

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
MEETING OF THE ADVISORY)
COMMITTEE ON CRIMINAL RULES:)
HEARING ON PROPOSED)
AMENDMENTS TO RULE 17)
)

Pages: 1 through 51
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Date: January 22, 2026

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Corporation Suite 305
Heritage Reporting
1150 Connecticut Avenue, N.W.
Washington, D.C.
Thursday,
January 22, 2026

The parties met remotely, pursuant to the notice,
at 10:59 a.m.

EVIDENCE RULES COMMITTEE ATTENDEES:

- HONORABLE MICHAEL W. MOSMAN, Chair
- HONORABLE ANDRE BIROTTE, JR.
- HONORABLE PAUL J. BARBADORO
- PROF. SARA SUN BEALE
- HONORABLE JANE BOYLE
- HONORABLE TIMOTHY BURGESS
- HONORABLE MICHAEL HARVEY
- PROF. NANCY J. KING
- BRANDY S. LONCHENA, Esquire
- MARIANNE MARIANO, Esquire
- SHAZZIE NASEEM, Esquire
- HONORABLE JACQUELINE H. NGUYEN
- SONJA RALSTON, Esquire
- HONORABLE CARLOS A. SAMOUR, JR.
- PROF. JENIA TURNER
- MARY JO WHITE, Esquire

OTHER COMMITTEE AND JUDICIARY STAFF ATTENDEES:

- HONORABLE JAMES C. DEVER, III
- CAROLYN A. DUBAY, Esquire
- PROF. CATHERINE T. STRUVE

1 we'll adjust on the fly as necessary.

2 For witnesses, please have your video off
3 and your microphones muted -- muted until you're
4 called on to make your formal presentation.

5 And then, for Committee members, you can
6 have your videos on or off during the hearing as you
7 desire, but have your audio muted when you're not
8 speaking. And then, if you want to make a comment or
9 ask a question during the question period, you can use
10 the Raise Hand feature on the Teams app or physically
11 raise your hand in the video frame to indicate you
12 desire to make a comment or ask a question, and,
13 Carolyn and Sarah, Nancy, I'll ask you to help me not
14 miss anyone who's got a question pending.

15 The hearing's recorded. A transcript will
16 be made publicly available on the U.S. Courts'
17 website. If you get disconnected, you can use the
18 original Teams link to rejoin or use the conference
19 bridge phone number at the bottom of the invite email
20 to rejoin us.

21 With that, I'll start. We'll hear from our
22 witnesses. Our first witness, if he's here with us, I
23 didn't check, Professor Paul Cassell. Paul, are you
24 available?

25 MS. DUBAY: And I'm sorry to interrupt,

1 Judge Mosman, but if this is Paul on one of the
2 numbers, they have to press star six to unmute if
3 anyone's having difficulty unmuting.

4 CHAIR MOSMAN: Thank you for that, Carolyn.

5 PROF. BEALE: Judge, we did have one
6 telephone number that we couldn't identify, so we
7 thought that might be Professor Cassell.

8 CHAIR MOSMAN: A telephone number that's
9 joined us?

10 PROF. BEALE: Yes.

11 CHAIR MOSMAN: Well, this is just --

12 PROF. BEALE: The schedule didn't have him
13 speaking until 11:05, so I suppose it's possible that
14 he has timed this to arrive at 11:04 and a half, not
15 realizing that in your courtroom, Judge, he needed to
16 be ready sooner. I believe, Ms. Eliason --
17 Professor -- Ms. Eliason, I'm not sure if I'm
18 pronouncing that right. I believe that she is on deck
19 and ready. Is that correct? There she is.

20 MS. ELIASON: Yes.

21 PROF. BEALE: I'd seen her show up.

22 MS. ELIASON: That's correct. I do know
23 Professor --

24 PROF. BEALE: Judge, do you want to go ahead
25 and just switch that order so that we could just go

1 ahead and get started?

2 CHAIR MOSMAN: Absolutely. Is your name --

3 MS. ELIASON: I do know --

4 CHAIR MOSMAN: Go ahead.

5 MS. ELIASON: Oh, I'm sorry, Judge. I do
6 know Professor Cassell was planning on being here and
7 leading off the testimony so that we could kind of not
8 waste the Committee's time and be repetitive. I'm
9 happy to start if that pleases the Committee, but I do
10 know we had confirmed with him that he was going to be
11 here.

12 CHAIR MOSMAN: All right. Well, let me
13 reach out to him one more time here to see if I hear
14 from him. If not, is your name pronounced Eliason,
15 Kristin?

16 MS. ELIASON: It is. That's correct, yes.

17 CHAIR MOSMAN: Well, let's --

18 MS. ELIASON: Similar to Boomer Esiason, the
19 great football announcer, yeah.

20 CHAIR MOSMAN: You can do a lot worse.

21 Paul, are you with us?

22 (No response.)

23 CHAIR MOSMAN: All right. Ms. Eliason, I'm
24 going to ask you to go ahead then and you'll take his
25 exact same time slot.

1 MS. ELIASON: Absolutely. Thank you, Judge,
2 and thank you, Committee members. As you all were
3 saying, I did submit testimony in writing to the
4 Committee last week. I will potentially be
5 supplementing that based on some of the questions that
6 you all may have if I feel that that's necessary, and
7 we'll get that into you all as soon as possible after
8 the hearing ends today. Judge Cassell, when he joins
9 us, is going to probably touch more on the ivory tower
10 issues that he, as a law professor, sees, and Ms.
11 Garvin and I would like to just kind of shed a light
12 on what we see on the ground.

13 Just by way of background, my name is
14 Kristin Eliason. I'm an attorney. I practice -- I'm
15 barred in Maryland, in the District of Columbia, but I
16 practice now -- a majority of my practice is in the
17 District of Columbia. I'm with an organization called
18 Volare. Prior to last year, we were known as Network
19 for Victim Recovery of D.C. We've been around
20 since -- we have been around since May of 2012, and a
21 big chunk of our services, I won't go into kind of our
22 other amazing services, but a big chunk of our
23 services, our legal services, include representing
24 crime victims in criminal proceedings under the
25 Federal Crime Victims Rights Act, which applies both

1 to federal courts, where we do practice in the
2 District, and applies to D.C. Superior Court, where
3 the majority of our trial practice occurs.

4 Additionally to the federal law, and I
5 mention it because I will be mentioning it during my
6 testimony today, in addition to the federal law, as
7 likely you all probably know, maybe you don't, because
8 of the way the District is set up, our Criminal Rules
9 of Procedure are required to essentially mirror the
10 Federal Rules absent some really good reasons from our
11 Rules Committee. I myself served on the Criminal
12 Rules Advisory Committee for our most recent Rule 17
13 and Rule 60 amendments, and the rules do currently
14 very much mirror the Federal Rules, and the reason I
15 mention that is, as you saw in my testimony, it is
16 likely going to significantly impact District victims
17 of crime both in federal cases and in D.C. Superior
18 Court cases.

