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Comment from Wroblewski, Jonathan

Posted by the **United States Courts** on Sep 16, 2025

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Comment

Judge Dever, Sara, Nancy, Members of the Committee -- I hope you all are well.

I published this week on our Substack -- sentencing.substack.com -- an essay on the Committee's work and on the pending Rule 17 amendment proposal. I am submitting the essay as public comment on the proposal. The comments reflect my admiration for the Committee and the Federal Rules of Criminal Procedure and my concerns about one important aspect of the pending Rule 17 proposal. [If you want to skip the admiration part and get straight to the comments, jump past the first seven paragraphs.]

Please let me know if you have any questions about the essay or if there's anything more I can provide to assist you in your work. I know the comments will receive your full consideration.

Thank you for all you're doing to further the cause of justice. My best to you and yours,

-Jonathan Wroblewski

Give Feedback

Attachments 1

Rule 17 Comment Substack 091525

Download (https://downloads.regulations.gov/USC-RULES-CR-2025-0003-0003/attachment_1.pdf)

Court Review Should Be Required Before Our Personal Information Is Judgmental

Proposed Amendment to the Federal Rules of Criminal Procedure would allow unchecked judgmental power

Jan 01, 2026 · DOUG BERMAN

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The Federal Sentencing Guidelines have been casually criticized — scorned really — since the first draft of the Guidelines Manual was rolled out in 1986. Some of the most common criticisms of the federal guidelines were invented by the Commission' General Counsel Kenneth Cohen years ago in his crowdpleasing stalking guidelines (and/or

- The Federal sentencing guidelines are too complex, inflexible, and severe and are much more so than guidelines designed by any other jurisdiction.
- Some prosecutors, defense attorneys, and probation officers are negotiating sentences that are "outside the guidelines" in ways that undermine sentencing consistency and that judges will accept and that will not be appealed. Thus, a new sentencing disparity has developed between sentences within the guidelines in the lower and those who should receive them.
- The guidelines, especially regarding drug offenses, produce harsh sentences that often result in different treatment based on the race of the defendant.
- The guidelines contribute to prison overcrowding.

The Commission General Counsel's Office, like so many other bagdatsers, turned nothing to do with the Federal Guidelines.

But if the federal code and federal Guidelines are fundamentally flawed and generally reviled, why do we have them? Why do we have a federal sentencing system at all? Although the federal criminal justice system is in many ways quite different from the typical state system, the Federal Rules have been replicated in basic structure and contents by numerous states. The rules are mostly a coherent whole, that follows a consistent style and set of terms, they employ simple words efficiently and sparingly, and the policies underlying them are generally viewed as fair, balanced, and reasonable.

A big part of the reason for the Rules' success lies with the bodies involved in creating and amending the Federal Rules of Criminal Procedure. Under the Rules, a proposed amendment to the Federal Court of the United States goes through a rigorous consultancy authority based in the Rules Enabling Act. Congress retained the power to reject proposed rules or amendments, to modify them, or to enact rules or amendments itself. It rarely does any of these.

The criminal procedure rules and their amendments are drafted in the first instance by the Advisory Committee on Criminal Rules, part of the Judicial Conference of the United States. The Committee consists of appointed judges, U.S. Department of Justice representatives — full disclosure I was that representative for many years — practicing lawyers, and legal scholars. It meets twice a year in person, and subcommittees meet remotely intermittently between meetings to discuss proposals.

All ideas for changes to the rules submitted to the Committee are considered. After public comment is sought on any proposal under serious consideration, draft rules or amendments are submitted to the Standing Committee on Rules of Practice and Procedure, another Judicial Conference committee which oversees all the rules committees (criminal, civil, appellate, bankruptcy, and evidence). The Standing Committee in turn submits them to the Judicial Conference, which finally recommends them to the Supreme Court for approval. The process is slow and cumbersome — it generally takes at least three years to develop and vote on amendments through the process — and highly deliberative. It leads to a respected product.

. . .

Every case, the Advisory Committee on the Criminal Rules has proposed and published for comment only one amendment to the Federal Rules of Criminal Procedure. The proposed amendment would add a new Rule 16.1 to the discovery and inspection matters. After receiving several requests to review the rule, the Committee found the existing rule, which is essentially unchanged from what was first adopted in 1946, needed an update. "This rule's existing guidance about obtaining, retaining, and responding to subpoenas to produce items is ambiguous and incomplete, and it has produced conflicting interpretations that affect multiple aspects of subpoena practice." See Comm. on Rules of Proc. And Prac., *Preliminary Draft Proposed Amendments to Bankruptcy, Appellate, Civil, Criminal, Evidence and Admiralty Rules and the Judicial Ethics Code*, at 4 (Aug. 2025).

The proposed amendment would provide that unless needed upfront. It spells out the proceedings in which the trial court would apply; when subpoenas may be issued without informing the opposing party; the circumstances that require the production of the subpoenaed material to the court rather than to the requesting party and the time for disclosure of subpoenaed material to the opposing party. Most importantly, the amendment would change the standard for subpoenas and defense attorney must show to obtain a subpoena.

Under the controlling Supreme Court precedent, United States v. Nixon, 418 U.S. 683, 700 (1974), in order to obtain a subpoena and then require production of any material, the moving party must 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 the failure to obtain them 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."

[1] The burden of the rule is that to obtain a subpoena, a request must be specific, and the material sought must be relevant to, and admissible in, a criminal proceeding. The proposed amendment would change the standard for obtaining a subpoena, requiring only that the information sought is defined with specificity and that it "likely to be admissible in evidence." Proposed amendment, Rule 16.1(a)(2). Instead, the burden shifts to obtain a motion to quash accompanying the proposal. This change would be a modest and reasonable one in light of the testimony the Committee heard in its consideration of various proposals to amend Rule 17, to hear some of the other changes.

But there is one provision of the proposal that is concerning. It is the one that authorizes prosecutors and defense attorneys generally, to propose and issue a subpoena without any motion and then without any review by a court. The only exception is that one is required to be subpoena for a non-party witness and confidential information or a subpoena issued by someone representing themselves. A subpoena issued by a lawyer, "must be served on a person, a business, or a nonparty organization with custody of the defendant, or anyone else — could have their personal or confidential information subpoenaed without any court review and then without even finding that the information sought will subject "likely to be admissible in evidence in the designated proceeding." And because personal or confidential information is subject to third party, the subpoena could be served without even notice to the person whose information is being sought.

This is troubling for several reasons. First, the Supreme Court has already ruled that in some circumstances — for some personal and confidential information — the Fourth Amendment requires a judicial determination before the government can obtain it. Although it is not a determination

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PUBLIC SUBMISSION Withdrawn

Comment from Alvan, Cesar

Posted by the **United States Courts** on Nov 17, 2025

Docket (/docket/USC-RULES-CR-2025-0003)
/ Document (USC-RULES-CR-2025-0003-0001) (/document/USC-RULES-CR-2025-0003-0001) / Comment

Reason Withdrawn

This comment was withdraw and re-posted under the Proposed Amendments to the Federal Rules of Appellate Procedure as it relates to Appellate Rule 15.

There are no documents available to view or download

Comment ID

USC-RULES-CR-2025-0003-0004

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Comment from Noel, Morgan

Posted by the **United States Courts** on Dec 10, 2025

Docket (/docket/USC-RULES-CR-2025-0003)
/ Document (USC-RULES-CR-2025-0003-0001) (/document/USC-RULES-CR-2025-0003-0001) / Comment

Comment

I support these changes to Rule 17. Before going into substantive changes, the edits to enhance clarity are well done. Shifting phrases like “title of the proceeding,” to “proceeding’s title” is helpful for clarity. Similarly, changing “require” to “order” helps clarify the way something is required. Changing “witness” to “recipient” also clarifies the broadness of potential subpoena’s targets.
It's also very helpful that Rule 17 now makes it clear that this rule does not bar subpoenas for non-trial proceedings.
As far as the loosening of the Nixon criteria, I do feel that the “likely to lead to” formulation is superior to the “likely admissible” language the current proposal uses. Undoubtedly the “likely admissible” standard is a superior revision, but I do lean the way of the New York City Bar Committee in believing that the broader formulation is useful for defense attorneys, and I don’t think it would have allowed excessive “fishing expeditions” since you would still have a concrete tie to admissibility.

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USC-RULES-CR-2025-0003-0005

Tracking Number

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PUBLIC SUBMISSION

Comment from Zaki, Joseph

Posted by the **United States Courts** on Dec 30, 2025

Docket (/docket/USC-RULES-CR-2025-0003)
/ Document (USC-RULES-CR-2025-0003-0001) (/document/USC-RULES-CR-2025-0003-0001) / Comment

Comment

This comment addresses proposed amendments to Federal Rule of Criminal Procedure 17 (Subpoena), including third-party subpoenas for electronically stored information (ESI). The submission supports the rule's objective and proposes a narrow, administrable clarification for the Committee Note: when a subpoena seeks digital evidence, the "designated items" may include ordinarily associated integrity context that is reasonably necessary for evidentiary use, and "reasonable particularity" may be satisfied using objective system identifiers commonly used to locate ESI.

The comment does not propose new discovery obligations or broaden subpoena scope. Rather, it explains why, in modern digital systems, production of "content only" often fails to provide the minimum context required to evaluate authenticity, completeness, and whether the produced item is the correct object. This gap predictably increases motion practice and admissibility disputes later.

A short, technology-neutral Committee Note clarification would reduce inconsistent practice by confirming that a Rule 17 subpoena may, where appropriate and not unduly burdensome, designate integrity-related artifacts ordinarily maintained with the item, such as system metadata and logs tied to creation, storage, access, export, and retention, and may specify objective identifiers (for example, object IDs, event IDs, account or device identifiers, hashes when available, and narrow time windows) to describe the designated items with precision. The Committee Note should also recognize courts' discretion to impose reasonable protective conditions (phased production, limited inspection, sealing, and tailored redactions) to protect legitimate privacy, confidentiality, and security interests while preserving verifiability.

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Attachments 1

Comment on Criminal Procedure 17 (Joseph Zaki)

Download (https://downloads.regulations.gov/USC-RULES-CR-2025-0003-0006/attachment_1.pdf)

Comment ID

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Comment on Proposed Amendments to Federal Rule of Criminal Procedure 17 (Subpoena)

Docket: USC-RULES-CR-2025-0003

Submitted by: Joseph Zaki (individual technical commenter)
Topic: Federal Rule of Criminal Procedure 17 (Subpoena) proposed amendments

Executive Summary

Modern criminal cases frequently depend on third-party held electronic evidence (ESI), including video, sensor outputs, cloud records, and system logs. When digital materials are subpoenaed, the evidentiary value often depends on associated integrity and provenance artifacts that are routinely maintained with the underlying data. I support clarifications to Rule 17 that reduce inconsistent practice and motion-driven delay, while keeping subpoenas appropriately particular and minimally burdensome for recipients.

This comment recommends that the Committee clarify, in the Committee Note, that:

1. Digital “designated items” may include ordinarily associated integrity artifacts (for example, access logs, audit logs, export logs, hashes, and time stamps) when necessary for evidentiary use.

2. “Reasonable particularity” can be satisfied using modern objective identifiers (for example, object IDs, event IDs, hashes, and narrow time windows).

3. Courts may structure production to protect sensitive information while preserving integrity (for example, phased production, inspection, sealing, and tailored redactions).

4. Productions should avoid a common failure mode: producing content without the integrity context that allows the court and parties to evaluate authenticity and reliability.

Recommendations

1) Clarify that digital “designated items” can include ordinarily associated integrity artifacts

For many forms of ESI, the “item” is not just a single file. The evidentiary item frequently includes accompanying records that establish how the item was created, stored, accessed, and exported. Without that context, parties often litigate authenticity and completeness later, increasing burden on courts and recipients.

A short Committee Note clarification would help confirm that a subpoena may identify and request integrity artifacts that are ordinarily associated with the digital item and reasonably necessary for evidentiary use, such as:

- access logs and audit logs related to the account, dataset, or repository holding the item
- export logs or download logs for the item
- retention logs or deletion indicators relevant to completeness
- hashes, signatures, attestations, and time stamps associated with the item or export process
- provenance manifests or system-generated metadata routinely maintained with the item

2) Confirm that “reasonable particularity” accommodates modern identifiers

Digital systems commonly index evidence using objective identifiers. A subpoena can be more precise, and less burdensome, when it specifies identifiers such as:

- object IDs, event IDs, case IDs, device IDs, or account IDs
- content hashes (when available)
- narrow time windows
- repository or bucket names, dataset labels, or system record types

Clarifying that such identifiers can satisfy reasonable particularity will improve drafting quality and reduce disputes about breadth.

3) Encourage protective structuring that preserves integrity without unnecessary exposure

Subpoenas for digital evidence can implicate privacy, security-sensitive system details, or confidential operational information. Courts should be encouraged to structure production in ways that protect legitimate interests while preserving evidentiary integrity, for example:

- phased production (integrity artifacts first, content second where appropriate)
- limited inspection or controlled access
- sealing, protective orders, and tailored redactions that preserve verifiability (for example, hash-anchored originals under seal)

This approach reduces recipient burden and supports reliable later use in proceedings.

4) Avoid producing “content only” without integrity context

A recurring practical problem in digital evidence practice is production of the file or clip alone, without the metadata and logs that allow parties to evaluate authenticity, completeness, and chain of custody. This often pushes the dispute downstream into motion practice and hearings. A Committee Note clarification that integrity artifacts may be requested, when ordinarily associated and reasonably necessary, would reduce that failure mode.

Suggested Committee Note Language (for consideration)

The following is offered as optional clarifying language for the Committee Note:

> In cases involving electronically stored information, a subpoena may describe the “designated items” with objective identifiers used by modern systems, including object identifiers, event identifiers, account or device identifiers, hashes, and narrow time windows. Where appropriate to enable evaluation of authenticity, integrity, or completeness, the subpoena may also identify ordinarily associated records maintained with the electronic item, such as access logs, audit logs, export logs, time stamps, and other system-generated metadata. Courts retain discretion to impose reasonable conditions and protective measures to reduce burden and protect legitimate privacy, confidentiality, and security interests while preserving the integrity of the produced materials.

Thank you for the opportunity to comment.

Joseph Zaki

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Comment from Federal Magistrate Judges Association

Posted by the **United States Courts** on Jan 16, 2026

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Comment

The Federal Magistrate Judges Association submits the attached comments

Attachments 1

FMJA Comments Final

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Comment ID

USC-RULES-CR-2025-0003-0008

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mkh-b192-k6hz

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FEDERAL MAGISTRATE JUDGES ASSOCIATION

COMMENTS ON THE PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF EVIDENCE, CIVIL PROCEDURE, AND CRIMINAL PROCEDURE
SET FORTH IN THE PRELIMINARY DRAFT DATED AUGUST 2025

The Administrative Office of the United States Courts published an invitation for comment on proposed rule changes to be effective in December 2026. The proposals include changes to Federal Rules of Civil Procedure 7.1, 26, 41, 45, and 81; Federal Rule of Criminal Procedure 17; and Federal Rule of Evidence 609. The proposals also include a new Federal Rule of Evidence 707.

The proposed rule changes are of interest to the Federal Magistrate Judges Association ("FMJA") because they address issues that come up in matters before Magistrate Judges. The FMJA is a voluntary association comprised of active, full-time, part-time, recalled, and retired Federal Magistrate Judges. These comments were prepared by the FMJA Rules Committee, which consists of 26 active Magistrate Judges from districts of all sizes across the country. The comments were approved by the FMJA Board of Directors. Accordingly, the FMJA Rules Committee has considered these proposed rule changes and, with the full support of the FMJA board, provides the following comments for consideration.

A. PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE

1. FRCP 7.1

Rule 7.1 requires that parties make certain disclosures to the court to assist it in determining whether a conflict of interest might exist that requires disqualification or recusal of an assigned judge under Canon 3C(1)(c) of the Code of Conduct for United States Judges. The

Rule is calculated to reach a majority of circumstances that are likely to call for disqualification based on a judge having a financial interest in a matter.

In response to concerns that the current Rule does not adequately alert judges to possible grounds for recusal, the proposed amendment clarifies and expands the types of organizations that must make disclosures.

Rule 7.1(a)(1) currently requires a "nongovernmental corporate party or nongovernmental corporation that seeks to intervene" to file a "statement that identifies any parent corporation or any publicly held corporation owning 10% or more of its stock" or, alternatively, "to state that there is no such parent or owner." Fed. R. Civ. P. 7(1)(1)(A-B). These statements must be filed with a party's first appearance and upon any corporate changes impacting the information. Fed. R. Civ. P. 7.1(b).

The first proposed change is to substitute the term "business organization" for the word "corporation" in recognition that business entities may have non-corporate forms. The other is to require disclosure of any business organization that directly or indirectly owns 10% or more of the party.

The FMJA fully supports these changes to Rule 7.1 because they will assist judges in making recusal decisions and help to flag potential conflicts of interest at the outset of a case.

2. <u>FRCP 45 and 26</u>

The Advisory Committee proposes changes to Rule 45 and a corresponding change to Rule 26. There are two proposed changes to Rule 45. The first change is that Rule 45(b)(1) be amended to clarify how subpoenas must be served and to allow for alternative methods of

service upon application to the court and a showing of good cause. The proposal also would allow for witness fees to be tendered either at the time of service or within a 14-day notice period when it requires attendance at a trial, hearing, or deposition.

The second change is that Rule 45(c) be amended to allow a subpoena to compel remote testimony so long as the testimony is within 100 miles of a witness's residence, even if it is more than 100 miles from the issuing district. This change also necessitates the proposed change to Rule 26(a)(3)(A)(i), which would require a party to specify in its pretrial disclosures whether any of the witnesses the party expects to present will provide remote testimony.

a. Rule 45(b)(1)

Magistrate Judges frequently handle subpoena disputes, including issues about service of subpoenas. The proposed changes clarify ambiguity in the current Rule around service and align service of subpoenas with methods of serving complaints under Rule 4(e)(2)(A-B) and methods of service that courts have long found to be reasonable, including service by mail or commercial carrier if there is confirmation of receipt. In particular, the amended Rule would permit personal service to a named person, service by leaving a copy of the subpoena "at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;" by "sending a copy to the person's last known address by a method of United States mail or commercial-carrier delivery, if the selected method provides confirmation of actual receipt;" or by "using another means that is authorized by the court for good cause and is reasonably calculated to give notice."

The FMJA supports the proposed changes to Rule 45(b)(1) because it is often difficult and costly to serve someone personally, and because the alternative methods of service will minimize the costs of service and delays associated with failed service, while verifying that the subpoena was delivered. The FMJA also supports the change insofar as it gives courts discretion to allow for other methods of service for good cause, something courts already are empowered to do with complaints. These changes also will reduce motion practice concerning methods of service.

The proposed changes to Rule 45(b) also include a requirement that subpoenas be served at least 14 days before a person is required to attend a trial, hearing or deposition, which the FMJA also supports because this provides a minimum baseline for what is reasonable notice and allows a party sufficient time to object in advance of a deadline for attendance. While 21 days' notice would in some ways be preferable to 14 days because a subpoenaed party may not be able to retain counsel and object within 14 days, we recognize that a longer period may not be practical given other deadlines in a litigation and the timing of when a party learns of the need to subpoena a witness. Nevertheless, we suggest that the Advisory Committee Notes emphasize that practitioners should attempt to give more than 14 days' notice when possible.

The last proposed change to Rule 45(b) is that the party serving the subpoena will be permitted to tender the fee and the mileage allowed by law either at the time of service or "at the time and place the person is commanded to appear." The FMJA appreciates the desire for flexibility in the tendering of the fee and costs, but believes that the proposed amendment does not take into account the needs of pro se and low-income individuals who may need the

modest fee and costs in order to travel to the place of the deposition. Individual Magistrate Judges who often handle motions to compel compliance with subpoenas and pro se matters are aware of situations when individuals could not afford travel. Accordingly, we suggest the Advisory Panel consider requiring tendering of the fee and costs at least 3 business days before the attendance is required unless the individual who is subpoenaed consents to tendering of the fee and costs on the date of the appearance.

b. Rule 45(c)

The proposed change to Rule 45(c) specifies that for remote testimony, the place of attendance is "the location where the person is commanded to appear in person." This change is proposed to extend the issuing court's power to compel attendance, clarifying that the court's subpoena power is nationwide so long as the witness is not required to travel farther than 100 miles. For purposes of Rule 43 and Rule 77(b), remote testimony is deemed to occur in the court where the trial or hearing is conducted.

