d 633, 635-36 (9th Cir. 1965) (holding, in a criminal case, that there is "an obligation on the part of the legal profession to represent indigents upon court order, without compensation"). *But cf.* Colbert v. Rickmon, 747 F. Supp. 518, 527 (W.D. Ark. 1990) (holding that courts have no inherent power to order attorneys to represent indigent clients). *See generally* Jerry L. Anderson, *Court-Appointed Counsel: The Constitutionality of Uncompensated Conscription,* 3 Geo. J. Legal Ethics 503 (1989) (discussing the trend against requiring lawyers to take uncompensated court appointments); Bruce Andrew Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance,* 81 COLUM. L. REV. 366 (1981) (discussing the constitutionality of *pro bono* court appointments); Judy E. Zelin, *Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Action,* 52 A.L.R 4th 1063 (1987 & Supp. 2004).

of Nebraska in *Bothwell v. Republic Tobacco Co.*[155] Bothwell presented four grounds for its holding that courts have inherent power to appoint attorneys to represent indigent litigants:

> (1) courts possess the inherent power to bring to their assistance those "instruments" necessary to ensure a "fair and just" adjudicative process in individual cases; (2) in many, if not most, cases, due to the adversarial nature of our system, lawyers are a necessary component in ensuring such a "fair and just" process; (3) to a significant degree, neither the private marketplace nor public or charitable efforts provide indigent litigants with adequate access to legal assistance; and (4) to that extent, such failure threatens the reliability of the results of the adversarial process.[156]

These grounds readily apply to appointing attorneys for indigent victims when important rights under the CVRA are at stake. Without an attorney to press her claims, a victim may be unable to obtain a "fair and just" adjudicative process.[157] Moreover, crime victim representation appears to be a prime example of a situation where "neither the private marketplace nor public or charitable efforts provide indigent litigants with adequate access to legal assistance."[158] No financial incentive will drive lawyers to represent victims in criminal cases.[159] And while pro bono representation for victims is expanding, it still falls far short of the needs of victims in the federal system. The fourth and final requirement--that the failure of attorneys to represent the indigent client threatens the reliability of the system--is also present where rights under the CVRA are at stake. Neither the prosecutor nor the defendant has a personal stake in the victim's rights, and, frequently, they will have other priorities and interests that may even be adverse to the rights of the victim. Accordingly, courts have inherent authority to appoint counsel to represent indigent victims

[155] 912 F. Supp. 1221 (D. Neb. 1995).
[156] *Id.* at 1229.
[157] *See generally* John W. Gillis & Douglas Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts,* 33 MCGEORGE L. REV. 689, 692 (2002).
[158] *Bothwell,* 912 F. Supp. at 1229.
[159] *See* Gillis & Beloof, *supra* note 157, at 698-700.

and, indeed, may even be able to require counsel to serve without compensation.[160] The local rules of some federal courts already explicitly recognize this power.[161]

In addition to this inherent authority, federal courts appear to possess statutory authority to make such an appointment. Title 28 broadly permits the court in both civil and criminal cases to "request an attorney to represent any person unable to afford counsel."[162] Moreover, at least one statute already directly authorizes federal courts to appoint counsel for child victims in certain cases. Title 18 U.S.C. § 3509 provides, "The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child." Congress, however, has not yet provided funding for this particular right.[163] Finally, in unusual circumstances where a crime victim may also face possible criminal charges of his or her own, the Criminal Justice Act would authorize appointment of and payment for defense counsel.[164]

My proposed Rule 44.1 would confirm the existing discretionary power of the courts to appoint volunteer counsel. The rule is purely discretionary (the court "may" appoint counsel) and is limited to situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, can ask for volunteer counsel to assist victims on a pro bono basis.

Finally, it might be argued that it is unnecessary to address this subject in a rule because the court's inherent authority to appoint counsel exists even without a rule. Both courts and victims, however, will find it useful to have this authority spelled out in the criminal rules to eliminate any lingering doubt. Indeed, just last year, a federal district court judge wrote that he had "scoured

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[160] *See* Mallard v. U.S. Dist. Court, 490 U.S. 296, 307 & n.8 (1989) (leaving open the question of whether federal courts possess the inherent authority to *require* counsel to provide legal services to the poor). Several lower courts have concluded that appointment without compensation is proper. *See Bothwell,* 912 F. Supp. at 1230-34 (counsel have a duty to serve without compensation); Family Division Trial Lawyers of the Superior Court-D.C. v. Moultrie, 725 F.2d 695, 705 (D.C. Cir. 1984) (rejecting argument that *pro bono* appointment violates the Thirteenth Amendment because attorneys can take steps to avoid the *pro bono* appointments and holding that *pro bono* court appointments are not *per se* "takings," as accepting court ordered representation of indigents is a condition of receiving a law license, but excessive burden could present takings problem); Williamson v. Vardeman, 674 F.2d 1211, 1211 (8th Cir. 1982) (noting that *pro bono* service is a voluntary obligation undertaken by attorneys when they apply for a license to practice law); Tyler v. Lark, 472 F.2d 1077, 1079-80 (8th Cir. 1973) (no takings problem with appointment); United States v. Dillon, 346 F.2d 633, 635-36 (9th Cir. 1965) (no taking problems with appointment). *But see* State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 759-70 (Mo. 1985) (questioning power of courts to appoint counsel without providing compensation).

[161] *See, e.g.*, D. Utah Civ. R. 83-1.1(b)(a) (1997) ("Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court.").

[162] 28 U.S.C. **§** 1915(e)(1) (2000) (emphasis added).

[163] Memorandum from the Administrative Office of the United States Courts to the United States District Court Judges and the United States Magistrate Judges (March 19, 1991) (available from the Administrative Office).

[164] *See* 18 U.S.C. § 3006A(a)(1).

caselaw and sources and cannot find anything that would allow it to appoint an attorney for a crime victim."[165]

In addition, the CVRA obliges prosecutors to eliminate any lingering doubt in the event of any material conflict of interest between the prosecutor and the victim by "advis[ing] the crime victim that the crime victim can seek the advice of an attorney."[166] This requirement may frequently require prosecutors to help victims obtain legal counsel. Accordingly, a separate rule on this subject is appropriate.

For all these reasons, the rules should be amended to recognize the court's authority to appoint volunteer counsel to represent a crime victim. I made this argument in 2006 in testimony presented to the Committee. While the Committee addressed most of my other specific changes specifically, it never discussed this particular proposed change. So, it appeared to me in later testimony (in 2007) that the Committee's failure to adopt (or address) my proposal was just an oversight.[167] In any event, in my 2007 testimony and law review article, I thought it was perhaps useful to emphasize just a few points in favor of this proposal. In light of the continuing need for legal counsel for victims, I reemphasize those points here in my current testimony as well.[168]

While the CVRA does not *create* a right to counsel for victims, nothing in the Act deprived the courts of their preexisting inherent authority. The courts generally have the right to appoint volunteer counsel in civil cases,[169] a power that would seem to extend to criminal cases. Indeed, the Supreme Court has left open the question of whether federal courts possess the inherent authority to *require* counsel to provide legal services to the poor.[170] In addition, Title 28 broadly permits the court in both civil and criminal cases to "request an attorney to represent *any person* unable to afford counsel."[171] And before *Gideon v. Wainwright,* courts could request that lawyers provide assistance to indigent criminal defendants. Presumably, that same power extends to requesting assistance for crime victims.[172] In light of all these facts, federal courts have the inherent power to request attorneys to represent indigent crime victims.