19 The bulk of my practice has been in D.C.
20 Superior Court, but because the rules are so similar,
21 I can offer some real-world examples of how the rules
22 currently impact victims of crime and how these
23 proposed changes very likely would have a huge
24 negative impact on victims of crime.

25 While I'm privileged to have the support of

1 my organization and 13 attorneys that work under me,
2 we have funding to represent victims of crime and we
3 represent hundreds and hundreds every year, many of
4 them in criminal proceedings in D.C. Superior Court
5 and some in the District Court for the District of
6 Columbia.

7 The majority of victims of crime do not have
8 representation both in the District and across the
9 country. As Ms. Garvin can testify, there are not a
10 lot of attorneys who represent victims of crime in
11 criminal cases. You know, we don't have laws that
12 require victims to be appointed counsel for free, and
13 there aren't a lot of organizations across the country
14 who do this work. The private attorneys that do,
15 often it is related to a civil case they might be
16 pursuing. So I do feel that I myself and Ms. Garvin
17 have a unique perspective when it comes to how Rule
18 17(c) proceedings can impact victims of crime.

19 What we're seeing on the ground and what
20 we've continued to see really until the District
21 Council passed a law to afford victims some more
22 protection is that many victims of crime aren't
23 provided notice before a subpoena goes out for their
24 personal and confidential information. Usually, the
25 requests are coming from defense counsel. I want to

1 be clear here. I strongly believe in the
2 constitutional rights of anybody being accused or
3 prosecuted or convicted of crimes. From the outset,
4 myself, my organization doesn't see it as a victim-
5 versus-defendant issue. We do really see this as a
6 victims' privacy issue.

7 Usually, defense, sometimes prosecution,
8 but, usually, defense counsel move to obtain -- the
9 vast majority of records that we see are medical,
10 mental health records, phone records, sometimes crime
11 victims' compensation records, but, usually, the
12 majority of them are medical and mental health
13 records, maybe education records.

14 Defense counsel file these motions under
15 seal, so the prosecution is not aware of them, the
16 victim is not aware of them. Even if they have
17 counsel in the case, if they're filed under seal, we
18 as counsel do not get served with those motions. The
19 court reviews them and then the court will make that
20 determination whether or not the request meets the,
21 you know, exigent circumstances or emergency
22 circumstances to issue the subpoena to get the
23 records.

24 Currently, right, under the rules that we
25 have, those records don't just go directly to defense

1 counsel. They come to chambers and then, usually, the
2 victim is notified. What complicates things,
3 especially when we're representing victims, is a
4 significant portion of the defense's motion is often
5 redacted, so we're arguing in a vacuum related to the
6 records. I'm an attorney. I've been representing
7 victims of a crime for almost 20 years. Many of my
8 colleagues have been representing victims of crime for
9 a decade plus. It's still very hard for us as lawyers
10 doing this work to argue in a vacuum, so for a pro se
11 victim who maybe just got notice, likely their
12 provider didn't even provide them with notice.

13 We see that frequently, that providers are
14 not abiding by local and federal laws to notify their
15 patients when they have records requests. We're
16 seeing that they get notified and then are essentially
17 being asked by the court, hey, I have your records.
18 What do you want me to do with them? And a pro se
19 victim who doesn't have the legal training or the
20 ability to really argue, who has also experienced --
21 you know, the majority of these requests are happening
22 in violent crime situations, so they've experienced
23 probably one of the worst situations of their life and
24 now are being asked to talk to a judge, someone who
25 likely is, you know, for a pro se person, probably an

1 intimidating figure, especially depending on the
2 victim's background, how they've shown up in court.

3 It's probably not surprising to this
4 Committee it's not an insignificant number of our
5 clients who have been defendants in criminal cases at
6 one time or another, so they're having to argue, make,
7 you know, subpoena arguments before the court and then
8 relevance arguments before the court related to what's
9 actually in their records, so it's a lot. It's a huge
10 burden to put on victims who are pro se, and it's a
11 huge burden even when victims are represented.

12 And, you know, we have a lot of really great
13 judges here in D.C. Superior Court who they and their
14 clerks will take the time to review the records, but,
15 without context from the victim, they may not know
16 that providing defense counsel with medical records
17 that contain a victim's reproductive health history to
18 the victim's abusive ex partner or current partner
19 could put the victim in significant danger, right?
20 Medical records, especially for folks who have the
21 ability or had the ability to have children, can
22 contain miscarriage information, abortion information.
23 In a domestic violence situation, that is extremely
24 dangerous, so there's information in these medical
25 records that, you know, without context, the court may

1 not know that probably -- they should probably be
2 redacted, so that's even when we have judges working
3 as kind of that gatekeeper for the information before
4 it gets turned over.

5 We're very fortunate that often the judges
6 will allow us, after we've made arguments regarding
7 whether or not the subpoena should be issued, to let
8 us make arguments regarding redactions, but, under the
9 proposed amendments, if records were to go straight
10 from the provider to the defense counsel, I'm sure we
11 can all agree -- excuse me, my large senior dog is
12 downstairs barking at the mail person, so if you hear
13 that, I apologize -- but going right to defense
14 counsel means that it's now on defense counsel to
15 determine what to show their client, what not to show
16 their client, and without any sort of protective order
17 mechanism in place, right? We've asked the court to
18 issue protective orders. It can put victims of crime
19 and their family into some very dangerous situations.

20 And then, finally, I know I have just a few
21 more minutes, I do want to mention that the Crime
22 Victims Rights Act itself, which again applies to the
23 federal courts and to the courts here in the District
24 of Columbia, puts a requirement on judges that they
25 accord victims their right to privacy and to be

1 treated with fairness and respect for their dignity.
2 Essentially, removing the judge from the -- first,
3 removing the victim from the process of being able to
4 say what they feel about their records being
5 requested, in my opinion, and I believe Ms. Garvin and
6 Professor Cassell echo it, would be a huge violation
7 of their right to be -- to their privacy rights,
8 excuse me, and then having them go straight to defense
9 counsel would also be a huge violation of their
10 privacy.

11 I do understand there's been arguments that
12 have been made about judicial economy. Having spent a
13 lot of time looking at the caseload data for the
14 federal courts, I absolutely understand that
15 especially depending on the jurisdiction judges are
16 overwhelmed and very busy, but there is an obligation
17 to ensure that victims have their rights to privacy
18 protected, and especially given the fact that a
19 significant portion of victims, I would probably say
20 99 percent of victims, especially in the federal
21 courts, do not have counsel, the judge is the kind of
22 one person that may have the opportunity to ensure
23 that that victim's right is protected.