Subsequent to the 1991 amendments to the Federal Rules of Civil Procedure that substantially modified the procedures for issuance of Rule 45 subpoenas, conflicts developed regarding "the place of compliance" and the proper venue for resolving subpoena-related disputes. The 2013 amendments consolidated the rules regarding "the place of compliance" and made clear that a party seeking relief from a subpoena must file a motion in the court for the district where compliance is required. *See, e.g.,* Fed. R. Civ. P. 45(c), (d)(1), (d)(3). Recognizing that resolution of subpoena-related disputes by the issuing court may be warranted, the 2013 amendments also added new subsection (f), which authorizes the court

where compliance is required to transfer a Rule 45 motion to the issuing court if either the person subject to the subpoena consents or the court finds exceptional circumstances. Fed. R. Civ. P. 45(f).

As explained in the 2013 Advisory Committee Notes:

> To protect local nonparties, local resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) [requiring that the place of compliance be tethered to the location of the subpoenaed nonparty] and the requirements in Rules 45(d) and (e) that motions be made in the court in which compliance is required under Rule 45(c). . . .
>
> . . . The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion.

Fed. R. Civ. P. 45(f), Advisory Committee Notes (2013).

The FMJA endorses the Advisory Committee's proposed amendment to Rule 45(c)(2) to ensure the authority to issue a subpoena to compel remote court testimony when appropriate under Rule 43(a) and agrees that the location where the person is commanded to appear, rather than the issuing district, should be considered the "place of attendance." That is, "place of attendance" is the "place of compliance" under Rule 45(d)(3).

While the FMJA endorses the change, the Advisory Committee may wish to consider additional amendments to Rule 45(d)(1) and (d)(3), which concern the place of enforcement of subpoenas. The current Rule requires a party issuing a subpoena or the party objecting to a subpoena to seek relief from the court for the district where compliance is required. While the

2013 amendments favored local resolution of subpoena disputes over the interests of the issuing court, the issuing court's interest in managing its docket and controlling the progress of trial alters that balance when the subpoena at issue involves trial testimony and in cases where the witness is providing remote testimony, diminishing the need for the court in the witness's place of residence, if different from the issuing court, to become involved. Additionally, expansion of Rule 45(f)'s provision allowing an attorney authorized to practice in the district of compliance to file papers and appear as an officer of the issuing court when seeking relief from a subpoena would enable the issuing court to resolve trial subpoena disputes while continuing to protect the non-party from the burden and expense of obtaining representation in a foreign district. All this being said, to protect local non-party witnesses subpoenaed for trial, it may be prudent to consider adding language to the rule or the advisory committee notes that encourage issuing courts to make reasonable accommodations to non-party witnesses (especially those who are pro se) who are not physically located within 100 miles of the issuing court's district, such as allowing the witness to assert objections during an on-the-record telephonic or video conference or incorporate the language of Rule 45(f), which states that "An attorney licensed to practice in the issuing district may appear as an officer of the issuing court solely to object to a subpoena for remote trial testimony.

c. Corresponding Changes to Rule 26

The Advisory Committee recommends a proposed amendment to Rule 26(a)(3)(A)(i) to clarify that each party's pretrial disclosures must specify whether any of the witnesses the party expects to present will provide testimony remotely. The FMJA supports this change because it alerts the parties to the need for remote testimony at the outset of a case to allow for sufficient

planning and coordination. This will minimize issues that often come up about whether remote testimony is permitted and is consistent with the intent of the Rules to encourage transparency in discovery and minimization of costs.

The amendment also simplifies the task of serving the subpoena by removing the requirement that the witness fee under 28 U.S.C. § 1821 be tendered at the time of service as a prerequisite to effective service. Though tender at the time of service should be done whenever practicable, the amendment permits tender to occur instead at the time and place the subpoena commands the person to appear. The requirement to tender fees at the time of service has in some cases further complicated the process of serving a subpoena, and this alternative should simplify the task. However, as noted above, in the case of low-income individuals, it may be better to require tender of fees no later than three days prior to the day the person is required to appear to account for individuals who may need the fees and costs to travel to the proceeding. The Rule could allow for tendering of fees and costs on the date of attendance if the witness consents.

3. FRCP 41

The proposed changes to Rule 41 would add language clarifying that a plaintiff may voluntarily dismiss "one or more of its claims" in a multi-claim case and clarify that, under Rule 41(a)(1)(A)(ii), a stipulation of dismissal need be signed only by all parties who have appeared and remain in the action.

While many courts have operated as if Rule 41 allowed for this, some courts concluded that the Rule as written did not permit the filing of "partial dismissals" on the grounds that the

Rule suggested a case could not be so narrowed by the parties. Magistrate Judges often handle cases on consent, including multi-party cases where this issue has arisen. The proposed changes provide clarity and allow for proper streamlining of cases. The FMJA agrees with the Advisory Committee that the amended Rule is more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings and therefore endorses the change.

4. FRCP 81

The proposed change to Rule 81 clarifies when and whether a party to a removed action must demand a jury trial. It proposes that a party who demanded a jury trial prior to removal need not renew the demand after removal but that if no demand was made prior to removal, a demand must be made within 14 days after filing a notice of removal or being served with a notice of removal. This change eliminates confusion (and a trap for the unwary) that arose under the current Rule, particularly in states where jury demands are made long after the filing of an initial pleading. The Rule also clarifies that Rule 38, which governs demands for jury trials, applies to removed cases.

Magistrate Judges are frequently asked to resolve motions concerning whether a party has waived a right to a jury trial. The new Rule will eliminate motion practice on this issue and provide clarity for parties, particularly in those states with rules that differ from the federal rule. Accordingly, the FMJA endorses this rule change.

B. PROPOSED CHANGES TO THE FEDERAL RULES OF EVIDENCE

1. FRE 609

The proposed amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The amendment would make the Rule more exclusionary by providing that the probative value of the conviction would have to "substantially" outweigh its prejudicial effect. The proposed addition of "substantially" is likely to have the effect of courts considering more carefully the admission of such evidence. The FMJA endorses this change because it minimizes the potential for prejudice to criminal defendants and focuses the jury on the conduct at issue in the trial rather than the individual's past conduct.

2. FRE 707

The proposed new Rule pertains to evidence created by artificial intelligence ("AI") or "machine-generated evidence" designed to address reliability of computer-generated evidence and to ensure that it is properly regulated for reliability and authenticity. It requires that AI-generated evidence, if offered without an expert witness, must satisfy the requirements or Rule 702(a)-(d). That is, if machine output is the equivalent of expert testimony, it is not enough to be self-authenticated under Rule 902(13); rather, there must be other assurances of reliability under the preponderance of evidence standard applicable to expert testimony.

Magistrate Judges are frequently called upon to rule on FRE 702 applications and understand the concern about AI-generated evidence. However, the FMJA believes this proposed Rule is premature, particularly when the Rules of Civil Procedure do not yet expressly address AI and when there are other rules of evidence that exist to deal with AI-generated exhibits, which in the near-term would be summaries, demonstratives or calculations or images—

all of which can be exchanged in discovery or pre-trial or in connection with an expert report and explored through standard discovery methods. Additionally, insofar as AI, and generative AI in particular, is fast evolving, the FMJA believes that it is more prudent to see how AI-generated materials are introduced and see what problems actually arise before creating a rule that may be unnecessary or become quickly outdated. In other words, the FMJA believes it is too early to assess the full scope of issues with AI evidence and that a *Daubert* analysis may not be the best way to assess such evidence. The FMJA supports consideration of amendments to the Rules of Civil Procedure that would require disclosure of AI generated documents so that the opposing party has an opportunity to explore the manner in which the documents were generated and evaluate reliability concerns.

C. PROPOSED CHANGES TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

There is only one change proposed to the Criminal Rules. The recommended change is to Rule 17 to allow subpoenas to third parties for information "relevant and material to the preparation of the prosecution or defense" to address a lack of clarity about whether the standard in *United States v. Nixon* applied and restricted defense subpoenas.

The FMJA enthusiastically endorsed this Rule change because it will provide much needed clarity and lead to consistency across districts.

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Comment from Anonymous

Posted by the **United States Courts** on Jan 26, 2026

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Comment

I did not see if there were particular prompts/questions that were directed to the public to answer. As such, I am going to just comment on what I noticed while reviewing the information on Rule 17. It is commendable and noted the thoroughness of the amendments to Rule 17. I want to call to question and suggest a few things. Is there and should there be specification on what is meant in 17c2A by “when available”? Do you mean to say when this is needed for the trial?
In addition, for 17(c)(2)(A), I do not know if this is stated, and maybe this should be clarified or stated so as to not leave room for any loopholes or uncertainty in interpretation that may cause undue duress to those at the receiving end of this section. Specifically, that the subpoena is not unnecessarily calling to witness or information that would cause undue stress, as may be if a witness, for example, is subpoenaed multiple times if more than 1 type of hearing is necessary, if the information is still the same, unless new information has come to light. In which case, I wonder if it should be stated that only this new information should be brought into the trial (by the witness or the data, etc.) and old information should not be said live in the courtroom. Instead, maybe it should be included that this information that has already been given can be recalled from the records taken by the court from the previous hearings.

In regards to 17(c)(2)(B)(iii), would the statement “or contain information that is, likely to be admissible as evidence in the designated proceeding” leave room for a potential fishing expedition to be done by either party? Could it be interpreted that information could be subpoenaed to possibly find something if there is a slight chance that it could be admissible in court, even in actuality it may not be. From my perspective, it seemed as though information or witnesses could be subpoenaed if it is likely that the information could be admissible in court, but who dictates what could be admissible in court before the trial/hearing begins (especially in cases where the admissibility of the information could not be known until the trial)? I understand that there are/may be checks for this, but what about in the latter case? At this point, the damage/perspective of the jurors has already been altered with this information, which could affect the credibility of the other party’s case in the eyes of the jurors, even if the information is not true/no longer admissible. Would there possibly be a need to change the “likely to be admissible” phrase to specify the admissibility of the evidence that would be subpoenaed a bit more (as this could be left for interpretation and potential fishing for information)?

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For 17(c)(2)(C), I think that a court order should apply, especially to determine the credibility of the subpoena and not cause the person undue duress.
For 17(c)(2)(E), what would the court consider “good cause”? I wonder if maybe the answer to this should be placed in here after “good cause.” I understand that there is a wide range for this, but maybe listing categories that would fall under this would be simpler in order to better specify this.
For line 122, pg. 86 on the PDF version [17(c)(6)], to clarify, does this mean if only the item that is being subpoenaed exists?
For line 128 [17(c)(6)], does promptly need to be specified/defined here?
For lines 334-344, I think there should be a distinction on what circumstances or when motions may not be needed. If they do not fall under these categories that could be included in this section, then a motion is needed. As stated that this occurs in some courts, I think it is good that a motion and a court order be issued for every subpoena, as it creates further checks and balances, which adds fairness to the trial.
As mentioned previously for 17(c)(2)(E) but now in discussion for line 380-398, I think this section should state what is included/meant for “good cause” by the court. This can be done by listing categories, for example. In addition, if the defense has a good and solid strategy, would the other party knowing their strategy cause an inability for their strategy/approach to work in their favor? Should there be more constraints on how the ex parte subpoena option should be used by the defense? I think that specifications should be made so that this should not be taken advantage of.

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Comment from International Attestations, LLC

Posted by the **United States Courts** on Feb 10, 2026

Comment

This comment generated by the Honorable Melissa A. Kotulski of International Attestations, LLC(R)(IAUSA) is developed at the prompting of the periodic and regular review of the rules through a rule making process that is generated by the U.S. Courts as presented by the Judicial Conference Advisory Committee (JCAC). For the 2026 Comment Period, the Committee presented its proposed procedural rule-changes for the U.S. bodies of law pertaining to Appellate, Bankruptcy, Civil, Criminal and Evidence (Collectively, The Rules. Separately Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules, and Evidence Rules). Ms. Kotulski has submitted testimony for the Civil Rules, and she is focusing her comments on three topics that also includes a review of one of the proposed changes to Evidence.
The drafters of the Rules of Civil Procedure and Evidence, in part, propose rules that are touching upon how procedure is impacted by new technology regarding notice of and place for g giving remote testimony (Civil Rules 26 and 45) along with the admissibility of that which is machine-generated (Evidence Rule 707). Also, business organizations will now be included as part of the provision addressing corporations (Civil Rule 7.1) as well as a shift to individual claims rather than entire action dismissals (Civil Rule 41).

IAUS

The drafters of the Rules of Civil Procedure and Evidence, in part, propose rules that are touching upon how procedure is impacted by new technology regarding notice of and place for giving remote testimony (Civil Rules 26 and 45) along with the admissibility of that which is machine-generated (Evidence Rule 707). Also, business organizations will now be included as part of the provision addressing corporations (Civil Rule 7.1) as well as a shift to individual claims rather than entire action dismissals (Civil Rule 41).

IAUSA proposes that the Judicial Conference further consider the rules in the international context something they exemplified that they already "get" by enriching pathways for inclusion of American borne personages whether individual, corporate agency, or other. They "get" business in the context of the Federalist Papers and the International Court of Justice. They "get" claims-based (rather than entire case-based) dismissals with a caution to understand them in the U.S. jurisprudence of the line-item veto. And they "get" technology's

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influence on the Courts--and may well wait some more time to make rules when their rules are not quite ripe for publication yet. (Comment Attached from the Honorable Melissa A. Kotulski of International Attestations, LLC)

Attachments 1

2026.2.9 Rules for Judicial Conference Changes

Download (https://downloads.regulations.gov/USC-RULES-CR-2025-0003-0010/attachment_1.pdf)

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INTERNATIONAL ATTESTATIONS, LLC® (IA) (USA)

Judicial Conference of the United States of America

GETTING INTERNATIONAL MATTERS IN U.S. RULE CHANGES: CLAIMS, BUSINESS ORGANIZATIONS & TECHNOLOGY

Comments for Proposed Rule Changes 2025-2026

Prepared by: The Honorable Melissa A. Kotulski
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Date Submitted: Monday, February 9, 2026, 11:59 p.m. PST

U.S. JUDICIAL CONFERENCE COMMENTS (2026)
FROM INTERNATIONAL ATTESTATIONS, LLC ®

GETTING INTERNATIONAL MATTERS IN U.S. RULE CHANGES: BUSINESSES, CLAIMS, & TECHNOLOGY

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2.) Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure (Posted August 13, 2025, Due February 16, 2026) https://www.regulations.gov/document/USC-RULES-BK-2025-0002-0001.

3.) Proposed Amendments to the Federal Rules of Civil Procedure (Posted August 13, 2025, Due February 16, 2026) https://www.regulations.gov/docket/USC-RULES-CV-2025-0004.

4.) Proposed Amendments to the Federal Rules of Criminal Procedure (Posted August 13, 2025, Due February 16, 2026) https://www.regulations.gov/docket/USC-RULES-CR-2025-0003.

5.) Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure (Posted August 13, 2025, Due February 16, 2026). https://www.regulations.gov/document/USC-RULES-EV-2025-0034-0001.

ABBREVIATIONS

Appellate Rules	The Rules of Appellate Procedure
Bankruptcy Rules	The Rules of Bankruptcy Procedure
Civil Committee	The Rules Committee dedicated to the Rules of Civil Procedure at the Judicial Conference of the United States of America
Civil Rules	The Rules of Civil Procedure
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CAS	Court of Arbitration for Sports
Criminal Rules	The Rules of Criminal Procedure
Evidence Rules	The Rules of Evidence
IAUSA	International Attestations, LLC
ICJ	International Court of Justice
ILC	International Law Commission
JCAC	The Judicial Conference Advisory Committee
The Rules	The body of rules for appellate, bankruptcy, civil, criminal, and evidence procedures.

STATEMENT OF PURPOSE

This comment generated by the Honorable Melissa A. Kotulski of International Attestations, LLC© (IAUSA) is developed at the prompting of the periodic and regular review of the rules through a rulemaking process that is generated by the U.S. Courts as presented by the Judicial Conference Advisory Committee (JCAC). For the 2026 Comment Period, the Committee presented its proposed procedural rule-changes for the U.S. bodies of law pertaining to Appellate, Bankruptcy, Civil, Criminal, and Evidence (Collectively, The Rules. Separately Appellate Rules, Bankruptcy Rules, Civil Rules, and Criminal Rules, and Evidence Rules). Ms. Kotulski has submitted testimony for the Civil Rules, and she is focusing her comments on three topics that also includes a review of one of the proposed changes to Evidence.[1]

[1] For the record, the other proposed rule changes are worthy of comment as well: 1. **Appellate Rule 15** (Review or Enforcement of an Agency Order—How Obtained; Intervention) addressing incurably premature petitions or applications; 2. **Bankruptcy Rule 2002** (Notices) in the context of captions referring to Form 416B requirements for a caption and **Bankruptcy Forms 101** (Voluntary Petition for Individuals Filing for Bankruptcy) showing which Employer Identification Number is required and **106C** (The Property You Claim as Exempt) determining exempted assets; 3. **Civil Rule 81** (Applicability of the Rules in General; Removed Actions) pertaining to jury demand after removal; 4. **Criminal Rule 17** (Subpoena) regarding relevance and materiality in subpoenas to third parties of applicability, codification of a *Nixon* standard, motion and order timing, *ex parte* proceedings, place of production, preservation of disclosure policies, and clarification of provisions for different proceedings; 5. **Evidence Rule 609** (Impeachment by Evidence of a Criminal Conviction) regulating the probative value and prejudicial effect of convictions in a "protective" balancing test. These Rules can be instructive for analysis of the other rules. For example, IA's argument that New Evidence Rule 707 be tabled or nixed entirely may be emboldened by comparison to approaches to Criminal Rule 17—which had gone through a potential erasure from that body of rules.

The drafters of the Rules of Civil Procedure and Evidence, in part, propose rules that are touching upon how procedure is impacted by new technology regarding notice of and place for giving remote testimony (Civil Rules 26 and 45) along with the admissibility of that which is machine-generated (Evidence Rule 707). Also, business organizations will now be included as part of the provision addressing corporations (Civil Rule 7.1) as well as a shift to individual claims rather than entire action dismissals (Civil Rule 41).

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ORGANIZATIONAL STATEMENT: INTERNATIONAL ATTESTATIONS, LLC ®

International Attestations, LLC® is a small, woman-owned organization borne from Hartford/Wethersfield, Connecticut (USA) that is focused on international affairs, international law, and constitutional law. The Honorable Melissa A. Kotulski, the Founder, Owner, & President of the organization, brings over forty years of experience in these fields—inclusive of rule-making procedures at the local, state, federal, and international levels. In fact, her experience with the centered diplomatic community at the U.S. State Department was buttressed by a direction of her gaze to Regulations.gov whilst further applying Administrative Law (Professors Andy Grewal & John Reitz) after developing expertise in that work in the Nation's capitol and other situses. This led to her advocacy of the platform to the U.S. Supreme Court during the rule changing efforts of 2022, which she sent via U.S. Post because electronic filings were unavailable and which led to the Clerk to send her a laudatory note on the matter.

The milestones of the three-year-old organization to-date have been wide-ranging at each level—

1. Serving as a presiding judge by applying International Court of Justice (ICJ) jurisprudence for the betterment of the next generation of the international law community.

2. Ensuring that national judiciaries were compliant with treaty standards set out by international bodies like G.R.E.C.O. with the U.S. State Department,

3. Engaging with ICJ and International Law Commission (ILC) activities in a formal setting at the General Assembly of the United Nations.

4. Conducting a series of blogposts dedicated in relevant part to the study of Federal Courts and Affairs, including an understanding of the rules-based processes in the U.S. and beyond its borders.

5. Analyzing intensively the hot zones of Israel and Russia/Ukraine, amongst other places around the globe that involve U.S. military and government as well as UN engagement—even attending the emergency session for Israel in late 2023 at the General Assembly of the United Nations.

6. Immersing herself in U.S. Supreme Court jurisprudence from an early age, inclusive of studies through George Washington University, George Mason University, and the U.S. Supreme Court Historical Society.

Throughout all of this time, Judge Kotulski has continued to deepen her understanding of rules-making engagement in the context of international law arenas with her profound understanding of the procedures in part arising out of the legacy of the American Bar Association's Rule of Law communities (currently overseen by former Justice Stephen Breyer). International Attestations, LLC has several other forthcoming projects, including supporting the Honorable Kotulski in her efforts to serve as an advocate at international courts with an aspiration to continue to serve as a judge and an arbitrator. Some say she may even be amongst the candidates for the next ICJ judge for the United States of America.