An illustration of this power is found in a decision by the U.S. District Court for the Western District of North Carolina in *United States v. Stamper.*[173]In this rape case, a dispute arose over the admission of certain psychiatric reports concerning the victim that the defense alleged demonstrated a pattern of making false allegations of sexual abuse. She requested independent

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[165] United States v. Bendawald, 2025 WL 2240421 at *2 (D. Idaho Aug 6, 2025)
[166] 18 U.S.C. § 3771(c)(2) (2004).
[167] *See* Cassell, *Treating Victims Fairly*, *supra* note 5, at 941 n.451 (citing 2007 CVRA Subcommittee Memo. at 17-20 (listing my proposals that the subcommittee decided not to recommend; my proposed Rule 44.1 change not among them).
[168] *See id.* at 941-42.
[169] *See generally* Judy E. Zelin, *Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Action,* 52 A.L.R. 4th 1063 (1987 & Supp. 2004) (collecting and analyzing cases considering the issue of whether the courts can appoint counsel in civil actions to represent indigents).
[170] Mallard v. U.S. Dist. Court, 490 U.S. 296, 307, 308 n.8 (1989).
[171] 28 U.S.C. § 1915(e)(1) (2006) (emphasis added).
[172] *See* BELOOF, CASSELL ET. AL, *supra* note 4, at 317-18.
[173] 766 F. Supp. 1396, 1397 (W.D.N.C. 1991).

counsel to protect her privacy interests.[174] After consulting with the victim, the court appointed counsel for her.[175] The court then allowed her counsel to participate in hearings regarding the evidence, including cross-examination of the relevant witnesses.[176] My proposed rule would simply confirm the existing discretionary power of the courts to appoint volunteer counsel demonstrated in cases like *Stamper.* The rule is purely discretionary (the court "may" appoint counsel) and is limited to situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, can ask for volunteer counsel to assist victims pro bono.

Finally, it might be argued that it is unnecessary to address this subject in a rule because the court's inherent authority to appoint counsel exists even without a rule. Both courts and victims, however, will find it useful to have this authority close at hand in the criminal rules. Rule 44 already covers the subject of appointing counsel for defendants in great detail, so adding a Rule 44.1 addressing victims' counsel is a natural corollary.

Since I made my argument in 2007, it appears that the caselaw continues to conform to the arguments I made. Modern federal appellate courts have confirmed and expanded this inherent authority doctrine. For example, the Fifth Circuit in *Naranjo v. Thompson* held that "federal courts have inherent power to order counsel to accept an uncompensated appointment" in "limited factual circumstances," specifically "where a district court has determined that exceptional circumstances warrant appointment of counsel and has unsuccessfully attempted to secure a non-compulsory appointment."[177] The Ninth Circuit has similarly recognized that "courts have the inherent authority to appoint counsel when necessary to the exercise of their judicial function, even absent express statutory authorization."[178]

In sum, a rule reminding district courts of their authority to ensure victims' interests are effectively presented would make the Advisory Committee's changes work more effectively—and fairly.

* * *

I look forward to presenting this testimony to the Committee and answering any questions that might be helpful as the Committee considers these important issues.

[174] *Id.* at 1397.
[175] *Id.*
[176] *Id.*
[177] Naranjo v. Thompson, 809 F.3d 793 (2015).
[178] Perez v. Barr, 957 F.3d 958 (2020).

TAB 2

STATEMENT

OF

KRISTIN ELIASON, ESQ.

HEAD OF SERVICES

VOLARE

BEFORE

THE JUDICIAL COFERENCE ADVISORY COMMITTEE

ON CRIMINAL RULES

REGARDING

PROPOSED AMENDMENTS TO

FEDERAL RULE OF CRIMINAL PROCEDURE 17

ON

JANUARY 22, 2026

(VIRTUAL HEARING)

Members of the Committee,

Thank you for the opportunity to testify regarding the proposed amendments to Federal Rule of Criminal Procedure 17(c).Volare submits this comment to accompany its oral testimony on January 22, 2026 in response to the Judicial Conference Advisory Committee on Criminal Rules' ("the Advisory Committee's") Notice of Proposed Amendment to Federal Rule of Criminal Procedure 17 ("Notice"). Volare submits this written testimony noting that it is a preliminary draft of the organization's full comment, and therefore anticipates modification to the comment before its formal submission to the Advisory Committee on or before the comment period closes on February 16, 2026. My testimony also incorporates the testimony of Paul Cassell.

I. Introduction.

Volare is a non-profit organization in the District of Columbia that provides free legal services, advocacy, case management, and therapeutic programs to victims of all types of crimes within the District.[1] Volare advocates for restorative, systematic change through strategic public policy, innovative partnerships, and trauma-informed trainings. Since its founding in May 2012, Volare has empowered over 13,000 survivors of crime..[2]

Volare is uniquely positioned to speak on the issue of subpoenas for victims' personal and confidential information. We offer direct legal representation for survivors of crime seeking to assert their rights in criminal cases in the Superior Court for the District of Columbia and the United States District Court for the District of Columbia. Volare represents survivors in DC Superior Court civil protection order and anti-stalking order cases (CPOs and ASOs), and proceedings on District campuses related to Title IX and the Clery Act. Volare also helps survivors in the District and across the country challenge unjust trial outcomes by litigating appeals, filing amicus briefs, and fighting for survivor rights all the way to the Supreme Court.[3]

The Notice introduces amendments to Federal Rule of Criminal Procedure 17 ("Rule 17") regarding third-party subpoenas. Among other changes, these amendments eliminate the requirement that victims receive notice and an opportunity to dispute and/or redact subpoena requests; alter the evidentiary standard that has long been used to prevent unnecessary and intrusive requests; and dilute courts' and judges' ability to protect victims' statutory and constitutional rights. Volare has specialized experience in this area: our team has represented crime victims in numerous hearings regarding defendants' requests to subpoena victims' privileged, personal, and confidential records from third parties ("*Brown* hearings").

While Volare assists hundreds of survivors each year, our efforts afford representation to less than 1% of the yearly total number of survivors in cases that are proceeding before DC Superior Court and much less than 1% of criminal cases in the federal district court. The vast majority of survivors, unfortunately, proceed pro se with little to no legal support to protect their rights. The rights of both Volare's clients, and particularly pro se victims of crime, will be severely harmed if Rule 17

[1] Volare believes in referring to individuals who have experienced violent crime as "survivors," not as "victims," as part of its mission to pursue survivor-defined justice—which empowers survivors to heal and engage as they choose. However, because the Rules and statutory language use the term "victim," we refer to them by that terminology throughout this comment.
[2] *About Volare*, Volare, https://www.volare-empowers.org/about (last visited Jan. 16, 2026).
[3] *Id.*

is amended as proposed. As such, Volare strongly opposes the implementation of these amendments to Rule 17.

II. The proposed rule will severely impair Volare's ability to protect victims of violent crime in the District of Columbia, whose local rules mirror the Federal Rules of Criminal Procedure.

Volare regularly represents clients in the Superior Court for the District of Columbia, whose Rules of Criminal Procedure are closely tied to the Federal Rules of Criminal Procedure. According to the D.C. Code, the DC Superior Court is bound to conduct business in accordance with the Federal Rules, unless it takes affirmative action otherwise.[4] The process for taking such affirmative action is intensive. Modifications to the D.C. Rules of Criminal Procedure must be approved through an established rulemaking process, starting first in the DC Superior Court and requiring a series of committee approvals and recommendations, before ultimately being approved by the DC Court of Appeals. Because the D.C. Code explicitly provides that the Federal Rules of Criminal Procedure serve as the default for the District,[5] the DC Superior Court must initiate this process to affirmatively reject *any* federal amendments.