24 And I'm not sure if I have any more time.
25 I'm happy to answer any questions right now or after

1 the rest of the witnesses testify, and, again, thank
2 you all very much for your time. I know that this is
3 not your full-time job, so I very much appreciate you
4 giving us time to be heard today.

5 CHAIR MOSMAN: Thank you, Ms. Eliason.
6 Separate from the merits of what you said, I just want
7 to compliment you on masterfully summarizing your
8 written concerns in the time you've been given. I
9 appreciate that very much.

10 MS. ELIASON: Thank you, Judge.

11 CHAIR MOSMAN: Actually, I didn't warn you,
12 Judge Nguyen, but I'm going to ask you to respond
13 first. There will be other questions perhaps. Ms.
14 Eliason's dominant concern -- well, one of them, is
15 certainly notice to victims. Perhaps you could
16 explain what the amendments do regarding notice to
17 victims if you don't mind.

18 JUDGE NGUYEN: First of all, let me join in
19 thanking you, Ms. Eliason, for your testimony today.
20 Throughout the subcommittee's discussions of this
21 rule, we spent quite a bit of time talking about
22 things like protective order, protecting victim
23 information. I just actually wanted to clarify your
24 concern because the rule, as amended, provides for
25 notice to the victim unless there's exceptional

1 circumstances. Is that insufficient, in your view, to
2 address your concerns regarding notice to victims?
3 And in what way do you think that that differs from
4 the current practices in the jurisdiction that you
5 currently practice?

6 MS. ELIASON: Yes, thank you for your
7 question. I do think it is insufficient, the reason
8 being that the majority of requests that we have seen,
9 especially before the district passed a law to
10 essentially remove the exceptional circumstances for
11 confidential information from certain types of
12 providers, doctors, physicians, therapists,
13 exceptional circumstances isn't defined, and because
14 it's not defined, we routinely see that being granted
15 and often, because it's under seal, it's an ex parte
16 request, we aren't made aware of the exceptional
17 circumstance.

18 And often the argument that has been made
19 and kind of in favor of the exceptional circumstances
20 at least as I've heard it and understand it is that
21 while the court is getting the records, you know, if
22 we don't send them directly to the defense, the court
23 is getting the records, so there's nothing to really
24 be worried about because they're protected by the
25 court.

1 But the problem is is that that's already a
2 violation for folks' privacy rights. You have now
3 chambers seeing the records, potentially the judge
4 seeing the records, combing through them, and while,
5 you know, for someone maybe who hasn't been through
6 that process, it might not seem like a big deal, but I
7 think we can all probably imagine, if you've told your
8 therapist the kind of most secret, private information
9 about yourself, even having a judge, you know, whose
10 job it is is to be protective of that information can
11 be an additional violation.

12 So I think the exceptional circumstances,
13 we're not seeing it. At least in practice, we're not
14 seeing it in a way that's, oh, the records are going
15 to be destroyed if we don't get them sooner, because
16 the majority of records that we're seeing being
17 requested are coming from professional practitioners
18 like hospitals, psychotherapists' offices, academic
19 institutions, and so, when we're seeing the
20 exceptional circumstances argued, it's not usually
21 related to necessarily something that I would
22 interpret as exceptional circumstances, and so that's
23 why I don't think it's protective enough if that
24 answers your question.

25 CHAIR MOSMAN: Thank you very much. We have

1 two further questions in just a couple of minutes, so
2 Professor Beale has raised her hand and Ms. Ralston
3 also. I'll take you in that order.

4 PROF. BEALE: Thank you. So, Ms. Eliason, I
5 was wondering, you described the D.C. amendments that
6 provide the kind of protection that you think is
7 warranted here, and I'm wondering whether those
8 provisions would remain in effect if Rule 17 is
9 amended. Obviously, D.C. has a different caseload,
10 you know, its own options to make adjustments through
11 the rulemaking process and through the city council
12 and so forth, so could you address how those
13 adjustments fit with what might be the amendments to
14 Rule 17?

15 And, I guess, the other question is just
16 following up on Judge Nguyen, your written submission
17 on page 6 says that it would allow victims information
18 to be subpoenaed without motion, and I think you
19 clarified with Judge Nguyen that you recognize that
20 the proposal carries forward the current requirement
21 in the absence of exceptional circumstances that there
22 be a motion and that the victim have an opportunity to
23 participate, so those two things just to clarify
24 points that you raised more in your written materials
25 than in your comments today.

1 MS. ELIASON: Yes, Professor Beale, I think
2 on page 6 might be a typo, so I think it's supposed to
3 say to be subpoenaed without court intervention, but
4 I'm not seeing the document. So I'll make sure that
5 we get that corrected, so the --

6 PROF. BEALE: Because it is the current --
7 it's the same as the current. It carries forward the
8 current --

9 MS. ELIASON: Yes.

10 PROF. BEALE: -- Rule 17 provision. Okay.
11 Thank you.

12 MS. ELIASON: Yes. So our current law in
13 D.C., right, doesn't impact the federal courts in D.C.
14 but does, as you mentioned, impact the D.C. court, so,
15 right now, the current Rule 17 was amended in 2017, I
16 believe, to reflect the 2004 amendments if I have my
17 dates right, so it conflicts with the council law.
18 Even if Rule 17 in the District Superior Court gets
19 amended to reflect the federal rules, we will have a
20 District law that essentially our argument would be
21 overrides the federal -- or, sorry, the District's
22 rule that reflects the federal rule.

23 So it does create some confusion, but, you
24 know, this wasn't a quick process by the District.
25 This was something that they held hearings on, that

1 there was a lot of advocacy from both the victim
2 community and victims advocates and legal and
3 otherwise advocates community to have the law amended
4 just to ensure that there's that extra protection over
5 records that are likely not going to -- the request
6 for which would likely not meet an exceptional
7 circumstance because they're all professional records
8 that, you know, most people would refer to as
9 privileged, right, but they have confidential
10 communications in them.

11 So, as the law stands, even if Rule 17 was
12 amended again locally to reflect the federal rule, we
13 have this law in place. And I will say that the
14 caseload in the District, I think we have about -- I
15 don't want to over or underquote it, but I think we
16 have about 12,000 new criminal filings annually in the
17 District Superior Court, and, as you can imagine, the
18 vast majority of victims in those cases are pro se,
19 and they're not just District residents, right?
20 They're folks who live and work in the DMV area who
21 may come into D.C. for all kinds of reasons, so it
22 does have the potential to impact not just people who
23 live in the District who have experienced crime in the
24 District but folks from all over the country and
25 potentially the world who come to visit the District.