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Rule 41. Dismissal of Actions.
Rule 45(b). Subpoena (Service)
Rule 45(c). Subpoena (Place of Compliance)
Rule 81. Applicability of the Rules in General; Removal Actions.

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Rule 609. Impeachment by Evidence of a Criminal Conviction.
Rule 707. Machine-Generated Evidence.

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1. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States of America).*
2. *Applicability of Art. VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion of 15 December 1989.*
3. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Order of 15 October 2008.*
4. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), Judgement of February 4, 2021.*
5. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgment of 8 November 2019 (Preliminary Objections).*
6. *Application of the International Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007.*
7. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015.*
8. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005.*
9. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda, Judgment of 9 February 2022.*
10. *Certain Iranian Assets, Judgment of March 30, 2023*;
11. *Certain Iranian Assets, Judgement of March 30, 2024*, Separate Opinion of Judge ad Hoc Barkett (USA).
12. *Jadhav (India v. Pakistan), Judgment of 17 July 2019.*
13. *Obligations of States in Respect of Climate Change*, Advisory Opinion of July 23, 2025.

International Court of Justice Jurisprudence (continued)

14. *Obligations of States in Respect of Climate Change*, Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), March 19, 2024.
15. *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010.*
16. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951.*
17. *Whaling in the Antarctic, Judgment of 31 March 2014.*

International Law Commission Rapporteur Regimes
(Chronological)

Representation of States in their Relations with International Organizations of a Universal Character (1959-1971: Abdullah El-Erian of Egypt).

Treaties concluded between States and international organizations or between two or more international organizations (1970-1982: Paul Reuter, France).

Status, privileges and immunities of international organizations, their officials, experts, etc. (1976-1992: Leonardo Días-González of Venezuela; Abdullah El-Erian of Egypt).

Responsibility of international organizations (2002-2011: Giorgio Gaja, Italy).

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WRITTEN COMMENTS

I. INTRODUCTION: INTERNATIONAL ATTESTATIONS ENCOUNTERS THE JUDICIAL CONFERENCE RULE CHANGES FOR 2026

The Judicial Conference of the U.S. (2025-2026) has accomplished some great milestones with the current set of proposed rule changes. First and foremost, they showed that shifts in court proceedings can and will be modulated, that the concept of finality does not apply, and that experience with the rules can come in many forms.

Published for comment on August 15, 2025, all five (5) categories of the Rules have at least one change this year: Appellate (1), Bankruptcy (3), Civil (4), Criminal (1), and Evidence (2). The Appellate Rule change in Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention) provides avenues for improving on the trap of "incurably premature" by adding a new part (d) before intervention and fees (new [e] and [f]) that mandates party filing of a new or amended petition for review when challenging the disposition of a petition for rehearing, reopening, or reconsideration. The next change to the Rules is the Bankruptcy Rule 2002 (Notices) and the Forms 101 (Voluntary Petition for Individuals Filing for Bankruptcy) and 106C (Schedule C: The Property You Claim as Exempt). The first change to the Bankruptcy Rules provides for a change in the caption expected on filings as prescribed by Rule 1005 as arising in Form 416B. The form-based changes clarification for elicitation of Employer Identification Number (EIN) for business filers and not the business hiring the individual filer (Form 101) and clarification for "assets exempted" (Form 106C).

Like the Appellate and Bankruptcy rule changings, no oral proceeding arose for the Civil Rule 81(c) concerning whether and when to consider a jury demand (if at all) after removal from the state courts to federal courts, in particular, should be in by the Rule 38 deadline. From the testimonies attended by Judge Kotulski,[2] the participants had a robust consideration of Rules 7.1, 41 and 45 concerning business organizations and remote testimonies, while Rule 26 on claims based as opposed to actions-based dismissals were merely touched upon. The Committees for Evidence and Criminal Rules also gave the public the opportunity to be heard in oral testimonies. The Criminal Rule proceedings centered on Rule 17 subpoena authority with an analysis of the materiality standard, application to proceedings other than trial, codification of a standard of likely admissible, requisites for motions and orders, and issues pertaining to *ex parte*, production, disclosures, and clarification of proceedings. There were two proposed Evidence Rules, including one considered herein about machine-generated evidence admissibility in Rule 707 as well as Rule 609 concerning when and how to question the validity of criminal defendants. Some themes relevant in the rules are 1. reliance on reference to other rules as the manner for which to incorporate the change (Appellate 15, Bankruptcy 2002, Civil 81, Civil 41, Civil 45, Civil 26), 2. Responses to technological impacts of procedure (Civil 26, 45, Evidence 707), and 3. Subpoena mechanisms (Civil 45, Criminal 17).

The committees for each are comprised of legal professionals from government agencies and courts, law firms of varying sizes from sole practitioner to large practices, private corporations, think tanks, and non-profit organizations. The testimonies, on the whole, came from individuals that have a range experience in the U.S. Courts, but almost all had some experience with those systems.

[2] This may change to all testimonies if transcripts are published before comment is made.

By the time testimony was provided for Civil, Criminal (2), and Evidence (20), Civil comments were the most prolific at 150.[3] Evidence had two days of testimony on January 15 and 29, 2026, Criminal and Civil had one day each on January 22 and 27, respectively.[4] Judge Kotulski sought and was permitted to give testimony with International Encouragements, the outline for which she transmitted on January 13, 2026.[5] Her Civil Rules testimony reflected the comments herein concerning the judicial conference in their getting claims with a caution about line-item vetoes, getting technology with cyber marshals and deputies, and getting business organizations. The preponderance of Judge Kotulski's testimony, entitled International Encouragements, centered on the shift to "business organizations" from "corporations" in Rule 7.1 by contextualizing them with three principal judgments and corresponding opinions and comments at the International Court of Justice (ICJ)[6] and her ongoing cautions concerning the International Law Commission (ILC) without an American[7] on that body. She lauded the Committee for seeing the importance of making that lexicographical shift and for being amongst the U.S. institutions that are showing compliance with the *Certain Assets* opinion.

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[3] Appellate 2 and Bankruptcy 5.

[4] The others, Appellate and Bankruptcy, were canceled due to a pending government shutdown.

[5] Judge Kotulski had originally sought to give testimony on all five bodies of rules, then there was a proposed government shut down so she parsed it down to two—for which she provided outlines. In the end, she gave testimony at the Civil proceedings and canceled her Evidence testimony on January 29, 2026.

[6] *Certain Iranian Assets, Judgment of March 30, 2023*; *Certain Iranian Assets, Judgement of March 30, 2024*, Separate Opinion of Judge ad Hoc Barkett (USA); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), Judgement of February 4, 2021*; *Obligations of States in Respect of Climate Change*, Advisory Opinion of July 23, 2025; *Obligations of States in Respect of Climate Change*, Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), March 19, 2024.

[7] Argentina, Brazil, Chile, Ecuador, and Nicaragua are the nations from the current nations from the Americas. The U.S. has not had a member on the body, as stated in Judge Kotulski's testimony, "almost unprecedented" since the only other time of the International Law Commission's history was from 2007-2011. The other four permanent members France had one gap in 2017-2020, Russia had theirs from 1987-1991 & 2012-2014

During those proceedings, Judge Kotulski was influenced by a number of the testimonials,[8] even commenting during hers on the astuteness of Tobi Millrood's excellent description of the distinguishability between procedural and substantive location of remote witnesses and the judges who hear the cases,[9] and taking the opportunity to show Exxon Mobil through Mr. Levy some of her observations about the well-rounded written statement at the ICJ by the Organization for Petroleum Exporting Countries (OPEC) in the context of the *Climate Change Opinion*.[10]

Four of the five rules were considered during the Civil Rules testimony. The Rule 7.1 comments centered on instructions for judge recusal (Levy), informal and formal conduct of business (Levy), third party litigation (Allman), conflicts of interest (Allman, Levy, Redgrave), direct/indirect clarification (Allman, Levy, Redgrave), and publicly-traded issues (Redgrave). Rule 41 was considered for its context with multiparty civil rights cases (Hendler) and statute of limitations (Hendler). Finally, the themes of Rule 45 centered on the benefits of live testimony, even when remote (Barnes, Dahl, Damour, Levy, Millrood). There need to be "safeguards to ensure the integrity of trial" (Millrood), a Rules Enabling Act issue (Levy), and Subpoena and Process Service Power Issues (Levy, Varlack).

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[8] Judge Kotulski attended the testimonies of Thomas Allen (retired General Counsel of BASF) and Jonathan Redgrave (Redgrave LLP) discussed Rule 7.1 and 45, Scott Hendler (Hendler Flores Law) and Tobi Millrood (Kline & Specter) considered Rules 41, with the latter also looking into Rule 45 along with Lauren Barnes (Public Justice), Xiomara Damour (Mayer Brown), Alex Dahl (Lawyers for Civil Justice), Robert Levy (Exxon Mobil), Tiega Varlack (Varlack Legal Services) and Rachel Downey (Hagens Berman). Due to other obligations that day, Judge Kotulski was unable to attend Navan Ward of Beasley Allen, Steven Fleischman of Horvitz & Levy, Brian Fitzpatrick of Vanderbilt, Matthew Moeller of the Moeller Firm, Mary Novacheck of Nelson Mullins, John Southerland of Huie, Fernambucq & Stewart (she heard the end of his testimony), and Rachel Downey (she heard the beginning of her testimony).

[9] Attorney Millrood noted that procedurally witnesses are likely considered in their place of testimony, while substantively the testimony takes place in the place of the judge. He was giving testimony for the American Association for Justice.

[10] Judge Kotulski offered to receive questions through February 10, 2026, at which time she planned to upload her comments.

From the Committee,[11] chaired by Judge Sarah Vance, many of the questions came from Andrew Bradt, Judge Lauck Rick Marcus, Judge Vance, and David Wright. Some of Mr. Bradt's questions centered on formal and informal business conduct (Levy), the problematics of Rule 43 (Levy), and dismissing a party from litigation without dismissing claims against the party (Hendler). Mr. Marcus was concerned with matters like the cost of Rule 43 compliance (Levy), ambiguity of party dismissal in Rule 41 (Levy), place of testimony (Millrood), prior order requirement (Allman), and the implications of the Kirkland decision in rule 45 proceedings (Redgrave). Judge Lauck was posed questions about remote live testimony qualitative differences (Redgrave), and Judge Vance touched upon questions of ambiguity (Redgrave), acquisition of subpoenas without approval (Millrood), and codes of conduct (Levy).[12]

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[11] The Chairs influencing these Rules were the Honorable Robin Lee Rosenberg (U.S. District Court, Southern District of Florida) and the Honorable Sarah S. Vance (U.S. District Court, E.D. Louisiana). The 2025-2026 Reporter and Associate Reporter were Richard L. Marcus (University of California, College of Law, San Francisco, California) and Andrew Bradt (UCAL Berkeley, Berkeley, California), and the members were Honorable Cathy Bissoon (U.S. District Court, Pittsburg, PA, W.D. of Pa.), Honorable Jane Bland (Supreme Court of Texas, Austin, Texas), David J. Burman, Esq. (Perkins Coie, LLP, Seattle WA), Honorable Annie Christoff (U.S. District Court, W.D. Tenn.), Professor Zackary Clopton (Northwestern U., Pritzker School of Law, Chicago, IL), Honorable David C. Godbey, U.S. District Court, N.D. TX), W. Mark Lanier, Esq. (The Lanier Law Firm, Houston, TX), Jocelyn D. Larkin, Esq. (Impact Fund, Berkeley, California), Honorable M. Hannah Lauck (U.S. Dist., E.D. Virg.), Honorable R. David Proctor (U.S. Dist., N.D. of Alab.), Honorable A. Marvin Quattlebaum, Jr. (U.S. Court of Appeals for the Fourth Circuit), Honorable Manish S. Shah (U.S. Dist., N.D. Il), Brett A. Shumate, Esq., AAG (ex officio) (U.S. Department of Justice, Washington, D.C.), David C. Wright, III (Robinson, Bradshaw, Hinson, P.A., Charlotte, NC). Joseph M. Sellers, Esq. (Cohen, Milstein, Sellers & Toll) was no longer on the committee. Liaisons to the Committee were the Honorable D. Brooks Smith (U.S. Court of Appeals for the Third Circuit) and Honorable Catherine P. McEwen (U.S. Bankruptcy Court, M.D. Fla.), and the consultant and clerk of court representative were, respectively, Professor Edward H. Cooper (Michigan Law, Ann Arbor, MI) and Thomas G. Bruton (U.S. Dist. Court, Dist. N.D.).

[12] Mr. Wright asked questions as well, the substance for which are not clear in Judge Kotulski's notes.

It is in this context that Judge Kotulski and International Attestations is getting principal encouragements to the Rules Committees for Civil and Evidence. First, there are considerations of what—if any—applicability the jurisprudence of line-item vetoes may have on finalizing the development of the Claims- versus Actions-based dismissals (Civil Rule 41). Next, the comments delve into commendations and cautions for perfecting legal terms of arts like Business Organizations (Civil Rule 7.1). The final thing to get to is technology, whether and how to account for new technology in remote testimonies (Civil Rule 26 and 45) as well as machine-based evidence (Evidence Rule 707).

II. PRINCIPAL ENCOURAGEMENTS BY INTERNATIONAL ATTESTATIONS

The principal comments by International Attestations centers on encouraging the Judicial Conference for getting claims, getting business organizations, and getting technology by reviewing and revising certain civil and evidence rules.

A.) Getting Business: Commendations & Cautions for Better Perfecting Legal Terms of Art through the Use of "Business Organizations" (Civil Rule 7.1)

Organizational and corporate discourse buttresses the analyses of the Constitution. The Government is considered in the context of its organization, Federalist 23, and the Union of the nation has an organization that is intimate and wiser than the ancient Greeks. Federalist 18. Indeed, all branches of government and the many States have a prance with the organization in the words of the Federalist drafters pursuant to the conception of "the organization of the national government" Federalist 59 (Concerning the Power of Congress to Regulate the Election of Members). The Founders speak of the "distinct and independent organization of the Supreme Court" Federalist 81 (The Judiciary Continued, and the Distribution of the Judicial Authority) as well as its "organization of the judicial power" corresponding in the States. Federalist 45 (The Alleged Danger from the Powers of the Union to the State Governments Considered). In one instance, the mass of the judiciary was even compared to taxation powers! Federalist 36. "Corporate bodies" are described in the Real Character of the Executive. Federalist 69. The military's organization (and discipline) is considered in the context of its beneficial effects on the science of war. Federalist 29. And, of course, Congress is considered an organization as well. Federalist 22.

"The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former." Federalist 45 (The Alleged Danger from the Powers of the Union to the State Governments Considered). Organization in Number 47 as well, but Number 42 says that heads of the substates are a distinct class. State and governments in their corporate in opposition to their collective capacities. Federalist 15. State's interior organizations with heightened military laws shows a "vice of the constitution" and the "deformities of a political monster" when ill-organized. Federalist 19. The "assemblage of societies" in a confederate republic must protect the separate organization of the members—lest abolition arise! Federalist 9. And even at the micro-sub-state level…Officers of corporations are listed as amongst officers of counties and towns. Number 45.

This is not exclusive to the United States of America. There even appears to be a warning to other nations forming constitutions—the U.S. having the eldest in all the lands of the world and standing as the inspiration for scores of all other nations. Federal constitutions—even risk over-organization—as it should be easy to give them liberty. Federalist 17. And there is a lesson when giving them…Mr. Hamilton…death, perhaps? Heck, he wasn't the only one writing on corporations and organizations. Madison had 8 to his 14 mentions.

Concerning Business Organizations in Rule 7.1, International Attestations presents commendations and cautions to the Civil Rules Committee. First, the progression of Rule 7.1 indicates compliance with international law, mores and standards concerning corporates qua "business organizations."

Many International Court of Justice cases have considered organizational and corporate measures. At testimony, Judge Kotulski discussed two contentious—*Certain Assets* (Iran v. USA) and *Racial Discrimination* (Qatar v. UAE)—and one advisory opinion—*Climate Change Obligations*. [13] There are indeed several others to consider in the context of the distinguishability and overlapping definitions of the two terms of art in the international realm.[14] But there's many other cases. Of the 46 cases considering corporations in some fashion, corporate comes through in a variety of ways. "Corporation" is used when "incorporating" treaties and national or subnational bodies, and even when considering what's happening "behind the corporate veil." Whereas organization clearly denotes beyond government. Making sure to understand that corporations may well be important to keep in the mix as of now international organizations in the international legal regime are intergovernmental organizations as opposed to private organizations.

The U.S. did not fare well in the minds of the international legal community in *Certain Iranian Assets*. Our nation was found to fail to meet obligations in a treaty of amity with Iran, and we have been ordered to compensate Iran through an agreement. And any questions of such compensation might be brought back to the Court. Of the four former Presidents of the Court giving separate opinions, Judge Tomka (Serbia)—the longest currently serving member—made note that Iran does not explain why corporate form should be inviolable or unpierceable. Judge Barkett (USA) responded to one of the seeming violations of the nation by stating that "Corporate status should be recognized [to] assure [the] right [of] foreign corporate entities…[to] free access [to] courts [to] collect debts, protect patent rights, enforce contracts, etc."

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[13] *Certain Iranian Assets, Judgment of March 30, 2023*; *Certain Iranian Assets, Judgement of March 30, 2024*, Separate Opinion of Judge ad Hoc Barkett (USA); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), Judgement of February 4, 2021*; *Obligations of States in Respect of Climate Change*, Advisory Opinion of July 23, 2025; *Obligations of States in Respect of Climate Change*, Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), March 19, 2024.
[14] Of the 46 cases considering coropr,

Qatar v. United Arab Emirates did not get to the merits, in part, because of the media corporations indicating that they were not being racially discriminant against Qataris in the UAE. Although they have proceeded to race on the merits in other cases, the ICJ did not consider that the UAE was culpable. Our nations Courts and Corporations may well have been lured to let the United States of America Government of 2016-2023. Some of those corporations are now backing the current presidential regime, which may not bode well for the Jerusalem case. That said, the Nobel Prize for Peace may well go to a Democratic leader if they can sway corporations to protect him even though the Republican discord may well have been associated with the loss at the ICJ for the U.S.A. That written, International Attestations strongly believes that Judge Kotulski—with her particular set of professional and personal experiences and expertise—would have helped the U.S. win the case, and hopes she can get to prove that with future endeavors.

These two contentious cases have led up to *Climate Change* Opinion, in which nearly 100 nations of the United Nations and several international organizations participated. The opinion of the Court considered the environmental concern in the context of obligations and consequences of States, even providing a pathway for some business entity participation in the discourse. Obligations were formed under the treaty, protocol and agreement frameworks, international law, environmental treaties, law of the sea and sea level, and human rights law. Consequences concerning climate change context (attribution, causation, underlying obligations) and wrongful acts (performance, cessation and guarantees of non-repetition, reparation), and reparation duties (restitution, compensation, and satisfaction). So it's not surprising that so many nations wished to participate in the discourse.[15] Most notably, the Organization for Petroleum Exporting Countries (OPEC) showed a good-faith concern not just about corporate responsibility but a duty to humanity.

[15] Another example of an opinion with extensive involvement of the United Nations community members arose during the Unilateral Declaration of Independence for Kosovo. Perhaps indicating a precursor for Ukraine, though they may have preempted it by filing both in the International Criminal Court (ICC) and ICJ at the commencement of hostilities in 2022.

"Organizations" has almost from the start been a pressing topic at the International Law Commission (ILC), which is responsible for the development and codification of international law. Right now, the "international organization" topics of note concern the Settlement of international disputes to which international organizations are parties, which has August Reinisch (Austria) as the special rapporteur responsible for managing the continued research progress of the matter in the ILC.[16] Since Giorgio Gaja's "Responsibility of International Organizations," responsibility has been the international topic *du jour*.

And it seems that with Certain Iranian Assets, that topic is heading towards States.

This development of "organizations" at the international level, that may be instructive through analogy, arose under the direction of Paul Reuter with "Treaties concluded between States and international organizations or between two or more international organizations." This treaty is so narrow that perhaps it barely has consequence or affect. It comes through in part with its non-retroactivity provision. This may be instructive for "business organizations." And while we do not have a member at the ILC, we now have a relatively new Judge on the ICJ. So we need to be on our best behavior…

[16] Treaties concluded between States and international organizations or between two or more international organizations (1970-1982: Paul Reuter, France). Others have been (Chronologically): Representation of States in their Relations with International Organizations of a Universal Character (1959-1971: Abdullah El-Erian of Egypt); Status privileges and immunities of international organizations, their officials, experts, etc. (1976-1992: Leonardo Días-González of Venezuela; Abdullah El-Erian of Egypt); Responsibility of international organizations (2002-2011: Giorgio Gaja, Italy). Of late, the last is oft-quoted, particularly since the special rapporteur became a member of the ICJ from 2012-2021.