As such, the amendments to Rule 17 will not only result in negative consequences for victims of violent crime in federal cases: it will harm thousands of crime victims in the District's local court system and necessitate a cumbersome process within the DC Court system to prevent the amendment from automatically becoming a part of the D.C. Rules of Criminal Procedure. Though Volare has the utmost confidence in the the DC Court system's ability to eventually reject the amendments to Rule 17, it is inevitable that there will be a prolonged interim period of potential ambiguity and confusion on behalf of victims of violent crime in the District who will bear the brunt of this Rule change.[6]

III. As currently written, Rule 17 contributes to a flawed system—but even it protects and empowers victims more effectively than its proposed amendments will.

The extent of the damage posed by the amendments to Rule 17 becomes clearer with a comprehensive understanding of how victims currently engage with the legal system, and specifically how the legal system and Federal Rules of Criminal Procedure presently address requests from defendants accused of violent crimes to subpoena victims for documents and other items.

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[4] *See* D.C. Code § 11-946 ("The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes and adopts rules which modify those Rules.").

[5] *The Rulemaking Process*, District of Columbia Courts, https://www.dccourts.gov/superior-court/rules-committee/rule-making-process?utm_source=copilot.com (last visited Jan. 16, 2026) ("In the case of federal amendments, the Civil Rules Advisory Committee or the Criminal Rules Advisory Committee will also alert the Superior Court Rules Committee *if it wishes to reject a federal amendment.*") (emphasis added).

[6] For context, it took nine years for amendments proposed in 2008 to be implemented. For the thousands of victims of violent crime whose privacy will be jeopardized as a result of the amendments to Rule 17, even an interim period a fraction of this length poses significant issues.

It is already common practice for defendants and defense counsel[7] to issue subpoenas for highly sensitive victim information, such as medical records,[8] mental health records,[9] a social worker's treatment records,[10] social media records,[11] bank records,[12] records of a victim's consultation with a domestic violence and sexual assault crisis center,[13] and even the diary of a minor rape victim.[14] The extent to which victims receive notification and are able to contest requests for such records is varied, and depends largely on the location where the victim brings the case, and what state and federal statutes protect them.

[7] Volare recognizes that the changes to Rule 17 implicate both the prosecution and criminal defendants, but is particularly concerned about the implication of receipt of such information by the defense.

[8] *See, e.g.*, Virginia Lawyers Weekly, *Criminal: Defendant Can Subpoena Alleged Victim's Medical Records* (Apr. 20, 2025) (defendant seeking, and granted access to by the court, medical records of victim of sexual assault), staffhttps://valawyersweekly.com/2025/04/20/criminal-defendant-can-subpoena-alleged-victims-medical-records/. According to a staff attorney at Volare, a victim's medical records include a host of information that should not be provided to a victim's assailant or their counsel. "Medical records, especially for women, contain an incredible amount of information on obstetrics history, and a wealth of information on a victim's birth control, sex life, or menopause." For any victim, because the companies fulfilling these requests are automated to filter the information provided to counsel or the court, medical records provided by third parties include information "pulled from any possible source, such as genetic testing and oncological history." Of course, this information is not only not at all relevant to the underlying crime, but it is "especially not the assailant's business what your family's oncological history is." The process is "highly invasive, yet our medical records in this day and age are teeming with information of that kind."

[9] In *State v. Chambers*, defense counsel sought copies of mental health records of a victim of sexual assault, despite presenting no evidence that claims were fabricated. Records were pursued solely on the basis that the victim had received prior mental health treatment. *See* Dana Difilippo, *High court sets standards for release of sex assault victims' mental health records*, N.J. Monitor (Jan. 23, 2023), https://newjerseymonitor.com/2023/01/23/high-court-sets-standards-for-release-of-sex-assault-victims-mental-health-records/.

[10] In a case involving an elementary school victim of sexual assault by his own teacher, defense counsel subpoenaed records of the elementary student's conversations with a licensed clinical social worker, and when records could not be obtained, attempted to depose the clinical social worker. *See* Katharine K. Foote et al., *Protecting Victims' Privacy in Sensitive Criminal Cases*, Nat'l L. Rev. (Aug. 22, 2023), https://natlawreview.com/article/protecting-victims-privacy-sensitive-criminal-cases-0.

[11] In *Facebook, Inc. v. Superior Court*, No. 157143 (Cal. App. 1st Feb. 13, 2020), defense counsel sought public and private social media records of a deceased victim of a fatal shooting. *See* David Horrigan, *Data Privacy Trumps e-Discovery: Court Erred in Ordering Social Media Production*, Relativity Blog (Apr. 17, 2020), https://www.relativity.com/blog/data-privacy-trumps-e-discovery-court-erred-in-ordering-social-media-production/.

[12] Benny Shaw, child victim of molestation, brought his case against the scoutmaster that molested him fifteen years later. In the process, defense counsel subpoenaed, without notice to him, Shaw's internet records and even banking records–records which would have little do with a molestation that occurred 15 years prior. *See* Associated Press, *Do Records Victimize Victims?*, Wilmington StarNews (Feb. 24, 2003), https://www.starnewsonline.com/story/news/2003/02/24/do-records-victimize-victims/30509279007/.

[13] In *State v. Zarella*, defense counsel sought all mental health, counseling, and medical records of victim of sexual assault, K.R., from 2009 to 2025: a total of 16 years. Records also included K.R.'s interactions with a domestic violence and sexual assault crisis center. *See* Meg Garvin, *Victory for Survivors: New Hampshire Supreme Court Affirms Crime Victims' Rights to Privacy*, Nat'l Crime Victim L. Inst., https://ncvli.org/victory-for-survivors-new-hampshire-supreme-court-affirms-crime-victims-rights-to-privacy/ (last visited Jan. 16, 2026).

[14] In the case of *State v. Waldner*, E.H., a minor victim of rape, faced subpoenas from defense counsel of the entirety of her personal diaries, despite little indication that they contained information relevant to the case, and in spite of the fact that defense counsel had already received her medical and counseling records. *See* John Hult, *Alleged assault victim's diary creates Supreme Court test of voter-backed victims' rights law*, News from the States (Mar. 20, 2024), https://www.newsfromthestates.com/article/alleged-assault-victims-diary-creates-supreme-court-test-voter-backed-victims-rights-law.

Victims of violent crime derive rights from a patchwork of state and federal statutes, state and federal constitutions, and other protections guaranteed to them by the Federal Rules of Criminal Procedure. While some legislative initiatives have sought to afford victims some kind of representation during the prosecutions of the crimes they experienced,[15] victims remain under-supported in the criminal legal system. Victims are not a formal party in criminal prosecutions. As such, many proceed pro se, with a limited understanding of their statutory or constitutional rights and inconsistent notification of what has occurred in their case. Despite the Crime Victims' Rights Act's requirement that prosecutors refer crime victims for independent legal advice related to their substantive rights, very few referrals are actually made by U.S. Attorneys' Offices for the volume of victims that they interact with. Furthermore, in a survey completed in 1998, in any state, less than 50% of victims were notified of pretrial release of their perpetrator—a fact that victims would likely view as crucial to their personal safety.[16]

Many of the victims that Volare represents are traumatized by what they have experienced. Sadly, this trauma cannot be "fixed" or "solved" merely by the legal system deciding to prosecute the crime that a victim has suffered—and victims can be retraumatized as a result of requests for personal, private information from the very defendants who perpetrated crime against them.