1 PROF. BEALE: Thank you for that
2 clarification.

3 MS. RALSTON: All right. I think I'm next.
4 Hi, Ms. Eliason. I'm Sonja Ralston from the
5 Department of Justice. I have, I think, two questions
6 that are related, which are ways that we might address
7 your concerns by defining the terms in the rule a
8 little better. I'm wondering if there's a way you
9 think we could define "exceptional circumstances" to
10 be more effective at balancing the interests that
11 you've raised and those that, I think, the rule is
12 trying to deal with, and then I noticed in your letter
13 you put forward an issue of crime of violence, whether
14 we could exempt, like, victims of violent crime. And
15 I was curious about whether, you know, you proposed
16 the definition of Rule 16 and whether you had
17 considered the fact that -- or, I'm sorry, Section 16
18 of Title 18, that, for example, rape and sexual
19 assaults are not crimes of violence under Section 16
20 and whether that would affect -- whether that's an
21 appropriate definition.

22 MS. ELIASON: Yes, thank you. So I think,
23 to answer your first question --

24 CHAIR MOSMAN: I'm sorry to interrupt. I'm
25 going to ask you to sit on that question for just a

1 minute.

2 MS. ELIASON: Absolutely.

3 CHAIR MOSMAN: We're over time here. I just
4 wanted to check. We'll have time if Professor Cassell
5 is unavailable, but if he's available, I want to turn
6 to him, so, Professor Cassell, can you tell me if
7 you're with us here this morning? If you can unmute
8 and let us know?

9 (No response.)

10 CHAIR MOSMAN: Ms. Eliason, do you mind
11 checking your phone to see if he's texted you or
12 anything like that?

13 MS. ELIASON: Absolutely, Judge. And I'll
14 send him an email as well.

15 MS. GARVIN: Judge, if I may?

16 MS. ELIASON: Sorry.

17 MS. GARVIN: I'm one of the next witnesses.
18 I have texted Judge Cassell, former Judge Cassell. He
19 has not yet responded to me. I have also emailed just
20 so that if you want to continue the conversation with
21 Ms. Eliason, I'll follow up with you all.

22 CHAIR MOSMAN: All right. Since we don't
23 have him, then, Ms. Eliason, if you need Ms. Ralston
24 to repeat the question, go ahead. Otherwise, you can
25 go ahead and answer it and you'll take up some of his

1 time.

2 MS. ELIASON: Okay. I'm happy to answer the
3 question. So I think, in my preferred and my
4 organization's preferred world, there's no carve-outs
5 or exceptions based on crime or otherwise, but if you
6 were to hold, you know, my feet to the fire as it
7 were, I think exceptional circumstances should be
8 narrowly limited, and I'm sure Judge Cassell and Ms.
9 Garvin also would love to answer this question.

10 For me, the exceptional circumstances should
11 essentially be you have more than a reasonable belief
12 that the records will be destroyed or lost in some
13 sort of way if the subpoena is not granted
14 immediately. I don't personally see any other reason
15 that a victim's right to privacy should be bypassed
16 other than that concern, a real concern, that the
17 records might be destroyed or lost, and I think that's
18 likely one of the reasons in D.C. that the council
19 removed the exceptional circumstances for those
20 different professional records, because it's very
21 unlikely that, you know, unlike someone who maybe has
22 an iPad that they could delete all of their
23 conversations off of, let's say academic institutions,
24 doctors' offices, that kind of thing, are much less
25 likely to have that issue.

1 Then, in terms of crime of violence, so I
2 think, you know, the federal cases that I've
3 represented victims in have been related to child
4 sexual abuse imagery and sexual assault, so I can't
5 speak to things like white collar crime, if you will,
6 and why records might be needed necessarily in those
7 cases. I would really prefer it applied to all
8 victims, but if we were going to narrowly define it to
9 crimes of violence, I would want it to be expansive,
10 such as one might find under the crime -- like, D.C.'s
11 Crime Victims Compensation statute, for instance,
12 defines crime of violence very expansively.

13 I would prefer it include all victims of
14 crime, but here we are, so, yeah, I would want it to
15 include at the very least victims of assault, sexual
16 violence, child abuse, intimate partner violence,
17 stalking, human trafficking, but, really, because
18 there are so many different ways someone might
19 experience crime, and we know there's been research
20 done on the impact of different types of crime, and
21 there was a study done that essentially concluded that
22 even folks who have experienced identity theft have
23 the same sort of emotional and mental trauma impacts
24 that someone who's experienced a violent physical
25 assault might experience, so if there were to be a

1 carve-out for certain types of crimes, I would want it
2 to be as expansive as possible, but, yeah, hopefully,
3 that answers your question.

4 CHAIR MOSMAN: Thank you very much.
5 Marianne, I know you have a question, but we're going
6 to table that and come back to it if you don't mind.
7 I'd like to turn now to Ms. Garvin, and I know she's
8 available because I saw her a minute ago. Ms. Garvin
9 is with the National Crime Victim Law Institute at one
10 of my favorite law schools, Lewis & Clark Law School
11 right here in Portland, Oregon. Good to see you
12 again.

13 MS. GARVIN: Good to see you, Judge, and
14 Committee members, thank you. I will just update the
15 Committee too. I have both emailed and texted and so
16 have not heard back. If my phone buzzes, it would
17 only be because Professor Cassell had returned a
18 message, and if that's the situation, I'll let the
19 Committee know because I know how robust his testimony
20 would be. So thank you all for the opportunity to
21 testify regarding these proposed amendments.

22 And I'm particularly grateful that you all
23 were graceful at least in communication with me to
24 extend some generosity in the fact that I couldn't get
25 in written testimony in advance. I am planning to

1 submit written testimony prior to the February
2 deadline. I do not believe anything that I will say
3 today has not been presented through the testimony of
4 Professor Cassell or Ms. Eliason, so I don't think
5 that anything I raise would be new information, so I
6 do believe that we'll be able to have a robust
7 conversation. If there is anything I raise that
8 hasn't been fully put forward in testimony, I'll make
9 sure that I build it out even more in my written
10 testimony that I'm able to submit.

11 So, by way of introduction, my name is Meg
12 Garvin. I use she/her pronouns so everyone has those.
13 I am the Director of the National Crime Victim Law
14 Institute, which is based at Lewis & Clark Law School
15 here in Portland, Oregon, as the Judge said. I am
16 also a law professor at Lewis & Clark, but I'm wearing
17 my hat as director of a nonprofit that works with
18 victims of crime all across the country as I testify
19 here today, and that hat is a hat that allows me to
20 directly represent victims of crime in state, federal,
21 and military proceedings, criminal proceedings, as
22 well as support other lawyers who do that work across
23 the country, so that's the lens through which I am
24 bringing some information to you today.