B.) Getting Claims: The Line-Item Veto May Be Good Law to Look to in Claims Versus Actions Based in Civil Rule 41

In the ICJ context, what we would have once called "line-item vetoes" arise with each individual claim being decided upon. This makes for a clear pathway to getting to the merits most of the time when cases are brought to the ICJ.

The jurisprudence dedicated to the line-item veto may well encourage the Judicial Conference of the U.S. as well as Congress to provide for better-improved claims-based methods for proceeding with cases in the U.S. Courts systems given proposed changes to Civil Rule 41.

Although initially dismissed for lack of standing reasons in a U.S. substate consideration of the line-item veto, whereby members of Congresses did not have sufficient personal stake for concrete injury to arise to Article III standing, Chief Justice Rehnquist discusses the concept in dicta in the context of all other types of vetoes such as Tenure of Office Act, one-House, pocket, and others done by Presidents Wilson, Grant, Cleveland, Coolidge, and others. *Raines v. Byrd*, 521 U.S. 811, (1997). This need to switch to a more specified dismissal of matters could be foreseen in Justice Stevens as well as Justice Breyer decisions. Perhaps Justice Thomas recalled that standing discourse whence providing his opinion about the Appropriations Clause in relationship to the Consumer Financial Protection Bureau. This discourse even has some appearance with the third decided opinion for the 2025 term, with regard to consideration of candidates as direct objects. *Bost v. Illinois State Board of Elections*, Slip Op. 24-568 (January 14, 2026) (Jackson, J., dissenting), Oral Argument with Kagan Question. Perhaps the principal case that seems to be well-settled is *Clinton v. New York*, 524 U.S. 417 (1998) (Stevens, J.) (overruled by the Line-Item Veto Act).

In sum, I encourage, make all due haste for such claims-based attention. It's time to better train those negotiating the U.S. Courts—advocates, parties, judges, and staff—to be prepared for the international implications of their decisions – procedural, substantive, or otherwise.

C.) Getting Technology: Whether and How to Account for New Technology (Civil Rule 26 & 45; Evidence 707)

Three of the rules considered by International Attestations respond to technological advances: Civil Rule 26 (Express Statement on Remote or In Person Testimony), Civil Rule 45 (Place for Remote Testimony (Rule 45), & Evidence Rule 707 (Machine-Based Evidence Admissibility). Judge Kotulski is no stranger to policy, procedural, and scholastic approaches to the cyber world. Judge Kotulski has focused and enhanced her expertise on cyber matters since attending a closed/cleared meeting at Georgetown's School of Diplomacy in 2011, helping to shape and take a class at Iowa Law in 2013 and 2014, influencing Cyber Endeavors and military engagements[17] at the Naval Postgraduate School (2014) and MITRE (2015), and continuing her 2014 argument for a cyber treaty with scholarship conducted privately, Doc. 3.5 (Wither the Cyber?).[18] In fact, I posited whether or not separate matters pertaining to cyber may be called for before the most recent UN Convention against Cybercrime (2024) came out. A gap still remains for much of the cyber realm in the civil worlds, and, perhaps, an opportunity passed to make a more all-inclusive treaty dedicated to cyber matters.

[17] Making note of this during her testimony.
[18] This publication came out around the same time as the Cyber Crime Treaty, which exclusively addresses Criminal Matters.

As Judge Kotulski stated in her testimony, there are more things that still need to get done concerning remote testimony. She encouraged the committees to begin thinking about "cyber marshalls" and "cyber deputies" that have the jurisdiction to wrangle in all the moving parts. These moving parts must be wrangled when the wrangling is ready in order to get appropriate judicial oversight on the matter.

Case in point, Evidence Rule 707 seeking machine-generated evidence admissibility is not ripe for implementation. Unless the Court wishes to secure scores more extraneous litigation based on potentially inefficient rules, the Judicial Conference might be best-suited to consider further the implications of such technologically-generated evidence. Because Rule 707 is so referential to Rule 702, perhaps the latter may become that which is commented upon and all revisions be rolled into the application of that rule. The way it stands at present, it seems like no rule at all. No matter what the Civil Rules Committee puts out there, the subject of the rule is ripe to generate litigation, confusion, and controversy. As such, the goal may be to limit the volume of litigation, confusion and controversy by bringing the rule to market when it is ready, not by bringing it to market to vet what that litigation, confusion and controversy yields.

Indeed, three years is a goodly amount of time to review a rule ahead of publication, but one more year may yield a more thorough understanding of how to attend to this particular type of evidence.

Or maybe you have determined from your review that Rule 702 sufficiently addresses such evidential standards for admissibility. In which case, it's better not to single it out and it's better to stick to the old mainstays and their litigation, confusions and controversies

III. **CONCLUSION**

The Rules Committees of 2026 are showing a strong proclivity of "getting it." They are getting it right, getting it done, and getting to the heart of the matter in getting claims, getting business organizations, and getting technology. There are some matters that need adjustment—but now it seems the Court is getting it.

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Document 1. International Attestations & Honor Use Licensing

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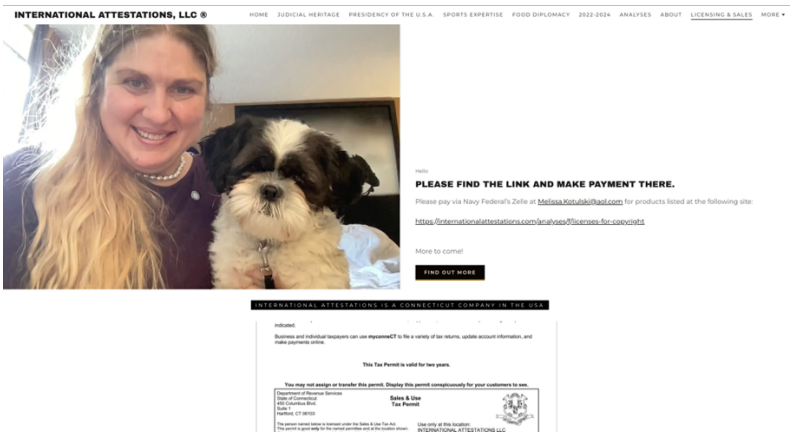

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Document 2. Testimony (Civil Rules 7.1, 26, 41, 45; Evidence 707) Outline, Notes on IA Testimony, Notes on Other Testimonies

Document 2.1	Original Outline	D6
Document 2.2	Notes for January 27, 2026: Civil rules 7.1, 26, 41, & 45	D7

Document 2.1 Original Outline

INTERNATIONAL ENCOURAGEMENTS (CIVIL)

(January 27, 2026)

International Encouragements for Proposed Changes to the Federal Rules of Civil Procedure

BIOGRAPHICAL STATEMENT

RULES TO CONSIDER IN THE INTERNATIONAL CONTEXT

- Nongovernmental business organizations (Rule 7.1)
- Narrowing Voluntary Dismissal to Claims Rather than Entire Action (Rule 41)
- Remote Testimony/Technological
    1. Express Statement on Remote or In Person Testimony (Rule 26)
    2. Place for Remote Testimony (Rule 45)

ENCOURAGEMENTS (EVIDENCE)

International Encouragements for Proposed Changes to the Federal Rules of Evidence

Machine-Generated Evidence Admissibility (Rule 707) Outline: No Rule At All?

a. Biographical Statement (Self, International Attestations, cyber/tech law expertise)
b. Litigation, confusion, controversy
c. No Rule at All? Comment

Document 2.2 January 27, 2026: Civil Rules 7.1, 26, 41, & 45

Original Outline
(Submitted January 13, 2026)

INTERNATIONAL ENCOURAGEMENTS (CIVIL)

(January 27, 2026)

International Encouragements for Proposed Changes to the Federal Rules of Civil Procedure

BIOGRAPHICAL STATEMENT

RULES TO CONSIDER IN THE INTERNATIONAL CONTEXT

- Nongovernmental business organizations (Rule 7.1)

- Narrowing Voluntary Dismissal to Claims Rather than Entire Action (Rule 41)

- Remote Testimony/Technological
    1. Express Statement on Remote or In Person Testimony (Rule 26)
    2. Place for Remote Testimony (Rule 45)

Notes from Hon. Kotulski's Testimony About Civil Rules 7.1, 26, 41, 45

ENCOURAGEMENTS (CIVIL)

(January 27, 2026)

International Encouragements for Proposed Changes to the Federal Rules of Civil Procedure

A. **Gratitude to Organizations**: Rules Committee Staff, Administrative Office of the Courts, and Civil Procedure Team

B. **Introduction to her**: 20 years of diplomacy; Expert in International Court of Justice, ILC, CAS, UNSC; U.S. Supreme Court; codification and development of international law as presented by the ILC and other organizations. Commend Committee for their compliance with international law for places going against USA.

C. **Substantive Remarks**

1. **Claims Dismissal Rather than Action as a Whole** – line item veto days may come back to haunt folks with this rule. Narrowing Voluntary Dismissal to Claims Rather than Entire Action (Rule 41)

2. Remote Testimony/Technological (Rules 26 & 45). Express Statement on Remote or In Person Testimony (Rule 26). Place for Remote Testimony (Rule 45). The concept of a **cyber marshal and deputy** for each of the remote geographic locations in a remote court to be linked for keeping such testimonies legitimate, authenticated, and included.

3. Nongovernmental Business Organization (Rule 7.1)
    a. Three principal ICJ cases: Certain Assets – I see this rule change as one of the methods of **compliance** with the Iranian case against the US (one of two currently at the ICJ). Read out Barkett quote: Corporation status comes up in III, para. 1 with instructions indicating "Corporate status should be recognized [to] assure [the] right [of] foreign corporate entities…[to] free access [to] courts [to] collect debts, protect patent rights, enforce contracts, etc."
    b. Qatar v. United Arab Emirates issues of media organizations.
    c. Climate Change Advisory Opinion. Allowed for some business entity participation in the conversation. Most notably, the Petroleum Exporting Countries, showing a concern not just concerning corporate responsibility but a duty to humanity, and, to the extent that it is a business, International Union for the Conservation of Nature

4. Questions here or by February 10, 2026 over the phone or in writing. My contact information is at Tab 5.

Notes from the Testimonies of Others (18) on January 27, 2026[19]

Rule 7.1 Nongovernmental Business Organization (4)

A. (3) Thomas Allman a Retired General Counsel of BASF Corp. (Rule 7.1 & 45)
B. (4) Jonathan Redgrave of Redgrave LLP (Rule 7.1 & 45)
C. (5) Melissa Kotulski of International Attestations (Rules 7.1, 26, 41 & 45)
D. (14) Robert Levy of Exxon Mobil (Rules 7.1, 26 & 45)

[19] Number in the front of the names in parenthesis is place in the lineup for testimonies for the day.

Rule 26 Express Statement on Remote or In Person Testimony (2)

A. (5) Melissa Kotulski of International Attestations (Rules 7.1, 26, 41 & 45)

B. (14) Robert Levy of Exxon Mobil (Rules 7.1, 26 & 45)

Rule 41 Narrowing Voluntary Dismissal to Claims Rather than Entire Action (3)

A. (1) Scott Hendler of Hendler Flores Law (Rule 41)
B. (2) Tobi Millrood of Kline & Specter (Rule 41 & 45)
C. (5) Melissa Kotulski of International Attestations (Rules 7.1, 26, 41 & 45)

Rule 45 Place for Remote Testimony (17)

A. (2) Tobi Millrood of Kline & Specter (Rule 41 & 45)
B. **(3) Thomas Allman a Retired General Counsel of BASF Corp. (Rule 7.1 & 45)**
C. **(4) Jonathan Redgrave of Redgrave LLP (Rule 7.1 & 45)**
D. (5) Melissa Kotulski of International Attestations (Rules 7.1, 26, 41 & 45)
E. (6) Lauren Barnes of Public Justice (Rule 45)
F. **(7) Mary D'Agostino of Hancock Estabrook (Rule 45)**
G. (8) Xiomara Damour of Mayer Brown (Rule 45)
H. **(9) Alex Dahl of Lawyers for Civil Justice (Rule 45)**
I. (10) Navan Ward of Beasley Allen / American Association of Justice (Rule 45)
J. (11) Steven Fleischman of Horvitz & Levy (Rule 45)
K. (12) Brian Fitzpatrick of Vanderbilt Law School (Rule 45)
L. **(13) / Max Heerman of Medtronic (45) Not present**
M. **(14) Robert Levy of Exxon Mobil (Rules 7.1, 26 & 45)**
N. (15) Matthew Moeller of The Moeller Firm (Rule 45)
O. (16) Mary Novacheck of Nelson Mullins (Rule 45)
P. (17) John Southerland of Huie, Fernambucq, & Stewart (Rule 45)
Q. (18) Tiega Varlack of Varlack Legal Services (Rule 45)
R. (19) Rachel Downey of Hagens Berman (Rule 45)

Document 3. Relevant IAUSA Articles (Most Recent First) by the Hon. Melissa A. Kotulski

Document 3.1	UNSC '26: Naturally Casting Latvia's Wooden Breadbasket & Aid Kit (January 12, 2026)	D12
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Document 3.8	Comment on Supreme Court Rules (February 7, 2023)	D57
Document 3.9	Nationality & Hoops at Court (May 17, 2022)	D64

Document 3.1 UNSC '26: Naturally Casting Latvia's Wooden Breadbasket & Aid Kit (January 12, 2026)

The United Nations Security Council (UNSC), per usual, has five new members in 2026-2027. Joining last year's rising class (Denmark, Greece, Pakistan, Panama, and Somalia) and the permanent members (China, France, Russia, the United Kingdom, and the United States of America), Bahrain, Colombia, the Democratic Republic of the Congo, Latvia, and Liberia officially began their two-year tenure on January 1, 2026. Latvia is the freshman in this batch, which leaves it ripe to highlight preparatory measures for the Presidency--a change that happens on a monthly-rotational basis based on placement in the English-language alphabet. It remains to be seen who will be elected to replace this last batch of five at the end of 2026 to determine their final year on the UNSC, by then Latvia will be well-trained in how to coordinate international security.

It will have also likely have served what will be its first and to that time only term as the President of the UNSC.

Latvia in the Context of the ICJ, UNGA, and the UN Security Council

With current top exports of natural gas, packaged medicine, wheat, wood, broadcasting equipment, Latvia is slated to serve as the UN Security Council's (UNSC) President in November. This will be the first time the nation has led any of the major parts of the United Nations--never having a case or judge at the International Court of Justice (ICJ) and never serving as the President of the General Assembly (UNGA) or Economic and Social Council (ECOSOC). The UNSC is a member of the UN System and it's beneficial to be prepared for what Latvia's diplomats and other service members may put on their presidential docket by looking both within the annals of that principal organ in the context of at least two other Charter-based bodies: the International Court of Justice (ICJ) and the General Assembly (UNGA)--which is the body that most often has fed the ICJ with requests for advisory opinions on matters of international law. UN Charter Article 96(1). Still, Latvia may well serve under one of the rare presidencies when the UNSC calls forth its charter-fueled prerogative to request advice on "any legal question."

Like Latvia, other nations amongst the UN Class of 2026 colleagues have only had one other term at the UNSC. Somalia had its freshman term from 1971 to 1972, while Bahrain's was 1998-1999 and Liberia only had one year (1961, without a presidency) for its previous and only other tenure as a non-permanent member of the UNSC. In fact, Bahrain is a great nation for Latvia to look upon as they sought out pacific settlement of dispute help from Guyana, another place closely-situated to your nation's populace. Mohamed Shahabuddeen (Guyana) was Bahrain's selection to serve for the nation as a judge *ad hoc* for its ICJ case on Maritime Delimitation and Territorial Questions defended against Qatar. Judge Shahabuddeen also served as a permanent member of the Court. Still, despite having four cases, Bahrain has never selected a judge ad hoc from its own populace (though they did have a member at the ILC from 1987-2006 with Husain M. Al-Baharna). This is dissimilar to Pakistan, which has had four (4) such judges from its nation and which has even declined to use its ICJ Rules-based Article 35 prerogative to select a judge to sit on the court.

So perhaps Greece, Somalia, Pakistan, & Panama are great nations that Latvia may also observe. Why? Amongst the other non-permanent members of this UNSC class, they each have had one judge serve as permanent members of the ICJ--though Panama has never had a case before the ICJ, perhaps in part because of its six terms at the UNSC (1958-1959, 1972-1973, 1976-1977, 1981-1982, 2007-2008, 2025-2026). Somalia's first case arose recently at the ICJ pacifically-settled against Kenya concerning Maritime Delimitation during the tenure of that nation's Judge Yusuf, whose term ended abruptly last year. With Latvia's first International Law Commission member this year, it bodes well for broadening that nation's ICJ horizons (judge candidacies) by being an advocate for developing and codifying international law with "Compensation for the damage caused by internationally wrongful acts" assigned to Mārtinš Paparinskis as the Special Rapporteur.

Latvians may be preparing to lead the world's security council with some of their own agendas in mind for the tenure of the presidency as well as what they will do after the nation has completed its term.

A Natural Gas Treaty Convention Held in Riga?

The world may be ripe for an international natural gas treaty and an obvious headquarters for the hypothetical treaty-body could be in Latvia's Riga. Such a treaty and treaty mechanism may be managed much in the vein of the Food and Agricultural Organization's (FAO) Headquarters in Rome, Italy--a culinary Mecca--and like the treaties of other commodities such as olive oil and table olives, coffee, sugar, coconuts pepper, cocoa, rice, tin, tea, rubber, jute and jute products, nickel, copper, grains and--perhaps most relevant to Latvia--tropical timber (4) and wheat (2). As a "producer member" as well as a "consumer member" of the Tropical Timber Treaty, Latvians stand uniquely situated to provide advice on the development of treaty provisions related to Natural gas. Tropical Timber Treaty, Art. 2(4) & (5). China, France, and the UK--other principal natural gas importers--may help with this treaty effort as well. An effort that will--if sparked--go beyond Latvia's tenure at the Security Council, which could light a grand legacy for posterity or leave smoldering ashes for which the nation will need to repair. Or both.

Ukraine as Europe's Breadbasket No Longer?

Ukraine, once Europe's Breadbasket, will be an interesting nation for Latvia to bring to the table. Latvians may benefit from not touching Ukraine at all during their November presidency--sending the message on their stance with their recent non-abstention, affirmative votes on Ukraine in the General Assembly.

Such silence could allow to stand what Latvia has stood with Ukraine.

Anything more may seem problematic with both Ukraine and Latvia competing for Wheat exports and with the former's war still raging on. Let Latvia's breadbasket open at the behest of other security powers, unless a major flareup happens leading up to or during Latvia's tenure as UNSC President. Beyond the region, this may also hold true to a lesser extent for Syria, another wheat importer with a somewhat heavy status on the Security Council docket. So perhaps all of the Security Council members can help the Freshman Latvia plan the year by making sure that the breadbasket of UN business in November may be dedicated more so to general resolutions like terrorism and maintenance of international peace or even other business pertaining to Sudan or Yemen.

In sum, Latvia is the world's next freshman whose first ever term as President will offer a great opportunity to enhance and embolden the nation. The best packaged medicine for ensuring peace for a region like Eastern Europe, indeed. Perhaps the marks of success for Latvia would be to broaden Europe's breadbaskets and work towards placement of a treaty headquarters in Riga dedicated to natural gas.

Supplement 1. The List of the Current UNSC Class by Presidency

This year's class, in order of presidency with the end of the nation's term in parenthesis:
January: Somalia
February: United Kingdom
March: United States of America
April: Bahrain (2027)
May: China
June: Colombia (2027)
July: Democratic Republic of the Congo (2027)
August: Denmark (2026)
September: France
October: Greece (2026)
November: Latvia (2027)
December: Liberia (2027)

No presidencies this year: Russia, Pakistan (2026), Panama (2026)

***

January 13, 2026 at 12:45 p.m. EST, updated with Supplement on January 26, 2026 at 1:40 p.m. PST.
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https://internationalattestations.com/licensing-%26-sales

(This appeal for funding is similar to almost all other posts)

Document 3.2 International Narcotics & Law Enforcement Bureau & ICJ 2022 Redux (November 14, 2025)

I intend to revise my Summer 2022 series on the International Narcotics and Law Enforcement Bureau (INL) of the U.S. State Department in the near future. I even put the previous entries in the 7-part regionally-nexused series up on SSRN, which is a nice academic marketplace of ideas where I place some of my older papers like my work on International Organizations and my note on Presidential Sites. I also have publication on Ireland in the International Review of Constitutional Reform.