The current system is already imperfect and difficult for non-lawyers to navigate—and Volare strongly opposes any attempt to reduce protections for victims any further, whether in state proceedings in the District or federal crimes prosecuted across the country.

A. The Current Subpoena Duces Tecum under Rule 17

As currently written, Rule 17 authorizes the issuance of subpoenas upon third parties for production of documentary evidence. Defendants accused of violent crimes have accordingly sought to use Rule 17 to subpoena victims of those crimes.

Defendants and defense counsel use the Rule 17 process to gather information, but the subpoena duces tecum in criminal cases was never designed to provide a means of discovery in criminal cases, and its chief innovation was to expedite trials by providing a time and place before trial for the inspection of subpoenaed materials.[17] And once a party invokes Rule 17, the trial court is empowered to quash or modify a subpoena if complying with it would be unreasonable or oppressive.[18]

The current system requires the court to affirmatively approve subpoena requests that seek personal or confidential information from a victim, with Rule 17 obliging those requests to be served "only by court order."[19] In addition, the party seeking the confidential information—typically the criminal defendant—is required to provide notice to the victim regarding the subpoena so they have an opportunity to move to quash it. While what qualifies as personal or

[15] *See, e.g.*, Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10607(c); D.C. Victims Rights Act, D.C. Code §§ 23-1901 *et seq.*
[16] Dean G. Kilpatrick, David Beatty & Susan Smith Howley, *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, Nat'l Inst. of Just., U.S. Dep't of Just. (Dec. 1998), https://www.ojp.gov/pdffiles/173839.pdf (last visited Jan. 16, 2026).
[17] *See Bowman Dairy Co. v. United* States, 341 U.S. 214 (1951) ("Rule 17(c) was not intended to provide an additional means of discovery.").
[18] *See* Fed. R. Crim. P. 17(c)(2).
[19] *See* Fed. R. Crim. P. 17(c)(3).

confidential information varies, victims can generally claim that their medical and health information, sexual history, personal communications, identity, and financial information qualify as such. If content within these categories is contested, victims have the opportunity to explain why their rights will be violated as part of a "*Brown* hearing," a separate type of evidentiary hearing specifically designed to balance defendants' interest in subpoenaed materials and the victim's rights.

While Rule 17 does not prohibit victims' personal or confidential information from being disclosed, the current system at least provides that victims receive notice of requests for their information and enshrines an opportunity for them to argue against the subpoena's issuance, or request modifications or redactions. A rule providing for anything less than this minimum standard paves the way for victims to be penalized for reporting crimes and cooperating with the prosecution, for their most personal and intimate records stand to be more easily exposed through a watered-down subpoena process. But a watered-down subpoena process with fewer protections for victims is precisely what the Advisory Committee is poised to create.

IV. Each proposed amendment to Rule 17 will hurt victims—and contribute to their re-traumatization and revictimization—by facilitating the surrender of their intimate information to their assailants, without meaningful involvement by counsel or the court.

The Advisory Committee has specified seven primary amendments to Rule 17,[20] each of which poses significant risks to victims and their participation in the legal system, as will be discussed below.

Of the amendments to Rule 17, Volare is particularly concerned about the risk that **the following four amendments** will create an environment significantly more hostile to victims asserting their statutory and constitutional rights, insofar as the proposed Rule:

1. Makes subpoenas available whenever the information sought therein is "likely to be admissible," replacing the current standard that it be "evidentiary and relevant." While the loosening of this standard is itself troubling, the proposed Rule also broadens the scope of proceedings in which subpoenas are available, making them available in a myriad of non-trial settings. Because "admissibility" is not a cognizable standard outside of the trial context, the proposed Rule creates a standard detached from the very scenarios it is meant to govern;

2. Allows victims' information to be subpoenaed without motion, eliminating court oversight and cutting off one of the few mechanisms available to victims to prevent abuse and unnecessary disclosure of personal information;

3. Gives defendants the ability to subpoena victims' information, and receive responsive documents directly–without limitation and without court involvement;

[20] These seven areas of focus include: (i) the expansion of subpoenas to proceedings other than trial; (ii) codifying a loosened *Nixon* standard; (iii) changing when motions and orders are required; (iv) changing when proceedings may be made *ex parte*; (v) altering the place of production; (vi) preserving disclosure policies in Rule 16; and (vii) clarifying which provisions apply to different proceedings.

4. Entrusts defendants with the ability to bypass victim notifications under the guise of citing "trial strategy," increasing the frequency of ex parte communication with the court and reducing the ability for victims to advocate on their own behalf.

Each change individually jeopardizes victims' privacy and safety. But together, these amendments build on each other to violate victims' rights at every turn.

A. Rule 17 as amended changes the standard from the previous standard set forth in *Nixon v. United States* ("are evidentiary and relevant") to a mere "likely to be admissible"—and dramatically increases the number of scenarios where subpoenas may be issued.

For years, defendants have been understood to be entitled to the production and inspection of documents under Rule 17 if those documents are "evidentiary and relevant" to issues that will arise at trial, subject to the various limitations and opportunities for third-party involvement described above. This standard, as articulated by the Supreme Court in *United States v. Nixon* and its progeny,[21] has restrained defendants from conducting "fishing expeditions" to obtain information irrelevant to issues that may be raised at trial.

The proposed Rule does away with the *Nixon* standard and instead permits defendants to seek documents that are merely "*likely to be admissible* as evidence in the designated proceeding."[22] According to the Advisory Committee, this change was necessary to prevent inconsistent applications of the Rule's original standard, which it said had "unnecessarily restricted access to evidence needed from third parties for trial and *other proceedings*."[23]

Indeed, the proposed Rule contemplates that defendants will be able to subpoena victims in settings reaching far beyond the conventional trial context. While defendants are almost certainly not entitled to broadened pretrial discovery from crime victims as a constitutional matter,[24] the proposed Rule enables defendants to subpoena victims in a myriad of non-trial settings, such as preliminary examinations and bail deliberations. University of Utah law professor Paul Cassell characterized the proposed Rule's drastic expansion as follows: "Effectively in 95% of all cases where pleas resulted, no victim subpoenas were possible. The new rule thus expands the possible situations where victims could be subpoenaed by something like 20-fold."

But the proposed Rule goes even farther, not only exponentially increasing the number of settings in which subpoenas can be used to obtain victims' private information, but also introducing a revised standard of admissibility that is ill-suited to govern them. Admissibility is a key consideration when the Federal Rules of Evidence ("FRE") govern, as they do during trial. But in

[21] *See generally United States v. Nixon*, 418 U.S. 683 (1974). The Advisory Committee summarizes the Nixon standard well, as "limiting non-grand-jury subpoenas to produce documents or other items to those that met specificity, relevance, and admissibility requirements," with many courts also requiring that the items sought were not otherwise obtainable by due diligence, that advance inspection was necessary to prepare before trial, and that the subpoena was not a "fishing expedition." Administrative Office of the U.S. Courts, *Preliminary Draft of Proposed Amendments to the Federal Rules*, at *91 (Aug. 2025), preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf (hereinafter "2025 Draft Amendments").
[22] 2025 Draft Amendments at *93.
[23] *Id.* at *92.
[24] Weatherford v. Bursey, 429 U.S. 545, 559 (1979); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (rejecting arguments that defendants are entitled to pretrial discovery through invocation of the Confrontation Clause).

many non-trial scenarios, the concept of admissibility is more illusory,[25] and in some, the FRE do not even apply.[26] Taken together, the result of these amendments is that victims will often be forced to argue against intrusive subpoenas by referring to a standard wholly divorced from the proceeding they find themselves in.