25 My concerns with the proposed amendments are

1 really echoes of what Ms. Eliason and Professor
2 Cassell have shared in the written testimony and what
3 Ms. Eliason has shared just today. What I'm going to
4 focus on is what I see are the negative effects of the
5 proposed changes on the statutory rights of crime
6 victims. I will weave in an example from practice,
7 but I'm also going to talk about both the rights and
8 the court obligation under the federal Crime Victims
9 Rights Act because I believe there's an unintended
10 erosion of both of those things in the proposed
11 amendments.

12 So I know the Committee is well aware of the
13 federal Crime Victims Rights Act, but I still want to
14 just ground us in it just for a moment. The intention
15 behind the CVRA that is actually expressed in the
16 legislative history and which I had the privilege of
17 being a part of drafting back in 2003 and 2004 was
18 that crime victims had for so long been treated not as
19 participants or rights-bearing individuals in the
20 criminal case but more as just witnesses in the case,
21 and so the CVRA was intended to holistically change
22 that approach to how victims engaged in criminal
23 justice, and it has both explicit rights that do that,
24 including one that is particularly at issue in the
25 amendments, right?

1 And Ms. Eliason already mentioned it, the
2 right to be treated with fairness and respect for
3 dignity and privacy, but it also, in the schema of the
4 CVRA, affirmatively put a duty on courts to "ensure
5 that crime victims are afforded their rights."

6 So, when Congress was crafting the CVRA, it
7 was looking at a landscape (a) where victims didn't
8 have a lot of representation, although the original
9 CVRA had millions of dollars that were designed to
10 change that as well. That funding has pretty much
11 dried up across the country. But there had been an
12 intent to move towards represented crime victims, but
13 recognizing that even with an influx of dollars, that
14 wasn't going to become the norm, the CVRA put in place
15 this other component, an affirmative duty on the
16 courts.

17 The proposed amendments, I believe, have to
18 be understood in that context, so Rule 17 actually
19 needs to be understood in this context, not just Rule
20 17(c)(3), right? (c)(3) was an amendment to the rules
21 that was designed to factor the CVRA, but all parts of
22 Rule 17 affect victims, affect subpoenas that could go
23 to victims. So, if we look at Rule 17's proposed
24 amendments with this backdrop, what we see is the
25 combined impact is going to increase the number of

1 subpoenas that will likely issue for victims'
2 information, not just information that hits under
3 (c) (3). Information is going to potentially go
4 directly to defendants, and courts will not have as
5 much of a role as a bulwark to protect the victims'
6 rights as is their duty.

7 So three specific aspects of the amendments
8 that I want to just lift up to talk about briefly.
9 First, the expanded proceedings, right? Rule 17
10 currently is focused on trial subpoenas, and I have
11 reviewed to the best of my ability the amazing work
12 that's been done to date by this Committee to factor
13 why, from an accused person's perspective, that
14 limitation is challenging, but on the flip side,
15 broadening up the proceedings that it's being
16 broadened up to make it a high risk that victims are
17 going to have persistent subpoenas about their
18 information happening.

19 And as Ms. Eliason noted, unrepresented
20 victims are going to have a ton of challenges
21 navigating that, so the number of moments that
22 subpoenas may be issued and the lower practical
23 barriers to repeated demands for information are going
24 to expose victims to not just the trauma Ms. Eliason
25 said but the practical realities of navigating a

1 criminal justice system that they are unfamiliar with,
2 and it's going to be happening earlier in proceedings,
3 where relevance is more up in the air and where the
4 rules of evidence are not necessarily in play at all
5 or are at play in a restricted fashion.

6 So that's one concern. I believe that
7 actually is leading to the very definition of fishing
8 expedition, particularly in sexual assault cases.
9 That's my senior dog, Maverick, and his name is
10 Maverick. One moment, Judge. I apologize.

11 The second thing that I wanted to flag is
12 the move away from the Nixon standard, which I know is
13 very much developed in the written testimony. I know
14 there has been a lot of thought put into this, but I
15 cannot not flag it, right? I have to flag this. This
16 threshold of likely to be admissible at the proceeding
17 at which the subpoena is at issue is problematic
18 because of the fact that at all of these new
19 proceedings that Rule 17 might apply at, the rules of
20 evidence may not be at play or are at play in a more
21 relaxed fashion.

22 So, again, what we have is more proceedings,
23 a lesser standard, right, for when they might come
24 into play, and then the third component is the prior
25 judicial approval. Ms. Eliason gave really powerful

1 examples in her testimony just a minute ago about
2 medical records in domestic violence cases. When
3 those might go directly to a defendant, it's
4 incredibly, just very bluntly, scary because of what
5 could happen to that victim. So, collectively, right,
6 collectively, these challenges place a greater burden
7 on unrepresented victims who are likely navigating
8 trauma and more often remove court oversight from
9 being that protective moment where rights could be
10 analyzed, right, where the court could do its duty.

11 So there's been discussion about, well, of
12 course, prosecutors are in the mix more. You know, I
13 work closely with prosecutors all across this country.
14 Assistant U.S. Attorneys are amazing individuals.
15 They are not and cannot be the victim's attorney, and
16 that's the landscape that we navigate within, and so
17 that's part of why Congress put an explicit moment on
18 courts to be in the mix when victims' records are
19 subpoenaed. It is a piece of what Congress did. It
20 said at every turn courts have an obligation.

21 So a very brief scenario from my work. As I
22 look at the clock, I'll make it incredibly brief. So
23 years ago, under the current Federal Rule 17, I was
24 working with a victim of human trafficking. The case
25 was moving through prosecution. She was an incredibly

1 young student. It involved both sex and labor
2 trafficking, and a subpoena issued for her education
3 records, right? Under the current Rule 17, we did
4 receive notice, although it only came after the court
5 rejected an exceptional circumstances argument that
6 had been made that to disclose the subpoena would have
7 disclosed trial strategy. We did get notification.
8 We did oppose it, and we had relevancy on our side
9 because it was a trial moment, and so there was a
10 prevailing moment.

11 Under the current rules, had this young girl
12 had to face subpoenas for her education, counseling,
13 medical records, all of which were eventually
14 subpoenaed also in that pretrial, immediate pretrial
15 moment, I have no doubt that the repetition of having
16 to fight subpoenas, even with counsel and even with an
17 Assistant U.S. Attorney who was supportive, I don't
18 believe she would have made it, and I do not believe
19 that I am exaggerating. I'm not a mental health
20 professional, but my experience with this young girl
21 was that one fight was all she had in her and we would
22 have lost her, and I mean that in the mode of self-
23 harm.

24 I don't think many victims could take the
25 repetition of subpoena reality that may be happening

1 under the proposed amendments. Even if courts
2 ultimately quash subpoenas, it is the repetition, it
3 is the fighting, it is the exposure to emotional,
4 financial, and psychological costs of all of this that
5 gives me really grave concerns. I respect that the
6 Committee is trying to find a balance. I just ask
7 that the Committee really think about how to evolve
8 Rule 17 in a way that doesn't make victims' rights
9 collateral damage, unintended collateral damage, to
10 increased efficiency and honoring of an accused
11 person's rights.