Though I have had qualifications to do so, I have never worked for agencies like the National Archives and Records Administration (NARA) or the Environmental Protection Agency (EPA). In fact, I even declined an offer at a Presidential Library because the site's work was too focused a topic from which I had graduated and such a position did not provide substantial responsibilities reflective beyond such single vision of biography. Biography that I had mastered under the tutelage of a Pulitzer Prize winning biographer in the early 2000s when working for a historic site dedicated to a single woman and her family (across the street from Mark Twain's place in Hartford, Connecticut). You see, by the time of that lovely NARA employee's offer, I had analyzed multiple continents for their national systems since I worked for the International Narcotics & Law Enforcement Bureau (INL) of the U.S. State Department (State) in 2013-2014.

My State teams barely touched upon the "goods" associated with the first part of that bureau's title. In fact, my foci were on analyzing the nation-based compliance with international legal standards for justice systems--including the judicial, prosecutorial, custodial, and law enforcement prongs of such systems. That meant that I had already assessed how national court systems were acting for treaty compliance--becoming an expert by 2014. So when that inspirational Director asked me to be a marginal part of her local NARA site (all she could at the time), I politely declined because I was ready for international judging across state-lines which is beyond the scope of a single Presidential Library. We left on as amiable terms as the person for whom she ably protected his presidential heritage (a gentleman from the midwest who knew controversy, indeed), and she became a reference to the United Nations for me. She is currently in well-earned retirement.

And since that time, I have researched or visited NARA sites where I have admired many an employee--archivist, director, security guard and more. The same holds true for national court systems, though I have more intimate knowledge as I have ***done*** things like encourage cross-national dialogue on the topics of foreign affairs in their national courts since I was with my INL Bureau teams in 2013/14 and continued independently in 2022 with my 7-part series. In fact, such ***doing*** continues with my hope (that still holds true) for a Summit between the leaders of the constitutional courts of the Ukraine, Russia, and the USA--if the former two could keep their lead judges in place long enough to plan one, I guess. Things have been volatile for the judiciaries of both nations since Lebedev's passing and Kniaziev untimely resignation, perhaps the Russians and Ukrainians and all those in-between would be best served to recall the impressive U.S. District Court judge Margaret McKeown's American Bar Association Rule of Law caution in 2023 about protecting judges from

reprisals. Maybe the ICJ universe might benefit from review of her presentation.

This Ukraine-Russian discourse refers to another sub-series in my Academic Journal Posts.

https://internationalattestations.com/blog/f/ukraines-chief-justice-shows-the-travails-of-a-wartime-judiciary (Ukrainian Chief Justice & His Wartime National Judiciary)

https://internationalattestations.com/blog/f/russia-ukraine-a-us-moderated-dialogue-on-commonalities (Tear Down These Walls encouraging a dialogue on foreign affairs in the national courts of Ukraine, Russia, and the USA).

https://internationalattestations.com/blog/f/russia-the-usa-a-diplomatic-triumph-at-the-icj (An accolade given to the Russian & America judges that concurrently served as Vice-President and President of the ICJ)

As for the EPA, while I hear it's a swanky place to work (voted #1 of all U.S. government agencies), I have encountered it through Water Law, Air Quality Law, Brown Fields Lands, meteorological analyses, local and state interactions with Federal regional systems reporting to the EPA (particularly in Florida, Hawaii, New York, & Vermont, amongst others). And I have applied how environmental law works in the international realm since around the same time as the INL position when I worked at looking at Water Law in a California city in the context of regional, federal, and international law.

Since that time, a very cool summer (in so many ways) on the California coastline considering Pacific appropriative rights and desalination processes--in part--I have mastered the International Court of Justice's (ICJ) climate change and international matters concerning boundary measures across water lines. Just to say that upon doing such research, the law of equidistance may be a starting point, but less frequently the endpoint than the seeming golden rule of national water boundaries provides in ICJ jurisprudence. Just look to the Great Lakes Controversy in Africa, of which now-Judge Okowa (Kenya) helped the world see more in a recent recorded lecture that she gave at the United Nations. I, too, have some writings on the matter, which I hope helped the Office of Legal Affairs of the U.S. State Department and the United Nations in preparing for their work on the Advisory Opinion concerning Climate Change--and maybe even the Kenyan contingent had a glance at some of my writings. Judge Okowa did a fine job bringing her international brands to the marketplace, indeed, and I wish her the best in that position.

My analyses were published soon after the announcement of the opinion in 2023, the published ICJ Advisory Opinion emblazons the obligations more than the consequences...Perhaps the private industries presenting to the Court on the matter helped sway them away from such bottom-line crushers that oftentimes hold up good international industrial and commercial activity.

https://internationalattestations.com/blog/f/icj-advisory-opinions-questions-presented
https://internationalattestations.com/blog/f/consequences-and-advisory-opinions-at-the-icj

I have also considered the regional and state level environmental matters with the USMCA and the state-level courts of the U.S.A. (see below).
https://internationalattestations.com/blog/f/the-usmca-the-eca-government-involvement-public-participation
https://internationalattestations.com/blog/f/environmental-courts-at-the-state-level

Still, in order to stay current for my INL overlap with ICJ matters, I have compiled that seven-part series b as a reprint below to prepare for the updated version. The series focuses on the regional side of collaboration with the U.S. on federal law enforcement matters whilst also considering which nations in that cadre had activity at the ICJ.

Stay tuned for my forthcoming INL & ICJ analyses Redux...

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November 14, 2025 at 1:13 a.m., tidied up on January 19, 2026 at 11:00 a.m.

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Reprinted below INL Homecoming Pt. 1- Pt. 6b: Tuesday, July 12, 2022, 9:00 a.m.; Tuesday, July 19, 2022 at 9 a.m.; July 26, 2022, 9:00 a.m.; August 2, 2022, 9:00 a.m.; August 9, 2022, 9:00 a.m.; August 16, 2022, 9:00 a.m.; August 23, 2022, 9:00 a.m.

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INL Homecoming Pt. 1 -- Sub-Saharan Africa
INL Homecoming Pt. 2: East Asia & the Pacific
INL Homecoming Pt. 3 -- Europe & Eurasia
INL Homecoming Pt. 4 -- Middle East & North Africa
INL Homecoming Pt. 5 -- South & Central Asia
INL Homecoming Pt. 6a & 6b -- Western Hemisphere

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(1) Sub-Saharan Africa: https://internationalattestations.com/blog/f/an-inl-homecoming
(2) East Asia & Pacific: https://internationalattestations.com/blog/f/inl-homecoming-pt-2-east-asia-the-pacific
(3) Europe & Eurasia: https://internationalattestations.com/blog/f/inl-homecoming-pt-3—europe-eurasia
(4) Middle East & North Africa: https://internationalattestations.com/blog/f/inl-homecoming-pt-4--middle-east-north-africa
(5) South & Central Asia: https://internationalattestations.com/blog/f/inl-homecoming-pt-5--south-central-asia
(6a) Western Hemisphere: https://internationalattestations.com/blog/f/inl-homecoming-pt-6--western-hemispher
(6b) Western Hemisphere: https://internationalattestations.com/blog/f/inl-homecoming-conclusion

Document 3.3 Outside Testimony Submission Dates are Here! (May 5, 2025)

Hey all, please find the list of outside testimony submission dates for the House & Senate Appropriations Subcommittees. There is also a list of the emails and to whom you should address such testimony requests. I would be honored to hear how you do, and...if you'd like, I can help you collaborate on your testimony requests. Please find my rules publication as well as my census comment from last year.
Hit me up!
MK

Rules for US-AOC 2025 (Appellate, Bankruptcy, & Evidence): https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0369

Census Boundary Comments 2024: https://www.regulations.gov/comment/USBC-2024-0012-0004

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DUE DATES 2025
Senate Subcommittee Due Dates 2025 for FY 2026

- May 9, 2025: Senate Legislative Branch; House Commerce, Justice, Science & Related Agencies; House Homeland Security
- May 22, 2025: Senate Agriculture, Rural Development, Food & Drug Administration, & Related Agencies
- May 23, 2025: House Agriculture, Rural Development, Food & Drug Administration, & Related Agencies; House Energy & Water Development
- May 30, 2025: Senate Energy & Water Development; Senate Military Construction, Veterans Affairs, & Related Agencies
- June 13, 2025: Senate Commerce, Justice, Science & Related Agencies; Senate Labor, Health & Human Services
- June 15, 2025: Senate Homeland Security; Senate Interior, Environment & Related Agencies
- June 24, 2025: Senate Defense

- June 27, 2025: Senate State, Foreign Operations & Related Programs
- July 1, 2025: Senate Financial Services & General Government
- 7 days after the respective Departmental budget hearing of interest: Transportation, Housing & Urban Development.

Likely no longer available this year:

1. House Defense
2. House Financial Services & General Government
3. House Military Construction, Veterans Affairs, & Related Agencies
4. House Interior, Environment, & Related Agencies (4 April 2025)
5. House Labor, Health & Human Services, Education & Related Agencies (9 April 2025)
6. Legislative Branch (9 April 2025)
7. National Security, Department of State, & Related Agencies (21 March 2025)
8. Transportation, Housing & Urban Development

EMAIL LIST 2025
Senate Emails (Veterans not available at time of publication)

- agri@appro.senate.gov (Agriculture, Rural Development, Food & Drug Administration, & Related Agencies)
- cjs@appro.senate.gov (Commerce, Justice, Science & Related Agencies)
- def@appro.senate.gov (Defense)
- ew@appro.senate.gov (Energy & Water Development)
- finsec@appro.senate.gov (Financial Services & General Government)
- homelandsec@appro.senate.gov (Homeland Security)
- lhhs@appro.senate.gov (Labor, Health & Human Services, Education, & Related Agencies)
- int@appro.senate.gov (Interior, Environment, & Related Agencies)
- legislativebranch@appro.senate.gov (Legislative Branch)
- thud@appro.senate.gov (Transportation, Housing & Urban Development, & Related Agencies)

- SFOPS@appro.senate.gov (State, Foreign Operations, & Related Programs)

House emails

- ag.approp@mail.house.gov (Agriculture, Rural Development, Food & Drug Administration, & Related Agencies)
- cj.approp@mail.house.gov (Commerce, Justice, Science & Related Agencies)
- in.approp@mail.house.gov (Interior, Environment, & Related Agencies)
- ew.approp@mail.house.gov (Energy & Water Development & Related Agencies)
- hs.approp@mail.house.gov (Homeland Security)

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May 5, 2025, 7:05 p.m.
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Document 3.4 Analysis of the UN Security Council's Class of 2024 (January 30, 2024)

New England is well-known historically for having thrived during the Whaling industry's heyday. Though. the local and state curricula may vie in a different direction now, growing up this industry was drilled into our consciousness through things like use of blubber to fuel lamps and analysis of a haggard Captain's hunt of one of the beasts. That heyday was ultimately replaced by the FIRE industries--leading to the rise of the State's insurance industry as the topmost in the nation. And nowadays, some of the central pulls relate to history of the town as a place where a prison was situated and a couple of presidents visited .

This industry may be very important in the international context in the coming days. At least the International Court of Justice's (ICJ) analysis of it in 2014 with the case of Australia v. Japan, New Zealand Intervening. After the Court had established its jurisdiction, it held that Japan's permitting regime was not within those acceptable by the International Convention for the Regulation of Whaling (ICRW). Even though the ICJ found that Japan had complied with its obligations in some instances, Japan was told to revoke authorizations, permits and licenses in the instances where it was not in conformity with its obligations. Australia was protecting the seas from a commercial activity that harmed its interests.

With the first resolution of the year, protecting commercial activity began the conversation for the 2024 Class of the Security Council of the United States (See Supplement 1 for More Details About the Class of 2024 & Its Presidents; and check out my previous post in January 2023 for background on my analysis about UNSC Class of 2023).

UNSC CLASS OF 2024 & THE ICJ

First, contextualizing the current class in relationship to the International Court of Justice (ICJ) emboldens the concerns about activities in the oceans, including illicit activities in the seas.

Even though this year's class consists of a group of nations with sparing interaction with the ICJ...

While Ecuador, Malta, Mozambique & Switzerland (2023-2024) as well as Korea and Slovenia (2024-2025) have never had a judge on that Court, Japan, Algeria, Guyana and Sierra Leone have had seven. Algeria, Guyana, and Sierra Leone (2024-2025) have seen three great judges from their nations serve a total of thirty-six years on the Court, with an overlap between 1994-1997 when they all served. Algeria's Bedjaoui (1982-2001) was the only one among them to have sat at the helm of the Court. Though the other two judges, Shahabuddeen (1988-1997) and Koroma (1994-2012), enjoyed some time on the Court during Bedjaoui's tenure, neither was there during his Vice President (1994-1994).

Switzerland, ever the distinguishable nation throughout the world, as it has taken its first tenure at the UNSC, has only had three cases before the Court—none of which have been concerned directly with environmental matters—and they were discontinued, dismissed, or removed against the one-time neutral nation: Dominica (diplomatic envoy status in host states); United States (banking and property considerations); and Belgium (commercial airlines issues with international compliance with banking and debt-related matters).

The other three non-permanent nations in the UNSC Class of 2024 have one case at that Court and they all have a nexus to protecting, accessing, and lawfully utilizing natural resources (Ecuador, Japan, and Malta). This could get interesting should the General Assembly receive a response to its advisory opinion this year—not likely, but a possibility...

Ecuador's aerial herbicide spraying case against Colombia, although discontinued 17 September 2013, was initiated with a three-fold purpose of (1) acknowledgment for violation of international when allegedly causing human health, property and environmental damage; (2) indemnification of loss and damage arising from death or injury, property harm, human rights and livelihood violations, natural resource depletion, and costs from monitoring public health, human rights and environment; (3) order that Colombia respect sovereign & territorial integrity of Ecuador as well as prevent future harm through prevention of use and dispersal of herbicides.

The last two environmental cases of the nations from the current UNSC Class directly relate to the sea in some fashion.

First, Malta's continental shelf case against the Libyan Arab Jamahiriya provided two judgments—one which asserted Italy's inability to intervene in the case and the other determining equitable principles for drawing the continental shelf a equidistant from the low-water mark on the shores of both nations as across the Mediterranean Sea.

Finally, as discussed above, Japan's *Whaling* case provided a moment in ICJ jurisprudence to scoff at the spectrum of lawfulness concerning seafaring activities of commercial vessels (as opposed, in part, to scientific ones).

***WHALING* AS A NEXUS BETWEEN UNSC CLASS OF 2023 & UNSC CLASS OF 2024**

With 1 declaration, six separate opinions, and four dissents, the *Whaling* case was rife with analysis as between many judges from non-permanent nations on the UNSC 2023 & 2024--namely Judges Owada and Cançado Trindade of Japan and Brazil, in particular. Owada, for obvious nationally-centered reasons, found cause to dissent against the judgment's dissipation of a large portion of a commercially viable permitting regime for his home country. Owada bucked against the widespread scope of the court's judgment and felt that it should have narrowed to the purposes of scientific research permitting.

Indeed, bridges arose between the dissenters and the separate opinion writers in the *Whaling* judgment. For example, Owada and Cançado Trindade both were concerned with limiting scope issues: with the former considering the judgment too far reaching and the latter concerned more specifically with Article VIII of the Convention. In a nod to Cançado Trindade's roots at the Inter-American Court, he really highlights the human rights element of the case—the conservation of living species and intergenerational equity. Cançado Trindade's overall quibble—as typical of the very prolific judge—was the need for the Court to further develop its judgment on matters like the object and purpose of the ICRW as well as its "living" status as an instrument, collective guarantee and collective regulation, and uncertainties of scientific research under Japan's regime.

Last year's class included two sets of non-perms, as always. Those who served 2022-2024 (Albania, Brazil, Gabon, Ghana, and the United Arab Emirates) and those who are serving between 2023-2025 (Ecuador, Japan, Malta, Mozambique, and Switzerland).

UNSC CLASS OF 2024 INHERITANCE FROM UNSC CLASS OF 2023: A CURSORY REVIEW OF 2023'S RESOLUTIONS IN THE CONTEXT OF ILLICIT ACTIVITY & THE MIDDLE EAST

The Class of 2023's 53 resolutions pertain to eleven nations (see below), three regions (Africa, the Middle East, & Western Sahara), & two topics (maintenance of international peace and security

Resolutions are the principal mechanism through which the Security Council affectuates its power in a manner that transmits/publicizes its intentions to the United Nations, its Members, and the wider world community. The basis for these resolutions arise from the Charter of the United Nations, which in addition to the formative section the Security Council, calls forth the responsibilities of that international body. For example, Art. 39 ensures that the UNSC may determine threats to peace, breach of peace, or acts of aggression and "shall make recommendations, or decide what measures shall be taken…to maintain or restore international peace and security."

In 2023, the resolutions pertaining to situations in nations related to Afghanistan, Bosnia & Herzegovina, the Central African Republic (CAR), Cyprus, North Korea, the Democratic Republic of the Congo (DRC), Haiti, Iraq, Libya, Mali, and Somalia.

Commercial activity in the *Whaling* case may be instructive for some review of UNSC Class of 2023's resolution. Indeed, distinguishable in large part because that whaling industry was permitted in some instances, commercial activity was a sometime concern for the previous year's class. Some resolutions concerned nations where the UNSC considered illicit commercial activities, though oftentimes in the context of arms trafficking. During both presidencies of the UK in July and China in November, the UNSC condemned CAR's illicit trade, in general, and trafficking in particular (in explosives and wildlife, for example) in the context of border security. Such condemnation applied to illicit transfer at the national level in the DRC, when, during Ecuador's tenure in December, the UNSC encouraged ways to dissipate small arms and light weapons, as well as Libya, when, during Brazil's tenure in October, the UNSC . Also in October, Haiti's issues, in relevant part, related to diversion of such arms.

The Middle East was by far the most robust resolution campaign throughout the tenure of the 2023 UNSC with nine (9) resolutions pertaining to that region of the world. And, while it was surprising that not one resolution pertained to the Ukraine or Russia—probably in part because the ICJ indicated provisional measures in March 2022—the hottest topic of the year arose as a result of an emergency session in the General Assembly. The Palestinian Question and violence in Israel, viciously debated in October, finally led to a resolution concerning Palestine on November 15, 2023 under China's tenure and came up again in December under Ecuador. The question of Israel also arose at the ICJ, with South Africa justifying institution of proceedings against that Middle Eastern nation through the Genocide Convention, in part relying on its typically commercial activity with Brazil, Russia, India, China, and South African (BRICS) to show, rather, a humanitarian concern.

UNSC CLASS OF 2024'S FIRST RESOLUTION (2722): PROTECTION OF COMMERCIAL & MERCANTILE ACTIVITY IN THE RED SEA

In addition to the non-permanent members of the UNSC attending to these resolutions, the U.N. Security Council always has as part of its membership the Five Perms--the phrase that I coined circa 2018 for the five permanent nations who are always on the U.N. Security Council (China, France, the Russian Federation, and the United Kingdom). One of the Five Perms, France, was the first to serve as the president of the U.N. Security Council this year. On July 4, 2023, I wrote about the European nation, which has been involved with Equatorial Guinea in two cases concerning immunities and criminal proceedings as well as return of confiscated property in criminal proceedings since that 2019 analysis.

Like the *Whaling* case analyses by the ICJ Judges, the sole resolution to date under France's current presidency, published on January 10, 2024 (Res. 2722), relates to another set of violations of international law as presented in the Middle Eastern context--illicit activities occurring against merchant and commercial vessels in the Red Sea that were *en route* to Yemen with essential goods impeding on the navigational rights and freedom of such vessels.

After condemning the Houthi attacks in November 2023 and demanding immediate cessation of future attacks like it, the Security Council affirmed the international law supporting navigational rights and freedoms by merchants and commercial vessels. With that affirmation, the UNSC stressingly noted that Member States may defend themselves against such attacks.

Organizations and agencies were given a nod by the French-led UNSC to encourage further protection of the region. The International. Maritime Organization (IMO) was lauded for its work to provide for

safe and secure transit of merchant and commercial vessels and tthe Yemeni Coast Guard and other regional capacity-building measures to encourage coastal and port State enhancement of maritime security may be bolstered through support by Member States.

In addition to enumerating obligations concerning the arms embargo and condemnation of weapons provision, the UNSC urged diplomatic efforts in the region as well as sought a report from the Secretary General.