These amendments will unquestionably challenge victims, who will be forced to litigate subpoenas in new and confusing ways, in a variety of novel, non-trial settings. But they will also burden the federal and DC Court systems alike. Even if the 20-fold increase in the number of possible situations in which victims could be subpoenaed that Professor Cassell forecasts does not produce an identical increase in the number of subpoenas actually issued, even a *fraction* of that amount risks judicial inefficiency, as judges take additional time to evaluate their merit.

A mere administrative bloat in adjudicating subpoenas, while damaging in its own right, is the best-case scenario. Even worse is the possibility that judges, for efficiency's sake, become more likely to grant defendants' subpoena requests without pausing to consider their merits beforehand. Combined with the lack of examination through direct delivery to defense counsel, the rapidity of plea and pre-trial processes, and the limited formal representation of victims, victims' rights are exponentially more likely to be violated.

B. Rule 17 as amended will allow defense counsel to subpoena victim information without motion before the court, taking away the best chance a victim often has to oppose intrusive requests.

When a defendant seeks to subpoena victim information, current practice requires defense counsel to obtain permission—via motion—from the court to issue such subpoenas. Defense counsel have criticized Rule 17's victim information motions as "unnecessary motions practice."[27] But the requirement to notify victims through motion is a crucial procedure to prevent abuse that should not be eliminated as thoughtlessly as the proposed Rule contemplates.

Defense counsel have sought to liken Rule 17 to its counterparts in civil practice,[28] but the situation in criminal law is vastly different: victims are not a party to litigation, and while prosecutors may seek to protect their rights, victims are usually unrepresented and unprotected—with the court serving as their only safeguard.

Removing the requirement that defendants go through motions before the court puts the onus on third parties receiving subpoenas to police the appropriate boundaries between what information is "personal and confidential"—a topic that is the subject of a wide body of case law in itself.

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[25] *See, e.g.*, Henry Zhuhao Wang, *One Size Does Not Fit All: Alternatives to the Federal Rules of Evidence*, 76 Vand. L. Rev. 1709, 1712, 1732 (emphasizing that while the FRE "focus on the admissibility of evidence at trial," that "they do not apply or are an awkward fit" in many areas of dispute resolution).

[26] *See* Fed. R. Evid. 1101(d) (listing exceptions to the FRE's applicability to grand jury proceedings and so-called "miscellaneous proceedings" such as extradition or rendition, a preliminary examination in a criminal case, sentencing, or bail deliberations).

[27] Nat'l Ass'n of Crim. Def. Laws, Letter to Advisory Comm. on Crim. Rules Regarding Proposed Amendments to Fed. R. Crim. P. 17, at *2 (Feb. 13, 2024), https://www.uscourts.gov/sites/default/files/24-cr-j_suggestion_from_nacdl_-_rule_17.pdf.

[28] *Id.* at *14 ("Although the Subcommittee has not offered its preferred standard for seeking discovery pursuant to third party subpoenas, we respectfully suggest that the criminal standard mirror the discovery standards established by the Federal Rules of Civil Procedure—that the discovery sought be "relevant" and "proportional"—and the procedures established in Civil Rule 45.").

Furthermore, third parties and the public will be the ones expected to decide between disclosure and a potentially extensive court battle on behalf of a victim's privacy. Third parties are unlikely to be motivated to protect victim's rights and information, and are vastly more likely to simply turn over the evidence. To expect third parties to have full knowledge of victim's rights laws—and to choose to enforce them—pushes the duties of courts and litigating parties to protect victims on to the public.

The reality of third party record production is that third parties often err on the side of overdisclosure, rather than run afoul of the court's subpoena powers. As one staff attorney at Volare has explained, electronic record requests for medical records, for example, often "pull in records from different providers and specialists, and because third party companies do fulfillment for subpoenas, there is no evaluation occurring to match a records request with the particular relevant crime. All records are provided for the responsive dates, with little to no filtration or triage." Documents are also provided without redaction, a process that would be costly and time consuming when the records returned are often hundreds of pages long. In fact, this attorney has even observed third parties erroneously including the records of other, unrelated individuals, that would not have been discovered if not for having a victim's advocate involved in the process, all in the interest of efficiency and saving costs. To expect third parties to be the defenders of victim's rights is not merely unrealistic—it actively divests victims of their ability to defend themselves.

Another unwelcome result of this proposed change is that even prosecutors will lack adequate notification of the subpoenas defendants seek. Prosecutors will only be able to learn what information has been shared with defendants if it is otherwise discoverable, and at that point, the victim's rights and privacy will already have been violated. So not only does the change take away power from victims; it imbalances the relationship between the prosecution and the defense, with defense counsel newly empowered to determine and interpret what violates a victim's rights, to decide what counts as personal and confidential, and to obtain sensitive information without knowledge by their opposing counsel.

By striking the typical motion process, the revised Rule also removes the courts as a final barrier to defendants' most intrusive subpoena requests. No longer able to strike non-responsive requests, implement redactions, and create guardrails around defendants' access to sensitive information, the revised Rule alienates courts and judges from their rightful duty to vindicate victim's rights. This alienation is tragic considering the positive role that judges *have* previously played. A staff attorney at Volare once assisted a victim who, after being assaulted at a local university, received a subpoena from her assailant demanding her college transcripts—a request plainly irrelevant to the assault at issue. There, the judge "slapped the defendant's attempt down" as an obvious fishing expedition. In another case, a staff attorney at Volare represented the mother of a minor child who had been sexually abused. After the defendant subpoenaed the child's mental health records, medical records, and school records, the victim and their counsel opposed the motion and ultimately convinced the court to deny it. Both stories exemplify how strong a bulwark the courts can be in protecting victims when defendants play by the rules under the current system and request subpoenas through motion.

Volare opposes this change not because of a suspicion about the good faith and motives of defense counsel generally, but out of skepticism that *any* self-interested party in litigation should wield the ability to decide for themselves—without oversight—how to weigh their own interests against those of an unrepresented party. Given the overwhelming likelihood that interested parties,

including criminal defendants, are likely to decide litigable issues in their own favor, the amendments contribute to an environment where defendants have *carte blanche* authority to obtain sensitive information without notice, without court involvement, and without knowledge by the prosecution.

C. Rule 17 as amended will enable subpoenaed documents to go directly to defense counsel and provide criminal defendants with unfettered access to victim's information—flagrantly violating victims' rights under the guise of "judicial efficiency."

As if it was not damaging enough for victims to lose their opportunity to be heard through a formal notice process, the amendments to Rule 17 also make it easier for their intimate information to be accessed directly by defendants, exacerbating victims' retraumatization and revictimization.