12 Thank you, and I will take any questions.

13 CHAIR MOSMAN: Thank you.

14 Ms. Moore, I left you hanging last time, so
15 why don't you go ahead and start. You can direct your
16 question either to Ms. Eliason, where you had the
17 question before, or to Ms. Garvin or both. Marianne,
18 you have any other questions?

19 MS. MARIANO: Sorry. I'm sorry, Judge.

20 CHAIR MOSMAN: Oh, there you are. There you
21 are. Go ahead.

22 MS. MARIANO: I didn't even realize my
23 camera was up. So the only question, I guess, for Ms.
24 Garvin I would have is, given your practice across the
25 country, there are many jurisdictions that already

1 allow subpoenas outside of trial practice. We heard
2 testimony from both prosecutors and defense attorneys
3 to that effect, and both prosecutors and defense
4 attorneys in those hearings confirmed that they
5 haven't seen this fishing expedition, and it wasn't
6 victim-centric admittedly, but it was in general,
7 right? So, because you have represented folks all
8 around the country, there are places where these
9 subpoenas are issued outside of trial. Has that been
10 your experience as well? And the notice provision in
11 the current rule would still apply, so if you could
12 just speak to that?

13 MS. GARVIN: Yes, and for clarification for
14 the record, I have only represented victims directly
15 in Oregon because that's where I'm licensed, but I
16 partner with lawyers all across the country on their
17 cases, so I just want the record to be clear for any
18 ethics review of something.

19 MS. MARIANO: In federal -- I apologize.
20 For federal court in Oregon or --

21 MS. GARVIN: Yes.

22 MS. MARIANO: Okay. Thank you.

23 MS. GARVIN: Yes, I'm licensed in Oregon
24 both at the state and federal level, and that's where
25 I practice predominantly, and then I associate when

1 I'm in other jurisdictions, generally not entering my
2 appearance individually but partnering on the case
3 instead, so, yes, certainly, and I did see that in the
4 testimony that has been received that there is a
5 practice of non-trial limitation around some of these
6 subpoenas in certain districts. I've definitely seen
7 that. We oppose on those grounds at times when we do
8 have notification and we're involved because we try to
9 argue Rule 17, its current iteration, shouldn't be
10 interpreted so broadly because of the history and
11 tradition that Rule 17 was never designed to be a
12 discovery device, and so it's most appropriately
13 situated as a trial subpoena moment.

14 In some courts, actually, that will prevail
15 in the moment, although it doesn't change practice in
16 others. It doesn't change even in the moment because
17 of the prevailing practice of the district, and then
18 we're just fighting on the other aspects of it, but,
19 again, when we brief that issue to a court about a
20 non-trial subpoena, we are briefing it around the
21 history and tradition. This is not supposed to be a
22 discovery device, right, and that particularly when it
23 comes to victims and a longstanding recognition that
24 there is no federal Constitutional right to pretrial
25 discovery from victims, again, sometimes we prevail on

1 that and sometimes we don't.

2 In terms of whether it's a fishing
3 expedition or not, again, I do think the lens through
4 which a career prosecutor and a defense attorney see
5 the world is quite different than a victim whose
6 records are being subpoenaed, and so, from my
7 perspective, I would certainly not label every
8 subpoena a fishing expedition. There are subpoenas
9 that I would be asking for as well no matter which
10 side of the equation I was on, but there are many more
11 I label as a fishing expedition because of the lens
12 through which I'm approaching the case.

13 MS. MARIANO: But, in the non-trial context,
14 when you say we litigate those other issues, once
15 you've litigated and lost that it should only be for
16 trial, I assume those issues would include relevance,
17 for example, or particularity?

18 MS. GARVIN: Yes.

19 MS. MARIANO: And those get litigated before
20 the court even outside of a trial still?

21 MS. GARVIN: It will be litigate -- it will,
22 yes.

23 MS. MARIANO: Thank you.

24 CHAIR MOSMAN: Thank you. There may be
25 other questions, but I see Professor Cassell has

1 joined us. Thank you for joining us. We're a little
2 short on time and your written remarks were, in my
3 opinion at least, quite thorough and very helpful, so
4 I'm going to give you, for starters at least, before
5 you take questions, five minutes to hit the parts of
6 your testimony you think are most important for us.
7 Go ahead, sir.

8 MR. CASSELL: Yes, thank you, Judge Mosman,
9 and I apologize. The logistical mistake was mine and
10 apologize for delaying my appearance this morning. I
11 have provided detailed written remarks, and maybe in
12 view of the limitations of time that you have, I could
13 just waive a right to make an opening statement and
14 proceed directly to any questions the Committee might
15 have. I think you've seen the beginning part of my
16 testimony summarizes the remarks, and I'll simply rest
17 on that and would be glad to answer any questions.

18 CHAIR MOSMAN: Thank you very much, and you
19 weren't able to hear, but Ms. Eliason and Ms. Garvin
20 were both very helpful and took up some of your
21 laboring oar there. So I'll open it up to questions
22 for any of our three witnesses. You don't have to go
23 just with Professor Cassell but any of our three
24 witnesses from members of the Committee. Ms. Ralston?

25 MS. RALSTON: And this could be for any of

1 you. My question is whether you have experienced or
2 you have an example of a time where a victim was
3 identified throughout the process, like, very close to
4 the time of trial as opposed to early on in a case?
5 Obviously, there will be cases where, in a reactive
6 case, the entire case is brought because a particular
7 victim was victimized, you know, at the moment the
8 defendant was arrested immediately, that kind of
9 thing, where we know who the victim is.

10 And in proactive cases, we often try as hard
11 as we can to identify all of the victims before we
12 bring the indictment, but I'm wondering if you have an
13 example of a time where, at the detention hearing or
14 at the time when a suppression hearing might have
15 happened, that we didn't yet know somebody was a
16 victim and then later on it becomes determined that
17 they are a victim, like before trial?

18 MS. ELIASON: I can speak to that. Only one
19 comes to mind and the case pled out before trial, but
20 it was a case involving more than 150 victims, but
21 only about 52 were able to have charges associated
22 with their victimization due to statutes of
23 limitations, but it was essentially a serial voyeurism
24 case where, at the time of indictment, maybe half had
25 been identified, and then, throughout the

1 investigation, more victims were able to be
2 identified. And so that is one place where I've seen
3 it where, you know, we would not have known at the
4 time of arraignment kind of the breadth of all of the
5 victims involved.