RESOLUTION 2722: A SUGGESTION FOR NEXT STEPS

In the instance of Resolution 2722, the UNSC Class of 2024 has begun its tenure by stepping in with a forceful measure—likely attempting to forestall the napalm effect of the issues arising in Israel to prevent--perhaps in the manner of the *Whaling* Court and in the manner of my hometown's foreseeing the need for new industry--the complete annihilation of groups of peoples in that region of the world.

I can suggest scores of takeaways from Resolution 2722. I provide only a one key observations. The State Department's Bureau of International Narcotics and Law Enforcement, my alma mater at the U.S. State Department, has indicated that private business interests are not necessarily a focus for their efforts in the Middle East and North Africa. However, if they haven't already, commercially-based protection programs like that which will arise with the Yemeni Coast Guard need to be enriched and the U.S. INL should include organizations like International Attestations, LLC to provide such through bridge building efforts to enrich public-private partnerships

Tuesday, January 30, 2024, 9:00 a.m.; updated 10:10 a.m.; updated 3:48 p.m.; updated January 31, 2024, 5:44 p.m. February 8, 2024, 10:00 p.m.

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Document 3.5 U.S. Supreme Court: Wither the Cyber? (July 25, 2023)

My annual authentication outline has included both cyber and advisory at one time throughout my consideration of these specified terms. As such, during the 2020 Term, I considered both terms at varying degrees of immersion. My history with these two terms differs. First, I developed an interest in Cyber Law in 2012, after attending a closed seminar at Georgetown University's Borne Scholars program (my significant other at the time was participating in that program). Also, advisory opinions at the U.S. Supreme Court became important to me as I developed an interest in the International Court of Justice. Ahead of my review of the 2022 term, over the next two weeks I will publish my brief analyses from two years ago.

Beginning with "cyber", there has been only one update since 2020 as the term has become antiquated in legal parlance (though it never really had a strong presence, to begin with). Interestingly, in a First Amendment case during the most recent term, "cyber" did in fact arise in passing. *Counterman v. Colorado*, 600 U.S. __ (2023). In a case where a female performer who was protected with a case against an overly-zealous fan, the accused was tried and found guilty for sending scores of messages that supposedly a reasonable person would have found threatening. This all went forward against his argument that he had a First Amendment defense to free speech. The appellate court agreed with the jury, and the U.S. Supreme Court vacated the judgment because the courts below had not applied the appropriate standard for determining *mens rea* in threatening speech (there seems to be an eradication of that requirement based on recklessness and reasonableness standards that appear to blur the lines between criminal and tort law). In any event, the phrase used in the opinion by Justice Kagan was a citation to one of those Facebook messages written by other fans defending the singer against her over-zealous fan's advances: "Staying in cyber life is going to kill you."

Perhaps evocative of Jodie Foster's overzealous fan turned violent, all parties have been overly cautious. The Court's standard just seems to kick the can down the road for this particular defendant (the Petitioner in this case). He has to undergo an entire new trial, and the result will likely be the same. 4.5 years in prison for liking a public figure too much, when perhaps interventions should have redirected his gaze before they became criminalized. Perhaps Counterman has learned his lesson and he might respectfully shift his music appreciation to that of Miranda Lambert, who responded to the recent selfie-gate debate by advising her audience-members to adhere to the rules of the venue and "Shoot tequila shots instead of selfies."

There were no mentions of cyber during the 2021 term.

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Cyber analysis from the 2020 Term

The Court has directly considered cyber matters in a small selection of cases.[1] There are clearly cases that also consider internet, the world wide web, and other similarly situated terms of art. Due to time constraints, this study focuses solely on "cyber" at the Supreme Court since Chief Justice Roberts has assumed the helm. The Court has included cyber when discussing small and upstart businesses as well as cyber schools and unwanted electronic contact. It has also consider cyberspace as the "most important places (in a spatial sense) for the exchange of views."[2] The Court has also lamented at the expeditious nature of the medium: "While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and dimensions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow."[3]

In response, Justice Alito laments that Justice Kennedy's Opinion is not a sufficient account of the differences between the cyber and physical world when considering tenets of free speech,[4] though they later join together when dissenting about the extent of ownership within the context of cell phone usage during the Cyber Age[5]-—posing the difficulty in drawing a constitutional line concerning privacy interests when also considering such cell phone data in comparison to financial and telephonic records.[6] The Court also analyzed how the Anticybersquatting Consumer Protection Act may protect unregistered trademarks.[7] In the most recent case, the Court implements the Commerce Clause doctrines as applied to the physical presence rule and later argues against a clear and easy applicability of physical presence in the Cyber Age, with such questions being addressed by state courts.[8]

[1] Bilski v. Kappos, 561 US 593 (Stevens, J, concurring in the judgment) (2010); US v. Jones, 565 US 400 (Alito, J., concurring in the judgment) (2012); Dutkevitch v. PA Cyber Charter School, 565 US 1265 (2012); Packingham v. North Carolina, 137 S. Ct. 1730 (Kennedy, J) (2017); Matal v. Tam, 137 S. Ct. 1744 (Alito, J) (2017); Carpenter v. US, 138 S.Ct. 2206 (Roberts, CJ) (Kennedy, J, dissenting)(2018); South Dakota v. Wayfair, Inc., 138 S.Ct. 2080 (Kennedy, J) (2018).
[2] Packingham v. North Carolina, 137 S.Ct. 1730, 1735. (Kennedy, J) (2017).
[3] Packingham v. North Carolina, 137 S.Ct. 1730, 1736 (Kennedy, J) (2017).
[4] Packingham v. North Carolina, 137 S.Ct. 1730, 1743-1744 (Alito, J, concurring in the judgment) (2017).
[5] Carpenter v. US, 138 S. Ct. 2206 (Kennedy, J, dissenting) (2018).
[6] Carpenter v. US, 138 S. Ct. 2206 (Kennedy, J, dissenting) (2018).
[7] Matal v. Tam, 137 S. Ct. 1744, 1752-1753 (Alito, J) (2017).
[8] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097-2098 (Kennedy, J) (2018).

Tuesday, July 25, 2023, 9:00 a.m.

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Document 3.6 United Nations & Global Counter-Terrorism Strategy (June 13, 2023)

On the crisp Tuesday after Memorial Day, I ventured into New York City to attend events at the United Nations. Once at the campus, I received a grounds pass from the appropriate office—one that expires on December 31, 2023. I attended two events: the Global Counter-Terrorism Strategy revision session (Strategy session) and the opening activities for the 35th Meeting of the Chairpersons of Human Rights Treaty Bodies (Chairpersons Meeting). Last week I discussed the Chairpersons Meeting, and today I will discuss my observations of the Strategy session.

When visiting the United Nations, I stayed for an hour of the Strategy session. The Global Counter-Terrorism Strategy was adopted through consensus in 2006 and is embodied in A/Res/60/288, establishing national, regional, and international efforts to fight terrorism. Every two years, the United Nations meets to discuss revisions for this strategy—basically an international group editing session moderating by a chairperson. Attending to the second revision of the eighth such session's document when I was in attendance, the Strategy session entailed going through part by part of the strategy and proposing revisions through national representatives. So, for example, the United States sought a rationale for adding paragraph 9-bis (soon to be released with or without the revision). During that meeting, I noted that a great deal of participation came from the United Kingdom (UK), United States of America (USA), the Russian Federation (Russia), the European Union (EU), and States from the Organization of Islamic Cooperation (OIC).

Before getting into specific paragraphs, several governments voiced their overall concerns with the strategy's second revision. Saudi Arabia's representative spoke on behalf of the OIC, with the following slogan: the collective voice of the Muslim world. They were concerned about combating homophobia, criteria for selecting specific inputs, and whether equal weight to groups and delegations. The USA followed when its delegate expressed issues with PP20 (desecration of religious texts) and OP86 (rule of law, human rights and gender development; naming the Human Rights and Gender Section of the UN Office of Counter-Terrorism). Next up was the EU's delegate, who was averse to the deletion of consensus language as well as civil society protections implementation and to the new topical language that do not appear in the Secretary General reports, previous strategy versions, and more. He, too, was concerned with deletions to OP86. The UK's representative spoke after the EU, echoing concerns about the deletion of consensus language—urging its retention. The Russian delegate spoke last during the open comment period on revision 2. He felt that there was lack of clarity for the selective approaches to the revision, particularly as to why some proposals were taken and others omitted. He felt there were still many controversial paragraphs in the proposal, and he expressed a concern about paragraphs that were removed. He affirmed that he was open to further discussion and ready to work constructively with all delegations.

After the general comments, the moderator took them through a paragraph-by-paragraph review of the document. Frankly, I had a great deal of fun observing this revision session, and had I not other obligations with the human rights world, I would have stayed the entire day! However, I was only able to stay through their review of PP24. During that time, while many paragraphs were skipped extensive commentary was provided for eight (8) of those paragraphs (PP 5 bis, 9 bis, 10, 16, 18, 21, 22, and 24). I have provided a copy of the zero-draft paragraphs in the appendix.

Russia, Saudi Arabia, Egypt, the EU, and Nigeria debated the language of PP 5 bis. Russia called for naming of specific terrorist organizations and there was a discussion between Nigeria, Egypt, and the EU concerning language concerning regional issues pertaining to Africa.

While the U.S. was the only nation to comment about the addition of 9 bis, they were joined by Russia and Mexico in debating the contents of PP10—focused on underlying conditions of nations that could foster terrorism. Russia wished for more consideration of violent extremism and racial processes, while the U.S. wished to hear more rationale for opening up to more edits of this paragraph after they had already reached a careful consensus. Mexico was flexible but wished to see the previously agreed language, while also suggested putting "preventing and" before "countering" in that paragraph.

Saudi Arabia, Nicaragua, the EU, the USA, Australia, Morocco, Switzerland, the UK, Turkmenistan, and Uzbekistan were the ten (10) entities that commented on PP16 (delivery of integrated and coordinated assistance at the field level). Field presences and resident coordinators were the common topics of debate among these ten governments. Saudi Arabia and Nicaragua both countered inclusion of resident coordinators. As for field presences recommendation by Turkmenistan, the US, Switzerland, the EU, and the UK questioned inclusion of such a topic in that paragraph.

After Costa Rica and Mexico expressed their disappointment at the deletion of PP18bis, Russia and US spared over PP21 (importance of the role of the media, civil society, religious actors, the business community and educational institutions). Russia was concerned with omission of digital technologies used by terrorist and hate groups.

Saudi Arabia, Switzerland, Israel, Syria, and Iraq debated the use of "incitement" of children to terrorism as an important addition to PP22 (systematic recruitment and use of children to perpetrate terrorist attacks). The OIC, to include Saudi Arabia and Syria and Iraq, as well as Switzerland pushed back against inclusion of the term, with Switzerland's delegate requesting that they narrow the margin of the term. Israel's representative justified her nation's suggestion to include the word because of the increased instances of this activity.

Finally, Saudi Arabia, Russia, and the EU asserted their viewpoints about including "in particular women-led civil society organizations" as part of PP24 (criminal justice systems standards). The OIC, through Saudi Arabia, and Russia did not wish to include this phrase, with the latter's delegate expressing concern about particularizing the civil society organizations as "women-led" and wishing for a more whole of government and whole of society approach. The EU's representative asserted his supranational government's support for the phrase. Nine nations simple voiced their support of the EU's assertions (US, Switzerland, Japan, UK, Costa Rica, Norway, Mexico, Australia, and Colombia).

Appendix 1. Highlighted Paragraphs from the Zero Draft

PP10 *Reaffirming* the primary responsibility of Member States and their respective national institutions in countering terrorism, concerned that terrorists continue to endeavour to exploit underlying conditions in some countries, such as limited reach of Governments and lack of capacity to deliver essential services by law enforcement and security institutions, and emphasizing that enhancing the capabilities and capacities of State institutions, where applicable and upon request, to prevent and counter terrorism is a pivotal component for successful efforts against terrorism,

PP16 *Recognizing* the important role of the United Nations in providing integrated and coordinated assistance at the field level, and noting in this regard the efforts of the Office of Counter-Terrorism in increasing its field presence, including at the regional level through programme offices in Hungary, Kenya, Morocco, Qatar and Spain, and the Behavioural Insights to Counter-Terrorism Hub and the Parliamentary Engagement Hub in Doha to facilitate the delivery of programmes closer to beneficiaries, enhance their impact and cost-effectiveness, and strengthen cooperation with national and local counter-terrorism actors, as well as regional bodies and other providers and recipients of assistance, and reminding the Office of Counter-Terrorism field presence to work in close coordination with the wider United Nations presence at the national or regional level,

PP21 *Stressing* the importance of the role of the media, civil society, religious actors, the business community and educational institutions in those efforts to enhance dialogue and broaden understanding, in promoting pluralism, tolerance and coexistence, and in fostering an environment which is not conducive to incitement of terrorism, as well as in countering terrorist narratives,

PP22 *Strongly condemning* the systematic recruitment and use of children to perpetrate terrorist attacks, as well as the violations and abuses committed by terrorist groups against children in all circumstances, including killing and maiming, abduction and rape and other forms of sexual violence, noting that such violations and abuses may amount to war crimes or crimes against humanity, and urging Member States to comply with applicable obligations under the Convention on the Rights of the Child,3 emphasizing the importance of accountability for such abuses and violations,

PP24 *Recognizing* the important contribution to the counter-terrorism efforts of Member States and Global Counter-Terrorism Coordination Compact entities derived from dialogue with and, as appropriate, support for and partnership with civil society actors committed to the principles and objectives of the Charter of the United Nations, as part of a whole-of-society approach, similarly recognizing that civil society actors should be further enabled to contribute to the goals of the Strategy, and in this regard noting the Secretary-General's guidance to the United Nations system,4

4 United Nations Guidance Note on the Protection and Promotion of Civic Space.

Tuesday, June 13, 2023, 9:00 a.m.

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Document 3.7 Obligations in Advisory Opinions at the ICJ (April 25, 2023) & Consequences in ICJ Advisory Opinions: Questions & Holdings (May 16, 2023)

Obligations in Advisory Opinions at the ICJ (April 25, 2023)

On March 29, 2023, the General Assembly sought another advisory opinion from the International Court of Justice (ICJ). This is the first dedicated solely to environmental issues. The first advisory opinion at the International Court of Justice was in 1948, and it related to conditions of membership at the United Nations. Advisory opinions were also active during the tenure of the ICJ's predecessor, the Permanent Court of International Justice (PCIJ). That Court entertained eighteen advisory opinions, while the ICJ has considered twenty-seven, with an additional two pending.

The request from the General Assembly seeks answers to a couple first impression topics: climate change, anthropogenic emissions of greenhouse cases, and impact on present and future generations. This climate opinion is not the first time the environment was directly considered for an advisory opinion's questions and/or operative paragraphs. For example, the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* considered such questions. Unfortunately, the extent that obligations of international law pertain to health and environmental effects of nuclear weapons in war or armed conflict was never considered fully by the Court. The ICJ declined to consider that WHO generated opinion.

Another facet of the newest advisory opinion to be presented at the Court is the citation to ten types of treaties and international obligations at the beginning of the query. "Human Rights" are heavily represented among those documents. Obviously the instruments and customary international law that relate to this subject matter are: (1) the Charter of the United Nations; (2) the International Covenant on Civil and Political Rights; (3) the International Covenant on Economic, Social and Cultural Rights; (4) the rights recognized in the Universal Declaration of Human Rights; (5) the principle of prevention of significant harm to the environment; and (6) the duty to protect and preserve the marine environment. But there are also arguments that the other four documents are also human rights instruments: (1) the United Nations Framework Convention on Climate Change; (2) the Paris Agreement; (3) the United Nations Convention on the Law of the Sea, and (4) the duty of due diligence.

"Human Rights" have been directly addressed in the questions presented and/or operative paragraphs of two (2) other cases (The forthcoming Jerusalem & Palestine Opinion; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999)). Rights in general were also discussed in the PCIJ's *Greco-Bulgarian Communities*, in which the opinion considered property rights of dissolving populations (1930).

Thirteen of the advisory opinions before the ICJ and the PCIJ have directly consider obligations in their questions presented and/or operative paragraphs (*Chagos Archipelago*; *Palestinian Wall*; *Immunity of Special Rapporteur*; *Nuclear Weapons in Armed Conflict*; *Nuclear Weapons*; *UN Headquarters Agreement*; *WHO and Egypt Agreement*; *Presence of South Africa in Namibia*; *South West Africa*; *Reparation for UN Injuries*; *European Commission of Danube Jurisdiction*; *German Settlers in Poland*; and *Status of Eastern Carelia*).

Obligations have arisen as the responsibility of States as a whole or individually, national governments, national courts, and treaty signatories. Further, obligations have been national as well as international. They have also been mutual or exclusive as well as based on legality or illegality. Actions of obligations can be to terminate, recognize (or not to recognize), enter into, consult, negotiate, give (notice), withdraw, transmit, place under (trusteeship system), ensure, breach, and contemplate.

The PCIJ cases established the modern foundation of obligations as considered by the ICJ. *Status of Eastern Carelia* established the obligation of one state to another, *German Settlers in Poland* set up international obligations contemplated by a treaty, and *European Commission of Danube Jurisdiction* ensured freedom of navigation and equal treatment of all flags.

South West Africa considered international and legal obligations, particularly with regard to transmittal of petitions for inhabitants as well as placement under the UN's Trusteeship system. *Presence of South Africa in Nambia* set the foundation for an obligation to recognize the illegality of one state's presence in another and, by extension, the duty to withdraw such presence.

Contractual obligations have been present at the ICJ as well. *UN Headquarters Agreement*required arbitration, *WHO and Egypt Agreement* established the mutual obligation to consult, negotiate and give notice, and *Reparation for UN Injuries* addressed breach of obligations due to the United Nations.

Nuclear Weapons in Armed Conflict attempted to address health and environmental concerns, while *Nuclear Weapons* instituted disarmament requirements.

Immunity of Special Rapporteur contemplated national responsibilities for international obligations. Malaysia and its Government were under obligation to inform its courts of the Secretary General's findings as well as the ICJ advisory opinion. Further, the national courts were mandated to deal with the question of immunity from legal process. Finally, overall the nation was to give effect to international immunity obligations.

Palestinian Wall addressed the need to terminate breaches of international law, cease construction, make reparations and to ensure compliance by Israel. Interestingly in the *Palestinian Wall* case, the Court also talked about negative obligations—the obligation not to recognize the illegal situation.

Finally, *Chagos Archipelago* implemented obligations arising from decolonization.

Other elements considered within the climate change questions posed to the ICJ concern States, consequences, acts, omissions, harm, small-islands, geography, vulnerabilities, adverse effects, affected by, individual, and people. As the world prepares for the results of the climate change advisory opinion, I will continue to consider these elements of the questions. The ICJ has set the deadline for written statements for 20 October 2023 and for written comments on those statements for 22 January 2024.

Annex 1. List of Advisory Opinions at the ICJ

Pending ICJ Advisory Opinions

1. Obligations of States in respect of climate change
2. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem.

ICJ Advisory Opinions (reverse order)

1. Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (2019)
2. Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (2012)
3. Accordance with international law of the unilateral declaration of independence in respect of Kosovo (2010)
4. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004)
5. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (1999)
6. Legality of the Use by a State of Nuclear Weapons in Armed Conflict (1996)
7. Legality of the Threat or Use of Nuclear Weapons (1996)
8. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (1989)
9. Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (1988)
10. Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal (1987)
11. Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal (1982)
12. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (1980)
13. Western Sahara (1975)
14. Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal (1973)
15. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (1971)
16. Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)

17. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (1960)
18. Admissibility of Hearings of Petitioners by the Committee on South West Africa (1956)
19. Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO (1956)
20. Voting Procedure on Questions relating to Reports and Petitions concerning Territory of South West Africa (1955)
21. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1954)
22. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951)
23. International Status of South West Africa (1950)
24. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (1950)
25. Competence of the General Assembly for the Admission of a State to the United Nations (1950)
26. Reparation for Injuries Suffered in the Service of the United Nations (1949)
27. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (1948)

Annex 2. List of Advisory Opinions at the PCIJ

1. B18 – Free City of Danzig and ILO (1930)
2. B17 Greco-Bulgarian "Communities" (1930)
3. B16 Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV) (1928)
4. B15 Jurisdiction of the Courts of Danzig (1928)
5. B14 Jurisdiction of the European Commission of the Danube (1927)
6. B13 Competence of the ILO to Regulate Incidentally the Personal Work of the Employer (1926)
7. B12 Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (1925)
8. B11 Polish Postal Service in Danzig (1925)
9. B10 Exchange of Greek and Turkish Populations (1925)
10. B09 Monastery of Saint-Naoum (1924)
11. B08 Jaworzina (1923)

12. B07 Acquisition of Polish Nationality (1923)
13. B06 German Settlers in Poland (1923)
14. B05 Status of Eastern Carelia (1923)
15. B04 Nationality Decrees Issued in Tunis and Morocco (1923)
16. B03 Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production
17. B02 Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (1922)
18. B01 Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference (1922)

Tuesday, April 25, 2023, 9:00 a.m.