As part of Rule 17's current requirement that victims be notified and given an opportunity to litigate subpoenas sought against them, victims typically have at least the chance to seek protective orders from the court with respect to documents they produce to defendants. These protective orders often redact portions of the documents to preserve victims' privacy, or tailor the manner in which defendants access personal information altogether.[29] A staff attorney at Volare who regularly assists victims with redactions describes it as a "time-consuming process." Each subpoena request can entail a series of proposed redactions back and forth between the victim, the defendant, and the court, often requiring specific data sharing platforms like Box that a victim may be unfamiliar with using. Victims also have to navigate seeming reasonable when requesting redactions to avoid the perception that they oppose *every* request, even if the vast majority of those requests are irrelevant. And while the amount of Rule 17 documentation utilized by the defense varies from case to case, the same staff attorney noted that it is even possible for *none* of it to be used at trial.

But the amendments to Rule 17 will enable defendants and defense counsel to access significantly more sensitive and private information from victims directly—such as reproductive health, mental health, and citizenship records—because Rule 17 will no longer look to the court's involvement as a safeguard in ensuring that victim's rights are being respected. Because documents will be delivered directly to defense counsel, the court and victim's advocates will not have the opportunity to redact, contest, or remove non-responsive portions of records.

These facts do not merely effectuate privacy harms: they also open the door for defendants to perpetrate further harms or crimes against the victim. In one case, a staff attorney at Volare was reviewed and redacted documents for a victim of felony sexual assault, which resulted in the breaking of one of the victim's limbs. The prosecution had requested the medical records, and in addition to containing a host of information about the victim, including her drivers license, birth dates, emergency contacts, and prescription medication, it also included the information of the victim's regularly scheduled physical therapy appointments, including times and locations.

In a world where this rule is passed, this staff attorney confirmed that defense counsel and defendants would have "known where the victim was" at that time, and that there was no chance that a third party responding to subpoena would "redact the name, time or location of a physical

[29] For example, a protective order from the court might require that defense counsel be present at any time that defendants themselves review sensitive information produced by a victim.

therapy practice." This sort of information, in addition to other more seemingly innocuous subpoena requests, such as for victim's social media activity, create an avenue for defendants to gather information on their victims that could very well enable them to commit further crimes against them. This is especially true, if, for example, a defendant were out on bond or, given the expanded timeline of access to the Rule 17 subpoena power, not yet arrested.

This leaves victims in an untenable position, forced to choose between pursuing a case to protect themselves where they know the defendant will have unfettered, direct access to information about them, or not bringing a case at all. As one staff attorney at Volare explained, "the mere prospect of a complete stranger [the prosecutor] knowing what your gynecological history is, whether you had an abortion or not, whether you have had a vasectomy, or take hormones for any number of medical reasons" is a factor weighing in many victim's minds against bringing their cases, not to mention the horror of knowing that the victim's assailant might gain access as well.

To be sure, the revised Rule offers a more expedient process for defendants to get information, no longer obligating them to beseech the courts. But it does so at the cost of victims' privacy and safety. Victims have a statutory right to be treated with fairness and with respect for their dignity and privacy, the likes of which cannot be compromised as a mere afterthought. And even if it *was* appropriate to subordinate victims' rights to those of criminal defendants for efficiency's sake—a notion Volare refuses to accept—the reality is that criminal defendants are complaining of a reality that does not exist.

For example, in the District, the DC Court system has proven perfectly capable of providing notice to victims even with swelling caseloads. In 2023, the DC Superior Court had just over 11,400 active felony and misdemeanor criminal cases in its criminal division, and approximately 2,400 misdemeanor and criminal contempt cases in its domestic violence divisions.[30] Of those 13,800 cases, over 10,000 were new filings or reopened cases.[31] Using the most recent judicial assignment data, less than 45 DC Superior Court judges have criminal cases as part of their caseloads this year.[32] It is clear that the District has been forced to manage a significant criminal docket with few judges, but it is less convincing whether this has actually produced the inefficiencies that this proposed Rule purports to fix. In Volare's frequent experience litigating victim subpoenas, the DC Superior Court's judges generally handle the receipt of victims' records and provide notification to represented victims in a relatively expeditious manner, even when there are multiple hearings and motions on a subpoena request, or when victims' counsel request proposed redactions. The belief that defendants need the ability to subpoena victims directly without court involvement because the court system *itself* is too inefficient is simply divorced from reality. But even if it *were* true, a compelling justification for compromising victim's rights for the benefit of criminal defendants flies in the face of their statutory and constitutional guarantees.

A prime example of the necessity of judicial review and a victim's ability to be heard on any request for their personal and confidential information occurred when I represented a survivor of intimate partner violence whose partner pleaded guilty and was convicted of stalking her and

[30] *District of Columbia Courts—Statistical Summary 2023*, DC Courts, https://www.dccourts.gov/sites/default/files/matters-docs/CY2023_Statistical_Summary.pdf (last visited Jan. 16, 2026).
[31] *Id.*
[32] *2026 Judicial Assignments*, DC Courts, https://www.dccourts.gov/sites/default/files/2026-Judicial-Assignments.pdf (last visited Jan. 16, 2026).

violating a civil protection order issued against him. The survivor sought therapeutic assistance related to the harm she had experienced and, subsequently, exercised her right to restitution in the criminal prosecution to reimburse her for the therapeutic expenses. Despite being represented by counsel, the defense did not serve the victim with its motion for her therapeutic records, choosing instead to file an ex parte motion with the court. The defense argued that the therapist's case notes would shed light on if, and how much of, the therapeutic sessions were related to the harm defendant caused. Ultimately, after some litigation on the issue, the court agreed to subpoena the victim's records and provide them to defense counsel. Ultimately, the victim had to make a terrible choice between protecting her emotional wellbeing or receiving restitution. Ultimately, the fear and retraumatization associated with the thought of her abusive former partner having access to and combing through her therapeutic records was too much, and she withdrew her restitution request. While that situation was horrible for the victim, she was at least provided notice and an opportunity to be heard on the issue *before* the records were provided to the defendant. Removing such a safeguard and allowing records to be sent directly to defendants would likely cause not only irreparable emotional harm to survivors but, given that such documents often contain victims' personal identifying information (addresses, phone number, social security numbers), has the likelihood to put their physical safety in danger as well.

D. Rule 17 as amended will lead to a proliferation of ex parte motions between defense counsel and the court, and bypass victim notifications whenever "trial strategy" stands to be revealed through a subpoena request—a virtually limitless carveout.

The Advisory Committee proposes that Rule 17's current system be revised to allow defendants and defense counsel to proceed with requesting and issuing subpoenas ex parte whenever not doing so—and providing adequate notice to victims—would "divulge trial strategy."[33] Volare is particularly concerned that this amendment opens the floodgates to essentially limitless ex parte communication between defense counsel and the court that will leave victims and their advocates in the dark.

As noted by Professor Cassell in an interview with Volare, "[a]lmost by definition, any subpoena to a crime victim will arguably [go to] trial strategy." By making "trial strategy" a legitimate basis for denying victims notification, defendants and defense counsel will be able to shoehorn any request for sensitive information into the category. In many cases, this will mean that unrepresented victims will not even know of, much less be able to quash, any subpoena requests from their assailant to obtain their personal information.

Notifying crime victims in advance of proceedings in the criminal justice process—and informing them of their rights to participate in that process—are prerequisites to the exercise of those rights. Giving defendants a justification to deny those prerequisites through "trial strategy" subordinates those rights.

I am an attorney who has represented victims of crime in their assertion of rights in criminal proceedings for 13 years and advocated for survivors for almost 2 decades. This advocacy included working with victims prior to formal adoption of the 2008 amendments to D.C.'s own Rule 17.