6 CHAIR MOSMAN: Thank you. Professor
7 Cassell, I'm going to turn to you. I don't mean to
8 put words in their mouths, but if I could summarize
9 what your two colleagues have told us, I'd say the
10 dominant concerns are, one, a reduction in the Nixon
11 standard, two, a perception that there's a reduction
12 in the mediating role of courts between subpoenas and
13 victims, and three, an expansion in the number of
14 occasions, not just trials but others, where victims
15 have to encounter these kinds of requests. Are those
16 your three dominant concerns, or do you have a
17 different one you'd like us to think about as well?

18 MR. CASSELL: Yes, I haven't had a chance to
19 hear them this morning, but I'm sure all their remarks
20 were spot on with what I've been coordinating with
21 them over the last several weeks. I would add one
22 more concern to the agenda, if you will, or the list
23 of concerns that the Committee might want to examine.
24 It's this exceptional circumstances rule or loophole,
25 I guess, would be a better word that currently exists

1 in the Advisory Committee notes.

2 Of course, that exceptional circumstances
3 exception will now apply in a far greater number of
4 situations given the expansion of the rule, and what
5 I'm particularly concerned about is the current
6 Advisory Committee notes say that an exceptional
7 circumstance could be the disclosure of defense
8 strategy, which, of course, is very easy to argue. I
9 think others have described that as a loophole that
10 you could drive a truck through.

11 The problem with that Advisory Committee
12 note is it seems to rest on trial-by-ambush
13 philosophy, that it would be proper for a defense
14 attorney to withhold information and then surprise the
15 prosecutor or perhaps even the judge at the trial by
16 suddenly springing new information into the case.

17 In my testimony, I discussed one of the
18 examples that I believe the Committee heard from other
19 defense attorneys. The defense attorneys were talking
20 about, well, we collected all this information and we
21 would have, I think the quote was "tipped our hand" if
22 there had been a subpoena procedure that required
23 notice go to the victim.

24 And tipping your hand, of course, is a poker
25 analogy. The U.S. Supreme Court has instructed

1 repeatedly, based on a famous *Law Review* article from
2 Justice William Brennan, that criminal trials are not
3 supposed to be analogized to poker games. They're
4 supposed to be cards on the table in general and a
5 situation where justice is the overriding concern
6 rather than springing something on the court or the
7 prosecutors later on in the case.

8 So one of the things that I recommend in my
9 written testimony is to eliminate any sort of notion
10 of trial by ambush, but I think it's also important to
11 loop prosecutors into these subpoenas. As I'm sure my
12 colleagues have mentioned earlier, many crime victims
13 will lack legal counsel. It may be the prosecutors
14 are well situated to provide legal advice as to how
15 motions to quash could be filed or what records have
16 already been provided to defense counsel, and so
17 keeping the prosecution in the loop is something that
18 should be encouraged rather than discouraged, which I
19 think the current draft of the proposed rule does.

20 CHAIR MOSMAN: Thank you very much, sir.

21 Any other questions from members of the
22 Committee? We're very short on time now, but any
23 others? Ms. Moore? Excuse me. Ms. Mariano, I missed
24 you.

25 MS. MARIANO: It's okay. Hi, Professor.

1 It's actually nice to virtually meet you. I've seen
2 your advocacy with the Sentencing Commission as well,
3 so our paths have crossed virtually in the past, but I
4 do have a question. The exceptional circumstance for
5 the notice requirement has been in the rule for 20
6 years. I wonder if you have -- there's no body of
7 case law, so I just wonder if you have -- if you could
8 point us to any litigation around that meaning within
9 the notice requirement?

10 MR. CASSELL: Yes, I did a Westlaw search, I
11 think, a week or so ago, and there doesn't seem to be
12 litigation one way or the other. I suspect the reason
13 there is little litigation is that crime victims are
14 poorly situated to litigate these issues. One of the
15 things I mentioned in my testimony is the way to
16 litigate the issue apparently under the current rules
17 is to go into contempt of court by refusing to produce
18 the materials, and then that would create a contempt
19 citation, which would then allow appellate review, and
20 expecting crime victims who are, first off, oftentimes
21 unrepresented by legal counsel and, secondly, to
22 pursue a strategy of going into contempt of court to
23 raise an appellate issue concerning the scope of Rule
24 17, I think, is unrealistic.

25 I would defer to my other colleagues here,

1 Kristin and Meg, who have presumably more real-world
2 experience than I do on these issues, but I think that
3 there just hasn't been an opportunity for crime
4 victims to present this issue and take it up to the
5 appellate courts that would then start to produce
6 written decisions.

7 CHAIR MOSMAN: Ms. Eliason, do you wish to
8 add anything to Ms. Mariano's question?

9 MS. ELIASON: No, I think I covered it
10 earlier in my testimony as well. Thank you, Judge.

11 CHAIR MOSMAN: Thank you. How about you,
12 Ms. Garvin?

13 MS. GARVIN: I would just echo what
14 Professor Cassell said, and what I would add is one of
15 the challenges is we've made the argument in trying to
16 litigate this. We were flagged that exceptional
17 circumstances had been raised in that case that I
18 mentioned earlier. We have tried to say, well, we're
19 not parties, so you could still share stuff with us ex
20 parte because we're not the government, and then we
21 ended up litigating whether the victim would end up
22 disclosing something to the government or not, and
23 that ended up being part of the litigation. We're
24 like, well, we're representing them, we're counsel.
25 We're not going to disclose if you direct us not to

1 disclose, but we got very sidetracked by that
2 litigation, and then the client didn't want to take
3 anything up on appeal. I mean, it just became a I'm
4 done with this, and so I do think not only are they
5 unrepresented, not only is there a lack of
6 availability to take something up on appeal, but also,
7 even when you have a case that might go up and you
8 might have some actual litigation over, many, many
9 clients don't have the way power to do that.

10 CHAIR MOSMAN: Thank you.

11 MS. MARIANO: Can I add to my question just
12 before, Ms. Eliason? Under the CVRA, most districts,
13 I think, have a victim witness coordinator within the
14 U.S. Attorney's Office, and I think, in my own limited
15 practice, so I don't mean to say speak for all of my
16 colleagues, but that notice very much goes through the
17 victim witness coordinator to the prosecutor in nearly
18 all these cases, so I'm curious about how that, the
19 litigation either on appeal or, frankly, the party
20 that can't take the interlocutory appeal is the
21 defense and that's the party that's most likely not
22 able to appeal the failure of that subpoena effort, if
23 you have any interaction with that, like the notice
24 within the District Court, not the District of
25 Columbia, which I know is so different, but the U.S.

1 District Courts do seem to coordinate through victim
2 witness coordinators.

3 MS. ELIASON: I'm not sure I'm fully
4 understanding the question. I mean, we work with the
5 victim witness coordinators a lot when we have cases
6 and they're incredibly useful. I will say from just a
7 side note, right, they don't often have a lot of time
8 because, right, they are both a victim coordinator and
9 a witness coordinator, meaning they're coordinating
10 every witness in a case, which becomes really
11 challenging from a scope-of-duties perspective. I
12 know that's not your issue, but I did want to flag it.