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Consequences in ICJ Advisory Opinions: Questions & Holdings (May 16, 2023)

On April 25, 2023, I published a blogpost about the most recent request for an advisory opinion about the obligations of states concerning climate change at the International Court of Justice (ICJ). In that post, I discussed one of the central tenets of the climate change question posed to the ICJ. I also highlighted the direct mention of human rights in the query. At the end of the entry, I listed other elements posed to the ICJ: States, consequences, acts, omissions, harm, small-islands, geography, vulnerabilities, adverse effects, affected by, individual, and people.

Today, I'll briefly sum-up the questions presented and the operative paragraphs of the principal advisory opinions addressing consequences at the ICJ because the *Obligations of States in respect of climate change* (*Climate Change*) request posits: "What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to: (i) States...[and] (ii) Peoples and individuals...?"

There have been four (4) advisory opinions that have centrally-addressed consequences.

The advisory opinions that have already been decided are the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) (*South West Africa*), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) (*Palestinian Wall*), and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*(2019) (*Chagos Archipelago*). Most recently, and still pending, is the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (*Occupied Palestinian Territory*).

Those questions presented are listed verbatim in chronological order:
1. What are the **legal consequences** for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (South West Africa)?

2. What are the **legal consequences** arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of thie Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions (Palestinian Wall)?

3. What are the **consequences under international law**, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin (Chagos Archipelago)?

4. (a) What are the **legal consequences** arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures (Occupied Palestinian Territory)?

5. (b) How do the policies and practices of Israel referred to in paragraph 18(a) above affect the legal status of the occupation, and what are the **legal consequences** that arise for all States and the United Nations from this status (Occupied Palestinian Territory)?

The term "consequences" also appeared once in a question presented in the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ. In Greco-Bulgarian "Communities" (1930) (Greco-Bulgarian Communities), the Greek government asked:

"Do the communities possess the characteristic of being connected as minorities and racial groups with the country in which the majority of the population is of the same race ? What are eventually the **consequences**, as regards the allocation of their property, where their members, as contemplated by Article 1O of the Convention, are dispersed or absent (in the legal sense of the term) ?"

Arguably, the PCIJ advisory opinion, Jurisdiction of the Courts of Danzig (1928), predates the first express mention of consequences by considering the results of certain activities (namely regarding the illegality of the the High Commissioner's decision in relationship to requests made by the Danzig government).

Consequences have increasingly been expressly considered within the questions presented to the ICJ for an advisory opinion, in that they have been part of the most recent three queries (Chagos Archipelago, Occupied Palestinian Territory, and Climate Change). And they've been the topic of four the last six advisory opinions questions. All five of the advisory opinions addressing consequences sprang up since 1970, with the Court having accepted seventeen queries seeking advisory opinions since that time. There have been a total of 29 requests for advisory opinions, which means that nearly one-sixth of all advisory opinions at the ICJ have considered consequences.

In the three advisory opinions that have hencefar been published, the relevant operative paragraphs are as follows:

1. ***Chagos Archipelago*** (#3-5):
Is of the opinion that, having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago.
Is of the opinion that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible;
Is of the opinion that all Member States are under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius.

2. ***Palestinian Wall*** (3):
A. The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law ;
B. Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;
C. Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;
D. All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assis- tance in maintaining the situation created by such construction; al1 States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation. while respecting the United Nations Charter and inter- national law, to ensure compliance by Israel with international humani- tarian law as embodied in that Convention;

E. The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.

3. ***South West Africa*** (1-3):
(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory ;
(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration; and
(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

4. **Greco-Bulgarian Communities** (111.2)
(2) Communities, within the meaning of the Convention, are of a character exclusively minority and racial. The State to which they are racially akin does not from this circumstance derive any right to the movable property or to the proceeds of the liquidation of the immovable property of a dissolved community whose members are dispersed or absent.

The dissents from American judges in the two most recent ICJ opinions concerned with consequences are notable. First, Judge Donoghue (USA) was the lone dissenter in all three relevant *Chagos Archipelago* holdings. She felt that the bilateral treaties were sufficient for completion of the process of decolonization. Perhaps foreseeing what her former slave-holding nation may endure for such an unlimited "statute of limitations", she contested that holdings insisting that the modern United Kingdom should suffer the consequences from conduct so remotely in the past (Donoghue dissent, para. 18). She felt the response of the other ICJ Judges was not limited enough (para. 22).

Next, Judge Buergenthal also was almost entirely the lone dissenter in the *Palestinian Wall* opinion, only being joined by Judge Kooijmans (The Netherlands) against the holding that all states were obligated not to recognize the illegal situation and they were not permitted to render aid or assistance in such construction. Judge Buergenthal asserted his dissent because in his view, "the absence in this case of the requisite information and evidence vitiates the Court's findings on the merits." He finished by stating that the Court was under no obligation to make findings in the case.

The earliest ICJ opinion showed a more divided Court concerning its holdings (*South West Africa*), with eight separate opinions and one declaration.

The only PICJ opinion is not cited, but the two most recent ICJ opinions both cite to the Greco-Turkish Agreement (1928) to stand for the proposition of the inadequately formulated question presented. In fact, the former has almost never been cited, only discoverable in the Written Comments of the Government of the Republic of Costa Rica in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* for a different assertion in the opinion; namely, that, as later codified in the Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Indeed, when the Court has been asked to consider consequences, it tends to give fairly detailed instructions about the path forward at the national and international levels.

List of Cross-References

Blogpost on ICJ Advisory Opinions Questions Presented: https://internationalattestations.com/blog/f/icj-advisory-opinions-questions-presented

Information about the Climate Change request: https://icj-cij.org/case/187

Tuesday, May 16, 2023, 9:00 a.m.

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Document 3.8 Comment on Supreme Court Rules (February 7, 2023)

The U.S. Supreme Court published new rules in December. They did so months after opening up a comment period on the proposed changes. The period was about a month and done without the benefits of Regulations.gov's electronic filing system for notice and comment periods.

On April 11 and April 19, 2022, I published two successive blog posts concerning the 2022 proposed U.S. Supreme Court Rule changes published by the U.S. Supreme Court's Clerk, Scott S. Harris. Those posts were entitled: U.S. Supreme Court Rule Changes 2022: Colors of Amicus Curiae and U.S. Supreme Court Rules: Favorability & Erasing Consent. The first post discussed the problems with potentially increasing amicus curiae briefs. The second post details the history of favorability as described in the rules concerning amicus curiae. Favorability is shorthand for how the parties shall give consent for participation in the case.

The comments for rule changes were due around the time of the second post. I expeditiously researched the historic rules and provided comments on favorability and the court's notice and comment methodology. After filing my comments, I moved on to many other projects--Supreme Court and holidays; the International Court of Justice and judges ad hoc; the Bureau of International Narcotics and Law Enforcement, and so on.

In mid-December 2022, I received a letter from the Clerk of Court, Mr. Harris himself! He thanked me for my thoughtful response to the Court's request for comments on proposed revisions to the Rules. He also wrote: "Your comments, and those of many others, were quite helpful in finalizing the amendments that were announced on December 5, 2022. We are grateful for your assistance."

In the spirit of my goal of moving comments online, I have decided to print the suggestions I made to the Court below.

Feel free to email me yours if you were among one of the commenters! Or better still, call me to write one for you...

SPECIFIED COMMENTS BY MELISSA A. KOTULSKI FOR PROPOSED CHANGES TO THE U.S. SUPREME COURT'S RULES (APRIL 2022)

Rule 37 Removal of Consent of the Parties & Using Regulations.gov
Question Presented 1: Whether favorability language may be beneficially added to the sections of Rule 37 that are directly impacted by erasure of the requirement that a party seeking to file an *amicus curiae* brief obtain consent of the parties or file a motion for leave?
Short Answer 1: The Court would likely benefit from adding favorability language to 37(2) and 37(3).
Question Presented 2: Whether the Court would benefit from use of Regulations.gov for posting about a notice and comment period?
Short Answer 2: It depends on the Court's discretion.

I. Language Concerning the Court's Favorability Would Likely Clarify the New Rule

A. *Amicus Curiae* Briefs Will Now Be at the Sole Discretion of the Court

The Court has published for public comment a proposed change of Rule 37's consent-of-parties provisions. Beginning with the inclusion of the *amicus curiae* in the Court's 1939 publication, this provision of the rule has a long-standing tenure with the history of this type of participation in a Supreme Court case. Favorability has stood as a part of the *amicus curiae* rule since 1954, but not as part of the provisions pertaining to consent. The Court might benefit from including a provision about its standard of favorability in the *amicus curiae* rule's paragraph 2 and 3.

B. Consent of the Parties Has Been Part of the *Amicus Curiae* Rules Since Their Inception

While there has been evidence of *amicus curiae* briefs provided to the Court before 1939, no provision existed in the Court's publication of the rules before that year. Between 1936 and 1939, under the tenure of Chief Justice Charles Evan Hughes (1930-1941), a new provision for the Rules of the Supreme Court of the United States was implemented. Adopted February 13, 1939, and effective February 27, 1939, paragraph 9 of rule 27 was inserted into the text as follows:

> A brief of an *amicus curiae* may be filed when accompanied by written **consent of all parties** to the case, except that **consent need not be had.** when the brief is presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision thereof. Such brief must bear the name of a member of the bar of this court. (bold used to highlight the relevant provision)

That means from its inception the parties were given the authority to offer (or withhold) approval for permitting friend of the court briefs and that authority was never required for the State parties (Solicitor General or State or political subdivision thereof).

Between the rules of 1939 and the rules of 1954, another substantial change arose with the implementation of a table of contents and a reshuffling of the rules so that the *amicus curiae*briefs were situated in their own rule at Rule 42 under "Part VIII. Practice".[1] Another shift arose between 1970 and 1980, when the rule was changed to #36.[2] The final major structural change happened between 1980 and 1989, when the rule was moved to #37 and the parts of the greater body of rules were renumbered and renamed situating the *amicus curiae* rule in "VII. Practice and Procedure".[3] That means the structure of this rule in relation to the other rules of Court has remained relatively stable since 1989—for more than 33 years—which means the rule's placement remained untouched during the Court's most recent revision in 2017.[4]

The Court implemented the imperative gateway measure of consent of all parties for an *amicus curiae* to enter an argument, except in the case of the Solicitor General, at the time of the first formalized *amicus curiae* rule. One posits why consent was built into the then two-sentence rule—which has since been expanded into its own rule and today stands at six extensive paragraphs. Looking at the context of the period, the adversarial internal strife of the 1930s led to a 1940s consolidation of national efforts on the international stage. And Chief Justice Hughes maintained a relatively global outlook since his days as Secretary of State (1921-1925) ushered in the Permanent Court of International Justice.

Between 1939-1954, the Court developed the consent concept even further. *Amicus curiae* briefs became the subject of an entire rule, expanding from one paragraph into five. The Warren Court's rule change's expansion to five paragraphs still centered the rule on the consent of the parties. The five paragraphs added a great deal of detail to the consent portion of the rule by distinguishing between season of a case (before petition, before merits); providing a procedure for when consent was not given; and expanding the Solicitor General exception to consent to include agencies, States, Territories, Commonwealths or the political subdivisions of such.[5]

1954 marked the year when the provision on favorability was inserted in paragraph one of then-rule 42: "…a motion for leave to file when consent is refused…[is] not favored." While that standard of favorability evolved into the current-rule 37's paragraph 1:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not service this purpose burdens the Court, and its filing is not favored. (2017 Rules)

Like the favorability development, the definition of consent continued to be enhance as rule revisions moved on. The 1980 rule changes added that the consent of the parties needed to be in writing (36[1]; 36[2]). Further, the drafters of the rules narrowed the limitations when filing of a brief to a case before the Court for oral argument (36[3]), this rule applied more broadly before the 1980 revisions.

The Rehnquist Court went through two major substantive revisions. Limitations on the numbers of *amicus curiae*briefs submitted in a case emerged in 1989 when the Court indicated that an *amicus curiae* brief can help bring a "relevant matter to the attention of the Court" that had not "already been brought to its attention by the parties" and anything that "does not serve this purpose simply burdens...the Court and its filing is not favored." (Rule 37(1)).[6] This favorability threshold provided the Court with the foundation for elimination of briefs addressing irrelevant and redundant matters. Further, such a threshold gave the Court a test for acceptance or denial of approval.

Next, the 1995 rules substantially expanded two of the six paragraphs (para. 2 and para. 3) by adding two sections to each paragraph (a and b).[7] This expansion provided *amicus curiae* with two primary pathways to submitting briefs: 1. via consent of the Court; 2. via consent of the parties. The latter pathway is what the 2022 rules propose to eliminate.

While the next revisions to the rule included the use of electronic transmission of materials to the Court in 2007 (Rule 37(3)(a)) and the inclusion of a sentence only permitting attorneys at bar to submit amicus curiae briefs in 2010 (Rule 37(1)),[8] 2022 will be the first substantive development concerning consent and *amicus curiae* briefs since 1995. This substantial change to *amicus curiae* briefs will mark the first substantive revision to this longstanding, historical provision by Chief Justice Roberts. He and his clerk, Scott Harris, have been serving in these positions long enough to reasonably foresee this revision to be his last to the amicus curiae briefs. Still, problems may arise and there may be a need for further changes in future rule revisions.

C. The Court's Jurisprudence Supports Inclusion of a Provision on Favorability

The Court has traditionally asserted that *amicus curiae* briefs not consented to by the parties would likely not be favored. By erasing these provisions, along with the language on favorability in para. 2 & para. 3, the Court will likely benefit from clarifying its standard of review of *amicus curiae* briefs. Justice Kagan's recent *Badgerow v. Walters* (2022) opinion indicates support for adding this language, while Justice Breyer's *Badgerow v. Walters* (2022) dissent supports the favorability provision simply arising in §1 of Rule 37. The former is the current standard proscribed to by almost the entire Court when considering "*et seq*," while the latter is the solitary dissent of a retiring, albeit longstanding, member of the Court.

As such, the standard of favorability will not be implied by its inclusion in para. 1 of Rule 37. And the practitioners will benefit from the Court's clarification with a phrase or sentence in para. 2 and para. 3 indicating the standard for favorability at the two distinctive phases of the case. Such a clearly stated standard will likely limit the *amicus curiae*to those that are "of considerable help" to the matter.

D. Suggestion for Insertion of Favorability Standard

The standard for favorability may be inserted as a phrase within the first sentence of or as a sentence at the end of revised paragraphs 2 and 3 of Rule 37. The details of the standard are, of course, at the discretion of the Court.

II. **The Court Might Benefit from Posting on Regulations.gov**

Like many federal agencies and courts, the U.S. Supreme Court is gracious to permit a comment period on the rule changes. Many agencies and courts use Regulations.gov, a portal designed to seek, collect, and post comments on proposed rule changes at various stages of rule-making. In fact, the U.S. Courts have been seeking regular comments on their rule changes since 2013 for the preliminary drafts of the (1) Federal Rules of Civil Procedure, the (2) Federal Rules of Bankruptcy, and (3) Federal Rules of Criminal Procedure; since 2014 the (4) Federal Rules of Appellate Procedure; and since 2015 the (5) Federal Rules of Evidence.

Half of the 32 comment periods sought bпy the U.S. Courts have yielded less than 13 comments per set of rule changes. While the other half have led to copious comments, only the top six have borne more than 100 comments. In sum, about 81% of comments periods produce less than 100 comments. And except for two specialized comment periods by the U.S. Courts that lasted one and four months respectively, almost all comment periods have lasted about 6 months from the time notice of the rule change (give or take a day).

Perhaps the U.S. Supreme Court might consider submitting the next comment period via Regulations.gov. Not all comments are published for the public to view. Though if the Court chooses to publish the comments, then like the Court's other materials, they can be discoverable and researchable for the public to use—likely leading to more refined responses to future comments on rules. Finally, the the Court can still offer a 1-month comment period, and it can reduce paperwork by accepting electronic files for some, if not all, comments.

While Regulations.gov is a relatively new mechanism for accepting comments, the Court has now undergone two rule changes without using this useful device for notice and comment periods. Perhaps the Court may consider using it for the next revision of the rules.

[1] Revised Rules of the Supreme Court of the United States, Adopted April 12, 1954, Effective July 1, 1954. The other parts of that table of contents were: Part I. The Court; Part II. Attorneys and Counsellors; Part III. Original Jurisdiction; Part IV. Jurisdiction on Appeal; Part V. Jurisdiction on Writ of Certiorari; Part VI. Jurisdiction of Certified Questions; Part VII. Jurisdiction to Issue Extraordinary Writs; Part IX. Special Proceedings; Part X. Disposition of Causes; Part XI. Abrogation of Prior Rules; & and Appendix with Forms.

[2] Rules of the Supreme Court of the United States, Adopted April 14, 1980, Effective June 30, 1980, including revisions of November 21, 1980.
[3] Rules of the Supreme Court of the United States, Adopted December 5, 1989, Effective January 1, 1990. The other parts of the rules were: Part I. The Court; Part II. Attorneys and Counselors; Part III. Jurisdiction on Writ of Certiorari; Part IV. Other Jurisdiction; Part V. Motions and Applications; Part VI. Briefs on the Merits and Oral Argument; Part VIII. Disposition of Cases; Part IX. Application of Terms and Effective Date
[4] Rules of the Supreme Court of the United States, Adopted September 27, 2017, Effective November 13, 2017.
[5] The fifth paragraph provides for the policy of submitting brief, motions, and responses (Rule 33, 35, 39, 40).
[6] Rules of the Supreme Court of the United States, Adopted December 5, 1989, Effective January 1, 1990.
[7] Rules of the Supreme Court of the United States, Adopted July 26, 1995, Effective October 2, 1995.
[8] Rules of the Supreme Court of the United States, Adopted July 17, 2007, Effective October 1, 2007; Rules of the Supreme Court of the United States, Adopted January 12, 2010, Effective February 16, 2010.

Tuesday, February 7, 2023, 9:00 a.m.

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Document 3.9 Nationality & Hoops at Court (May 17, 2022)

Springfield, Massachusetts has a great sight to the west of I-91 as one enters the city: A building shaped like a basketball commemorates the past, present, and future facets of the sport. Although some manifestation of the Naismith Memorial Basketball Hall of Fame has been open since 1959, the sport has been around since 1891. What heights the players have attained since that time--most fans well know that dunk from the foul line that set the stage for the soaring/scoring theatrics of the current generation. And the bar at the national level, keeps on araisin'!

Basketball has been a sport at the Olympics since 1936 and the Court of Arbitration for Sport (CAS) has seen more than 30 cases. At that tribunal, the vast majority of cases (19) have been dismissed. While jurisdiction was affirmed in one (1) case, four (4) instances arise when jurisdiction was denied. Finally, the Court partially upheld all but two of the eight (8) cases that have been upheld. In addition to scores of individuals (even Allen Iverson has made an appearance in this Court), parties have included clubs and international organizations, such as: Fédération Internationale de Basketball (8), FIBA Europe (2), International Paralympic Committee (1), Nederlandse Basketball (Bond) (1), the Russian Basketball Federation (1), the Russian Anti-Doping Agency (1), the VTB United League (1), and more, The Fédération Internationale de Basketball was involved with a quarter of the cases--eight (8) of the thirty-two (32), almost always as the respondent.

The dismissals happened because of issues pertaining to *res judicata* (already adjudicated), *prima facia* bases and burden of proof, jurisdiction to impose sanctions the duty of a internal body of a federation, applicability of rules, admissibility of appeal, admissibility of counter-claims, and so on. The subject matter is even more wide-ranging, with issues like appearance of teams, age/youth of players, doping, and nationality (election/plurality/discrimination).

Jurisdiction was affirmed in the doping and level of experience case, but not the contract and deadline, validity and appealability to CAS, standing for jurisdiction, and exhaustion. None of the cases determining jurisdiction addressed nationality in any substantial fashion.

In addition to topics that include anti-doping, national law in disputes, 3rd parties in arbitration agreements, employment contract issues, and delays in arbitration standards, issues of nationality do span into the upheld cases.