[33] 2025 Draft Amendments at *95 ("Proceeding ex parte is important when disclosure to another party of what the subpoena requests, the identity of the recipient, or the explanation why the subpoena complies with (c)(2)(B) could lead to damage to or loss of the items that the party is attempting to obtain, or divulge trial strategy, witness lists, or attorney work-product.").

In 2017, the DC Superior Court Criminal Rule 17(c) was updated to incorporate the 2008 federal rule amendments and included in a comment the federal committee's reasoning for including the "exceptional circumstances" exception to notifying crime victims. "Defense strategy" was frequently used as the justification for seeking a subpoena without victim notification. Of the situations Volare attorneys were involved in, records were sent from the holder directly to chambers and then the victim was notified. While it may be argued that no harm comes to the victim if they have an opportunity to be heard before the records are released to the defendant from chambers, a violation of the victims' right to privacy has already occurred--court staff and the judge now have access to information about a victim that is often extremely private, personal, and, often, privileged. Without procedural mechanisms in place to allow a victim the opportunity to be heard *even before* records make it to chambers, it is highly likely a victim will be revictimized in this process,[34] making it even more difficult to navigate a Rule 17(c) motion without counsel.

However, even "[a]fter the 2017 rule change, while notification happened more regularly, victims continued to have their records subpoenaed prior to notification under the exceptional circumstances exception. For victims of crime, this continues to be a highly violating procedure, even if it is only a judge and chambers' staff seeing their personal and confidential information."

Seeing this impact, the DC Council passed the Expanding Supports for Crime Victims Amendment Act in 2022. D.C. Law No. 24-341. The act explicitly requires judges in DC Superior Court, when determining whether to issue subpoenas for victims' confidential information from 8 different types of professionals (including physicians, mental health professionals, and sexual assault counselors/advocates) to

> "(A) Serve the victim with notice of the potential disclosure of confidential information; and
>
> "(B) Provide the victim with 14 days from the date of service to object to the disclosure of confidential information and provide an explanation for why the disclosure is not in the interest of justice.
>
> "(2) When determining whether the disclosure of confidential information is required in the interest of justice, as provided in subsection (c)(1)(B) and (5)(B) of this section, the court shall consider the rights of crime victims under § 23-1901 and 18 U.S.C. 3771.

After the 2017 rule change, while notification happened more regularly, victims continued to have their records subpoenaed prior to notification under the exceptional circumstances exception. For victims of crime, this continues to be a highly violating procedure, even if it is only a judge and chambers staff seeing their personal and confidential information. The DC law requiring notice before the issuance of a subpoena for privileged records, for instance from doctors or therapists, ensures that victims are meaningfully being afforded their rights under the CVRA. It allows victims to provide the court with context about the records, victims or their counsel to make arguments about proposed redactions, etc.

This law requiring notice ensures that victims are meaningfully being afforded their rights under the CVRA. It allows victims to provide the court with context about the records and allows victims

[34] For a more fulsome discussion of how the criminal system revictimizes survivors and can "make it more difficult for survivors to pursue justice" because of its intense, high-pressure, and adversarial nature, *see generally* Negar Katirai, *Retraumatized in Court*, 62 Ariz. L. Rev. 81 (2020).

and their counsel to make arguments about proposed redactions. The proposed amendment will be a step backwards for victims rights, both in D.C. and outside of it.

The amendments will also significantly reduce the number of victims willing to go to trial. As one staff attorney at Volare explained, Volare has to realistically explain to victims the criminal process that they face: "You are going to testify before a grand jury, and the defense is going to get your grand jury testimony, and try to trip you up at trial. At trial, you are going to be in the same space as the person who horrifically harmed you. They won't be cuffed, because it will be a jury trial." Should the proposed amendments to Rule 17 go into effect, Volare will likely have to revise its guidance about what could happen at trial or explain to victims why a plea deal may be preferential because of the risks inherent in a more intrusive subpoena process. As is detailed in the statement attached to this comment by survivor "Jane," the fear of having one's personal and confidential information provided to the prosecution or defense is a daunting prospect that may impede participation in the criminal legal process.[35] For survivors who choose, or who are forced, to move forward with participating in a criminal prosecution, safeguards such as victim notification *prior* to any decision made on requests for their personal and confidential information, are one of the few ways to mitigate additional revictimization for those survivors.

Even for those victims who are willing to bring a case to trial, the applied reality of such a surprise tactic is "cruel." "You have someone who hasn't eaten or slept for a week because [they] are so scared, and then potentially you have a defense attorney pull some deep dark secret from their medical records or psych records," which the victim did not even know the defense had. In some cases, this might effectively "blow up trial," with the victim "so upset that they will be unable to proceed."

"Victims are already nervous about cross examination to begin with" but to face the prospect of such a thing at the start of the case would only make the situation worse. As a staff attorney at Volare explained, "the amendment would change the landscape so drastically that [I], as a victim's rights attorney, would have to counsel that essentially, Rule 17 no longer exists."

E. These amendments operate in tandem to create untenable circumstances for victims.

To drive home the impact that this rule change will have, Volare proposes the following hypothetical, arguing that it is thoroughly possible under the amendments as written:

> A victim of sexual assault has her cell phone location information and phone records subpoenaed. Defense counsel, in their own discretion, determine that because these records are held by a third-party, they are not personal or confidential. Therefore, the subpoena goes forward without notice to the victim or motion before the court. These records are delivered directly to defense counsel, who permits the defendant to review its contents. Defendant, utilizing this information, can determine the victim's typical behavior and routines, and uses this information to stalk and pressure the victim to drop the case. Because no motion is required, the prosecutor is entirely unaware of the subpoena. The court, without knowledge of the subpoena or receipt of the documents, is likewise unaware and unable to protect the victim. The victim, also unaware of the subpoena, cannot protect herself from the defendant's attempts to revictimize her, whether through practical or legal means.

[35] *See* Attachment A. Volare is eternally grateful to Jane for trusting Volare with her story.

Ultimately, each of the above four changes takes away a layer of protection from victims, leaving them bare before the court with little more than the best intentions of another party's counsel to shield them. Therefore, Volare strongly opposes the passage of these amendments to Rule 17 as written.

V. To avoid needlessly imposing negative consequences on victims, the Advisory Committee should cabin its proposed amendments to Rule 17 so that they carve out violent crimes—or at the very least, explicitly exclude the District of Columbia from its sweeping changes.

For the reasons articulated above, Volare strongly opposes the Advisory Committee's amendments to Rule 17, which it believes will undermine victims and force the dissemination of their most sensitive, private information. But Volare proposes two modifications that, if adopted, will reduce the harm posed to victims: *first*, that the Advisory Committee narrow the scope of the revised Rule so that it does not cover cases of violent crime; and *second*, that it expressly carve out the District of Columbia from the revised Rule.

A. Carve out Violent Crime

Rule 17 already offers a carve out for victims' personal and confidential information. However, as revised, the amendments render that particular exception to be a distinction without a difference.[36] Instead, the Advisory Committee should expand the personal and confidential information exception to apply to all Rule 17 subpoenas of victim information in cases of violent crime.

Such a modification should be a relatively easy drafting lift for the Committee. The definition of violent crime has been established for decades, and the Committee will be able to utilize the longstanding definition as outlined in 18 U.S.C. § 16:

> The term "crime of violence" means—
>
> (a)an offense that has as an element the use, attempted use, or threatened use of physical force against the person or prop-erty of another, or
>
> (b)any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Such a revision would still permit the amendments to be applied in the numerous federal cases not involving violent crime, such as for white collar defendants. However, it would also ensure that victims of violent crime, who are most likely to be viscerally impacted by the rules, are still able to defend their rights to privacy under the current system.