13 When I'm working on a case, I actually work
14 directly with the prosecution. When the victim is
15 unrepresented, they are almost always relegated, most
16 of their conversations, to conversations with victim
17 witness, and every now and then the prosecutor
18 participates in that, but I'm not sure how -- I
19 haven't had that experience, any interaction with them
20 around a Rule 17 subpoena that would change the
21 conversation.

22 CHAIR MOSMAN: So we have just a couple
23 minutes left. I know Professor King has her hand up.
24 I'm going to turn to her, and then I'm going to make
25 sure I don't end the meeting without asking whether

1 Professor Beale or Judge Nguyen or Judge Dever have
2 anything they wish to add, so we'll go in that order,
3 starting with you, Professor King.

4 PROF. KING: Hi. Thanks to all of you for
5 appearing today and for your submissions. I have a
6 question for all three of you. I think, Ms. Garvin,
7 you mentioned this in your last answer and that is, is
8 it your experience that whenever there's an ex parte
9 motion there is also no notice to the victim because
10 they're different, right? Ex parte is the
11 prosecution's not told. Notice is the victim gets no
12 notice. And I believe, Professor Cassell, Paul, your
13 submission equated the two. You were using the idea
14 that an ex parte motion might be available for trials
15 to protect trial strategy as informing your view of
16 what the notice provision, the scope of the notice
17 provision is. So do courts separate those two things?
18 Do you separate those two things? How has it worked
19 in your experience?

20 MS. GARVIN: I'll jump in first since it was
21 in my last answer, but I believe the other two will
22 likely want to jump in. We separate them and try to
23 argue that they are separate. They get conflated by
24 courts and practitioners not infrequently. I won't
25 say frequently, but not infrequently. We have had to

1 deal with it literally where we're saying notice has
2 to come to us, we are not a party, and we end up
3 having to litigate that, and there seem to be -- where
4 it seems to be coming from is perhaps not an
5 intellectual conflation but a fear of conflation of
6 relationships, meaning that folks think the victim
7 will automatically disclose and therefore are
8 perceived as party like with a small p. That seems to
9 be what's happening. But I believe Kristin has had
10 this happen too.

11 CHAIR MOSMAN: Ms. Eliason?

12 MS. ELIASON: Yes, thank you, Judge, and I
13 do want to acknowledge that Ms. Mariano had said --
14 specifically wanting to know about the federal courts,
15 but in the federal cases I've been involved in, this
16 issue hasn't come up as much. What we see is exactly
17 what Ms. Garvin said. We see these as two distinct
18 things, but they are often conflated, and practically
19 on a day-to-day level, what we see happen is the ex
20 parte motion is filed. Victims' counsel, we are not
21 notified that the motion is filed. We are not given a
22 copy of the motion by defense counsel and so are
23 relying on the court to know that we're involved,
24 right?

25 Sometimes maybe we haven't actually

1 physically been in front of them. We've emailed a
2 copy of our presence to chambers, but, you know, so we
3 often have to affirmatively -- we look at the docket
4 and see if there's been a sealed filing and then reach
5 out to the court and defense counsel and remind them
6 that the victim is represented.

7 And then what we also see -- this, I think,
8 also speaks to Ms. Mariano's question is that when
9 they're done in an ex parte manner in these kind of
10 sealed proceedings, the prosecution is not notified,
11 and at least when we've been involved, I can't speak
12 to pro se victims, we have been informed that we are
13 not to tell the prosecutor that the proceeding is even
14 happening, and it's worked out really funny where, you
15 know, the court asks the prosecutor to step outside
16 the courtroom and the prosecutor kind of figures out
17 what's going on, and so that puts -- you know, I'm an
18 attorney, I understand, but that puts especially pro
19 se victims in a very tough place where the prosecutor,
20 who's the person giving them information and is
21 legally obligated to give them some information about
22 the case, right, when hearings are happening, what
23 hearings are about, the victim now can't talk to them
24 about this issue, which I think is not only
25 complicated for the victim as a pro se person but I

1 would argue is a violation of the victim's right to
2 confer with the prosecution, which is their right
3 under the Crime Victims Rights Act.

4 CHAIR MOSMAN: Thank you, Ms. Eliason.

5 Very briefly, Professor Cassell, anything
6 you wish to add to that?

7 MR. CASSELL: Yes, it's interesting to
8 compare Rule 17 subpoenas to grand jury subpoenas. If
9 a victim were subpoenaed to testify in front of a
10 grand jury, she would be entitled to exercise her
11 First Amendment rights to comment on those proceedings
12 afterwards, and now we have Rule 17 defense subpoenas
13 are apparently producing gag orders, as Ms. Eliason
14 mentioned. Those gag orders can only rest on trial-
15 by-ambush premises because there's no other reason why
16 those would be ex parte proceedings warranting a gag
17 order.

18 CHAIR MOSMAN: Thank you very much.

19 Professor Beale, anything you wish to add?

20 PROF. BEALE: Nothing further. No, thank
21 you.

22 CHAIR MOSMAN: Judge Nguyen?

23 JUDGE NGUYEN: Nothing for me other to, once
24 again, thank our three witnesses for appearing and
25 giving us your very thoughtful comments today.

1 Appreciate it.

2 CHAIR MOSMAN: Thank you. Judge Dever?

3 JUDGE DEVER: Like Judge Nguyen, I also want
4 to thank the witnesses for both their written
5 testimony and their testimony here this morning. It's
6 been very helpful.

7 CHAIR MOSMAN: Thank you. I agree it's been
8 useful to us. You've given us serious things to think
9 about. I appreciate you making the time and effort to
10 be with us today. I want to take just one minute if
11 you'll indulge me because I can't help but reflect on
12 the fact that I'm a federal judge because of Professor
13 Cassell. When he was on the bench, I was invited to
14 express my interest, so I called him. I said, I'm too
15 young, I don't really want to do this this young in my
16 life. And his words were, I quote, "That ladder only
17 drops out of the sky once in your life, Mike. You
18 better take it." So I did, and then he promptly quit
19 shortly after that.

20 MR. CASSELL: I tried to figure out how to
21 climb down the ladder.

22 CHAIR MOSMAN: So thank you all for your
23 serious thoughts and your experience, and thank you,
24 particularly those who work in this arena, for the
25 work that you do. It's important work, and we're

1 grateful that you do it. That concludes our meeting
2 here this day. Thank you very much.

3 (Whereupon, at 12:03 p.m., the meeting in
4 the above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A
CASE TITLE: Meeting of the Advisory Committee on
Criminal Rules: Hearing on Proposed
Amendments to Rule 17
HEARING DATE: January 22, 2026
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: January 22, 2026



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