B. Carve out the District of Columbia

Alternatively, the Advisory Committee should expressly exclude the District of Columbia from its amendments to Rule 17 to prevent their application in the DC Court system. As discussed above, any change to the Federal Rules of Criminal Procedure immediately impacts the District—and as such, the Advisory Committee is obliged to consider how its proposals will impact not only victims of federal crime, but the lives of thousands of victims of local crimes in the District as well.

[36] *See supra* IV.B.

Volare recognizes that some of the amendments to Rule 17 may be beneficial in *some* contexts, in *some* jurisdictions. But it sees no need to subjugate the District's local court system to serve the purpose of combatting non-violent crimes in unrelated jurisdictions.

In light of the sensitive, private information about crime victims that defendants typically seek through subpoenas to third parties, it is vital that victims receive notice and an opportunity to be heard. It is equally important that the court retains a robust role in ensuring that subpoenas to third parties do not become intrusive "fishing expeditions," the likes of which the Federal Rules of Criminal Procedure have long opposed. Because these amendments undermine these principles and therefore put violent crime victims at risk, Volare strongly opposes the Advisory Committee's proposed amendments to Rule 17.

VI. Conclusion

As one staff attorney at Volare aptly summarizes it, "in this work, we always talk about the trauma experienced in the original victimization, and the subsequent victimization that occurs within the court system…like hundreds of little cuts against the victim." These amendments to Rule 17, taken together, do much more than cut the victim little by little: they strip survivors of violent crime of their rights, privacy, and even safety.

The amendments to Rule 17, particularly, (1) loosening the *Nixon* standard and introducing third-party subpoenas into a myriad of non-trial settings; (2) allowing victim information to be subpoenaed without motion, permitting counsel to determine in their own favor what information is personal or confidential; (3) authorizing subpoenaed documents to be delivered directly to counsel, and therefore defendants, rather than through the court; and (4) opening the flood gates for ex parte motions for victim information by allowing "trial strategy" to be used to dodge victim notification, operate in tandem to create a world where nothing stands between defendants and victim's private and sensitive information.

Taken together, these new rules create a system that is, at best, negligent to victim's rights, and at worst, effectively sanctions abuse of process by defendants and counsel. As such, Volare strongly opposes the rule as written and strongly encourages the Advisory Committee to either: vote against passage of the amendments to Rule 17, or implement carve outs both for application of the amendments to cases of violent crime, and specifically, for the District of Columbia.

Respectfully submitted,

Kristin Eliason, Esq.
Head of Services
Volare

Attachment A:
Testimony of Jane[37], a Pro Se Victim Who Did Not Report a Crime Due to Fear of the Invasiveness of the Criminal Process

When I was a college student, I was the victim of the crime of video voyeurism. A person whom I thought was a close friend hid his phone, camera rolling, in the shower of a bathroom where I was changing out of my bathing suit and into my regular daily clothes. I never would have known what he did if it were not for him receiving a spam phone call in the middle of changing. I heard his phone vibrate, and thought it was my own. When I discovered the actual situation, I was both numb and horrified.

I confronted him about what had happened, and he admitted to having video taped me. He claimed it was the only time he had done something like this. To this day, I don't know if this was true. I made him delete the video while I watched, and I checked it was not in his deleted files. I remain uncertain to this day if it might be anywhere else.

The next morning, I went to meet an older advisor and mentor of mine, who happened to be a state felony judge and a former prosecutor. We had a frank conversation about what had happened. Just sharing what occurred with him was humiliating and awkward—frankly, I was afraid that he would never look at me the same again. And then came the most difficult question: did I have enough, in his experience, to bring a case? Was it even worth it?

While he never told me one way or the other, I came to the conclusion that the prospect of having to bare myself before the court, another judge, the prosecutor, and most crucially the defense and my former-friend, now-perpetrator, was just too much.

There were a lot of reasons I came to this decision. I was going into my sophomore year of undergrad out of state. I feared that if I got caught up in an extensive and complex trial in my home state, I would be unable to participate in getting my degree.

The experience of having this happen to me was traumatizing enough. Every time I went into a bathroom, I found myself compulsively looking for cameras, even when logically I knew there were none. I, embarrassingly, had a panic attack in the bathroom of a restaurant in another state. Whenever I saw my former friend pop up in old photos, or even saw people like him in the media, the raw dread and horror of the moment came flooding back.

I knew that the experience of having to revisit what happened, repeatedly, would be like ripping the bandage off of a wound, over and over. Rather than allowing it to heal and disappear from my mind, I would be causing myself to scar. I would be permanently marked by not just the experience, but reliving it in the courts, in a way that I felt I wouldn't be if I walked away. And because the litigation and any evidence, such as the video itself, would be open to view by the public, I would be marked not just to the system actors, but also in my small hometown community.

[37] Name has been changed to protect the survivor's identity.

I wanted the invasive and violating experience that I had to smooth over like sand in an oyster, walled off completely from my thoughts and memories. That would be impossible if I brought my case.

The other large factor in my decision not to bring the case was what my mentor told me about the realities of the subsequent litigation. Not only would I be questioned about what happened that day, but any number of things that might be relevant to the defense's case. And I would required to return to the courthouse in my hometown any time I wanted to contest discovery by the defense.

Among the items that likely would be subpoenaed for discovery were my mental health records, educational records, call logs, internet history, and social media history. While they had no relevance to what I experienced, any good defense attorney would try to use them to fabricate a reason why I was lying about what happened. They would see that I received treatment for anxiety and OCD—my conditions led me to misinterpret what I saw. My grades had dropped slightly during my second semester at college—I would be using this case as an excuse to get sympathy from professors and extensions on deadlines.

More disturbing than these spurious assertions was the idea that the man who had committed video voyeurism against me would be getting more voyeuristic pleasure out of digging into the annals of my life. In my worst nightmares, I imagined him masturbating to the documents—what I was sure he would have done to the video if I had not caught him. The experience of being videotaped made me constantly feel watched. But knowing that he would have had his eyes on my most private life—the truths that I bore to my therapist, my doctor, my closest friends through messages and social media—would be voluntarily signing up to have him do it all over again. To this day, the very idea makes me nauseous.

Having discussed with the staff attorneys at Volare, and having read the rule change, I know that I would be even less likely to bring my case under these proposed rules than I would have that day in years ago. To know that I and my life could be "watched" without notice to me, the court or my victim advocate, at any time in the proceedings, would put me in a constant state of fear and anxiety. To know that I would have to upend my life and return to the courthouse at any stage in the proceedings to contest an overbroad subpoena would be far too much for me to handle. To know that I could have been surprised on the stand with the knowledge that my perpetrator had not only dug into and "watched" my private documents (another trauma) and decided to bare them before the court and the public at trial (a new trauma again)... The feeling is nearly impossible to describe. While most of the law is devoid of feelings, as I'm sure this rule change is also meant to be, I implore the committee to consider the feelings of victims in this rule change. The horror of the experience would be like nothing else: I can only compare it being akin to having seen the recording of myself in the first place, naked and unaware—until I wasn't.

Thank you for considering my testimony,

Jane

TAB 3

No written testimony outline or comment was submitted by the requested January 16, 2026 deadline.