Of all the 32 basketball cases having been heard by the CAS, nationality is addressed merely as a statement of the place of origin (i.e., Croatian, Dutch, Greek, Latvian, Serbian, Spanish, Venezuelan, Yugoslav) of the player and/or the arbitrator. A player's place of origin could be for club purposes (i.e., Hellenic) or national team purposes (i.e., Yugoslav). Further, a legal nationality must be the same as the basketball nationality. Among these cases is also a discussion about the prohibition against discrimination based on nationality.

Finally in one of the fully upheld cases, the panel of arbitrators (France, Greece, UK) critiqued the system's nationality criteria basis for determining a player's place of origin for the purposes of playing basketball in a professional league. They seemed to encourage a system where the criteria would be based on the period of time that the individual plays in national competitions. This panel cautioned against teams substantially or wholly composed of "sporting mercenaries."

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Document 4.
Notes to Support Comments
(Internal Document)

An official website of the United States Government.

Back to Document Comments (/document/USC-RULES-CR-2025-0003-0001/comment)

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PUBLIC SUBMISSION

Comment from New York County Lawyers Association, Federal Courts Committee

Posted by the **United States Courts** on Feb 11, 2026

Docket (/docket/USC-RULES-CR-2025-0003)
/ Document (USC-RULES-CR-2025-0003-0001) (/document/USC-RULES-CR-2025-0003-0001) / Comment

Comment

See attached file(s)

Attachments 1

NYCLA Comments (Proposed Rules)

Download (https://downloads.regulations.gov/USC-RULES-CR-2025-0003-0011/attachment_1.pdf)

Give Feedback

Comment ID

USC-RULES-CR-2025-0003-0011

Tracking Number

mlh-4q0e-bx83

Comment Details | **Submitter Info**

New York County Lawyers Association

February 10, 2026

Via Electronic Submission
Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure

Re: Response to Request for Public Comment on Proposed Local Rules Amendments

Dear Judge Bates:

The New York County Lawyers Association's Federal Courts Committee (the "Federal Courts Committee") respectfully submits this letter in response to the Judicial Conference Committee on Rules of Practice and Procedure's invitation to provide comments on the proposed amendments to existing rules and forms announced in a memorandum dated August 15, 2025 (the "Proposed Changes").[1] *See* Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence (Aug. 15, 2025) (the "Proposed Changes").[2]

The Federal Courts Committee sets forth below its comments to (1) the proposed changes to Federal Rule of Criminal Procedure 17; (2) the proposed Federal Rule of Evidence 707; and (3) the proposed changes to Federal Rules of Civil Procedure 26 and 45. The Federal Court Committee thanks the Committee on the Rules of Practice and Procedure for the opportunity to comment on the proposed amendments and the Rules Advisory Committees for their diligent work in preparing these amendments.

I. Proposed Changes to Federal Rule of Criminal Procedure 17

The Federal Courts Committee commends the Advisory Committee on Criminal Rules (the "Criminal Rules Committee") on its decision to modernize Federal Rule of Criminal Procedure 17 ("Rule 17"). However, the Federal Courts Committee believes that additional changes are needed beyond those reflected in the Report of the Advisory Committee on Criminal Rules dated May 15, 2025 ("Report").

The Federal Courts Committee believes that there are numerous problems with the present rule, including that it has been inconsistently applied, overly restricts a criminal defendant's ability to obtain discovery from third parties, and does not account for changes in the nature of discovery since its original adoption in 1944. We therefore endorse the Criminal Rules Committee's decision to review and propose amendments to Rule 17.

In particular, the Federal Courts Committee notes its agreement with the Criminal Rules Committee's decision to clarify that Rule 17(c) applies not only to trials but also permits parties

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[1] This letter was approved for dissemination by NYCLA's President as a Committee statement. This statement has not been approved by the NYCLA Board of Directors and does not necessarily represent the views of the Board.

[2] *Available at* https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf.

to subpoena materials in connection with sentencing, suppression, detention, and revocation hearings. As the Criminal Rules Committee noted, parties often present evidence at these types of proceedings, and the Federal Courts Committee agrees that, to the extent there is a need for third-party evidence, the parties should have the opportunity to obtain it through a Rule 17(c) subpoena.

The Federal Courts Committee also agrees with the Criminal Rules Committee's decision to modify the test that the Supreme Court articulated in *United States v. Nixon*, 418 U.S. 683 (1974), but believes that the Criminal Rules Committee's proposal to "incremental[ly] change" the *Nixon* standard does not go far enough to remove the impediments to a criminal defendant's ability to mount an effective defense and to rectify the unfair imbalance between the prosecution and defense in preparing for trial. In particular, as discussed below, the Federal Courts Committee believes that the Criminal Rules Committee should have adopted the proposal of the New York City Bar's White Collar Committee to replace the *Nixon* "admissibility" requirement with a standard that permitted both the prosecution and the defense to obtain Rule 17(c) discovery that is "relevant and material to the preparation of the prosecution or defense" or, at the very least, should have approved the "likely to lead to admissible evidence" standard supported by a minority of the Criminal Rules Committee. *See* Report § II.A.2.

As the Criminal Rules Committee noted, almost all federal courts now apply the *Nixon* test to restrict the scope of Rule 17(c) subpoenas. The *Nixon* test generally requires the subpoena proponent to "clear three hurdles," specifically, (1) relevancy; (2) admissibility; and (3) specificity. *Nixon*, 418 U.S. at 700.

The Federal Courts Committee agrees with the Criminal Rules Committee's decision to replace *Nixon's* specificity requirement with a "reasonable particularity" standard. *See* Report § II.A.2. Multiple courts have recognized the unfairness of the current specificity requirement, which some courts have interpreted in a manner that conditions a criminal defendant's ability to obtain needed documents that he/she has never seen before on the ability to adequately specify their contents. The Federal Courts Committee agrees with then-District Judge Richard J. Holwell's observation that "requiring the defendant to specify precisely the documents he wants without knowing what they are borders on rendering Rule 17 a nullity." *United States v. Rajaratnam*, 753 F. Supp. 2d 317, 321 n.1 (S.D.N.Y. 2011). The Federal Courts Committee therefore endorses the Criminal Rules Committee's decision to replace the specificity requirement with a "reasonable particularity" standard, which mirrors the standard applicable to civil document discovery under Federal Rule of Civil Procedure 34(b).

As to the proposed modification of *Nixon's* admissibility requirement, the Federal Courts Committee believes that the Criminal Rules Committee's proposed change to a "likely admissible" standard does not go far enough to eliminate the problems with *Nixon's* admissibility requirement. As the Criminal Rules Committee noted in its Report, courts have applied inconsistent standards to this element, with some courts applying a stricter standard requiring "the requesting party to prove with certainty that the information would be admitted." *See* Report § II.A.2. This interpretation has often unfairly prevented defendants from obtaining exculpatory evidence, including impeachment material, leading practitioners to correctly opine that "courts have interpreted 17(c) so narrowly that it is rarely useful to criminal defendants, and instead serves as an additional tool for the prosecution." Robert G. Morvillo *et al., Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation,* 42 Am. Crim. L. Rev. 157, 160 n. 12 (2005).

In expanding the discovery obligations under Federal Rule of Criminal Procedure 16 in 1974, the Criminal Rules Committee espoused the view that

> broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.

Fed. R. Crim. P. 16, Advisory Committee's Note to the 1974 Amendment. The Federal Courts Committee agrees with that perspective and believes that the Criminal Rules Committee should apply the same philosophy in revising Rule 17. Doing so, the Federal Courts Committee believes, means using the materiality standard.

In addition, unlike the prosecution, which has a broad ability to collect documents from third parties through, among other things, grand jury subpoenas and search warrants, a Rule 17(c) subpoena is a criminal defendant's only vehicle to compel production of materials from third parties, including materials that are helpful or necessary to cross-examine the prosecution's witnesses. A broader Rule 17(c) standard therefore strengthens the constitutional guarantee that provides criminal defendants "'a meaningful opportunity to present a complete defense,'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta* 467 U.S. 479, 485 (1984)), which includes "the right to confront their accusers" through cross-examination. *United States v. Tucker*, 249 F.R.D. 58, 67 (S.D.N.Y. 2008). As then-District Judge Shira A. Scheindlin opined, the confrontation "right is meaningless if a defendant is denied the reasonable opportunity to obtain material evidence that could be crucial to that cross-examination." *Id.*

While the Criminal Rules Committee's rejection of the stricter *Nixon* admissibility standard is an important step in the right direction, the Federal Courts Committee does not believe that it goes far enough to safeguard a criminal defendant's constitutional rights. For example, in *Thor v. United States*, 574 F.2d 215 (5th Cir. 1978), the defendant was unable to locate witnesses who he believed had exculpatory evidence and sought to subpoena an address book that he believed contained their addresses. *Id.* at 219. The Fifth Circuit upheld the district court's denial of the subpoena on the ground that the address book was "not evidentiary" and therefore not available pursuant to a Rule 17(c) subpoena. *Id.* at 220. While the address book would meet a materiality standard, it would probably not meet the "likely to be admissible" standard proposed by the Criminal Rules Committee.

Similarly, the hypothetical set forth in the New York City Bar's White Collar Committee's letter provides another example in which the materiality and "likely to be admissible" standards may lead to divergent results. In the hypothetical, initially posed in Alan Silber and Lin Solomon, *A Creative Approach for Obtaining Documentary Evidence From Third Parties* (July 17, 2017), *available at* https://www.pashmanstein.com/printpilot-publication-a-creative-approach-for-obtaining-documentary-evidence-from-third-parties.pdf?1768597874, a defendant in an embezzlement prosecution believes that the financial data of a family business that encrypts its data using highly sophisticated software contains exculpatory evidence that would exonerate him. This hypothetical defendant filed a motion under Rule 17(c) to obtain both the data itself and the software program that would allow him to access the data. Even if the data itself meets the "likely to be admissible" standard, the necessary software program likely would not, with the result being that this defendant would

not be able to access this evidence. Conversely, the hypothetical software program would satisfy a materiality standard.

Moreover, the Criminal Rules Committee's stated concern in Section II.A.2 of the Report that a broader materiality standard may lead to "fishing expeditions" can be better addressed by retaining the limitation in current Rule 17(c) that affords courts the discretion to quash or modify subpoenas that are "unreasonable or oppressive." As opposed to categorically preventing criminal defendants from accessing certain materials that the Federal Courts Committee believes are necessary to present a complete defense, adopting a broader Rule 17(c) standard while retaining the current language authorizing courts to quash or modify overbroad subpoenas promotes the fair and efficient administration of criminal justice, especially given the inherently fact-dependent nature of discovery issues.

Accordingly, the Federal Courts Committee believes that the Criminal Rules Committee should have instead adopted the materiality standard proposed by the New York City Bar's While Collar Committee, or, alternatively, a "likely to lead to admissible evidence" standard, in clarifying and revising *Nixon's* admissibility requirement.

We thank the Criminal Rules Committee for the opportunity to comment on the proposed changes.

II. Proposed Federal Rule of Evidence 707

The Federal Courts Committee also wants to highlight its support for the proposed Federal Rule of Evidence 707 ("Rule 707") and suggests a few additional changes as set forth below. This proposed new rule would impose a standard for admission of "machine-generated" evidence, applying to that evidence the reliability and fit thresholds applied to expert testimony under Federal Rule of Evidence 702. Under the current rules, certain types of evidence generated by artificial intelligence programs can be admitted without an expert or other witness to vouch for (and be cross-examined on) the reliability of that evidence. While Federal Rule of Evidence 403 offers litigants the ability to object to such evidence, the proposed new Rule 707 provides greater clarity by utilizing the familiar Rule 702 standard and imposing a gatekeeper role on the Court.

The Federal Courts Committee respectfully wishes to raise two comments for consideration before the new Rule 707 is finalized. First, the Federal Courts Committee suggests including in Rule 707 a definition of "machine-generated evidence" to mean "evidence generated by a machine-based process or system to make predictions or draw inferences from existing data." This definition, which adopts the language in the proposed Committee Note to the new Rule 707, more closely tracks the new rule's purpose to ensure testing of potentially unreliable predictive and inferential software and systems, such as algorithms or machine-learning output. The Federal Courts Committee's proposed definition also addresses concerns that the phrase "machine-generated evidence" is too broad because it would make clear that machine-generated materials that are not created by artificial intelligence are excluded. For example, the Federal Courts Committee's proposed definition would exclude spreadsheets, emails, digital files of audio recordings like voicemails, computer-generated music in an audio or video file, and documents created using a word processor (like this letter)—which are machine-generated but not typically used to make predictions or draw inferences from existing data.

Second, the Federal Courts Committee echoes the suggestion of the American Civil Liberties Union that the rule should be revised as follows (proposed additions underlined and proposed deletions crossed out): "When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it is limited to evidence not based on scientific, technical, or other specialized knowledge or if expert testimony in support of the evidence satisfies the requirements of Rule 702(a)-(d). ~~This rule does not apply to the output of simple scientific instruments.~~" The Federal Courts Committee suggests this revision for two reasons. First, it resolves concerns with unreliable methodologies and unreliable output by requiring an expert witness to testify in support of complex evidence whose reliability could not be established by a layperson operator or supervisor. Second, this revision clarifies the scope of applicable evidence by eliminating the vague phrase "simple scientific instruments" and instead harmonizing the proposed rule's language with that of Rules 701 and 702 regarding "scientific, technical, or other specialized knowledge." Enabling proponents of evidence that is not based on such knowledge to establish its admissibility without extensive proceedings, such as those that apply under Rule 702, should reduce the risk of overwhelming courts with the need to spend time on each submission of evidence, especially as machine learning is increasingly used to generate and supplement even the simplest kinds of information. For example, the Federal Courts Committee notes that summaries of voluminous evidence, permitted under Federal Rule of Evidence 1006, can often be better organized and prepared for presentation to a jury by a machine, without necessitating Federal Rule of Evidence 702-type inquiries into reliability.

The Federal Courts Committee also suggests that the Advisory Committee consider the application of the rule to evidence not offered for its truth.

The Federal Courts Committee applauds the Advisory Committee on Evidence Rules for its effort to establish rules governing this difficult technological area, especially given the speed with which machine learning and artificial intelligence technology have changed over time.

III. Proposed Changes to Federal Rules of Civil Procedure 26 and 45

The Federal Courts Committee also wants to highlight its support for the Advisory Committee on Civil Rules' (the "Civil Rules Committee") proposed amendments to Federal Rules of Civil Procedure 26 ("Rule 26") and 45 ("Rule 45").

The Civil Rules Committee has proposed a narrow, targeted amendment to Rule 26(a)(3)(A)(i) that would require parties' pretrial disclosures to state whether any witness is expected to testify remotely, as opposed to in person. In practical terms, the amendment would require parties to identify in advance not only the witnesses they expect to present, but also the anticipated mode of that testimony. As the Civil Rules Committee stated in its report, this proposal is linked to the companion amendments to Rule 45(c) (place of compliance) and Rule 45(b)(1) (service of subpoenas) and was prompted by the Ninth Circuit's decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023).

The practical problems the proposed amendments seek to address arise from the combined operation of Rule 45(b)(1)'s personal service requirement and Rule 45(c)'s geographic limits when those provisions are applied to subpoenas seeking only remote testimony. Both provisions were developed to govern subpoenas compelling physical presence

and travel, where territorial limits and personal service serve important due-process and fairness functions. When compliance is entirely remote, however, those concerns are not implicated.

The current interpretation of Rule 45(c) applied by some courts has produced results that are inconsistent with modern litigation practice. For example, under prevailing Ninth Circuit authority, a subpoena compelling remote testimony may be unenforceable absent personal service within the geographic limits of Rule 45(c), even where the witness would never be required to travel to the place of compliance. *See In re Kirkland*, 75 F.4th at 1042-47.

This result creates an unnecessary obstacle to remote depositions and testimony that does not meaningfully advance fairness or due process. The proposed amendment properly recognizes the distinction between remote and in-person compliance. It clarifies that territorial and service concepts designed for physical presence should not control subpoenas seeking remote testimony, which do not raise the same territorial or travel-based concerns and therefore should not be governed by service rules that no longer reflect modern practice.

The Federal Courts Committee believes that the amendment reflects contemporary litigation reality. Remote depositions and testimony are now routine, efficient, and widely accepted by courts and practitioners. The Federal Rules of Civil Procedure should reflect that reality. Remote testimony often reduces costs, minimizes witness burden, and increases access to evidence, particularly for non-party witnesses and parties of limited means. Where compliance occurs remotely, the traditional concerns underlying Rule 45(c)'s geographic limits are not implicated.

Importantly, existing protections under Rules 26(c) and 45(d) remain fully available to prevent undue burden, harassment, or abuse. Courts retain ample authority to limit, condition, or quash subpoenas where fairness concerns arise. The proposed amendment does not expand substantive subpoena power; it clarifies the permissible means of compliance.

From a practitioner's perspective, the amendment to Rule 26 functions as a sensible coordination measure rather than a substantive expansion of discovery obligations. Requiring advance disclosure of anticipated remote testimony promotes transparency and fairness by giving parties and courts an opportunity to assess logistical and technological considerations, raise Federal Rule of Civil Procedure 43 or Rule 45 issues in a timely manner, and avoid last-minute motion practice.

For these reasons, the Federal Courts Committee supports the proposed amendments to Rules 26 and 45.

New York County Lawyers Association

Scott B. Klugman and Michael B. Eisenkraft
Co-Chairs, Committee on the Federal Courts

Aasiya Glover, Matthew Goldstein, Irina Shpigel, and Hon. Joseph Kevin McKay (ret.)
Ad-Hoc Federal Rules Subcommittee

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Comment from Berger, Mitchell

Posted by the **United States Courts** on Feb 11, 2026

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Comment

Dear Ms. Dubay: I write concerning proposed changes to Federal Rules of Criminal Procedure, Rule 17. In reference to the above proposed changes to the Federal Rules of Criminal Procedure, Rule 17, I am unclear as to why self-represented parties appear to be treated differently under the proposed amended rule. Full comment attached. Please note that the views expressed are mine alone and not those of an agency, organization or other individuals. Sincerely, Mitchell Berger

Attachments 1

frcprule17mbcomment

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Comment ID

USC-RULES-CR-2025-0003-0012

Tracking Number

mlh-8bfv-515a

To: Carolyn A. Dubay, Esq., Chief Counsel, Rules Committee Staff, Administrative Office of the U.S. Courts,

From: Mitchell Berger, (comments made in personal capacity), mazruia@hotmail.com 2.10.26

Re: **Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules; Hearings of the Judicial Conference,** https://www.federalregister.gov/documents/2025/07/14/2025-13104/advisory-committees-on-appellate-bankruptcy-civil-criminal-and-evidence-rules-hearings-of-the

Dear Ms. Dubay: I write concerning proposed changes to Federal Rules of Criminal Procedure, Rule 17. In reference to the above proposed changes to the Federal Rules of Criminal Procedure, Rule 17,[1] I am unclear as to why self-represented parties appear to be treated differently under the proposed amended rule. The proposed language reads:

"Subpoena by a Self-Represented Party. A subpoena is available to a self-represented party only after the party: 110 (A) files a motion; (B) makes the showing described in (2)(D); and (C) obtains an order" [Lines 107-113]. This language is not in the current version[2] and is supported on the basis that "self-represented parties are not bound by ethical rules that deter an attorney's misuse of the court's compulsory authority, raising the risk that the subpoena would not comply with (c)(2)(B)" (e.g., relevance, admissibility and that this would not appreciably add to the court system's burden.

However, potentially this could undermine a pro se party's Sixth Amendment rights in their self-representation by subjecting them to a higher standard than formally represented parties. Though rare and probably unwise,[3] self-represented parties in federal criminal cases should not necessarily be disadvantaged relative to those who have attorneys (ignoring for a moment the small segment of self-represented parties who themselves may be attorneys or have legal training). Pro se parties can be adequately sanctioned by the courts and this could and should be explained during the process to all parties. I do not believe the committee's stated rationale for this proposed change outweighs the importance of affording self-represented parties the same latitude and flexibility given to those who have selected or been able to obtain what they view as adequate representation. All parties should be held to the same standards regardless of representation.

Sincerely,

Mitchell Berger Note/Disclosure: I am submitting these suggestions solely in my personal/private capacity. The views expressed are mine only and should not be imputed either to other individuals or to any public or private entity.

[1] https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf
[2] https://www.law.cornell.edu/rules/frcrmp/rule_17
[3] Jona Goldschmidt and Don Stemen, *Patterns And Trends In Federal Pro Se Defense, 1996-2011: An Exploratory Study*. 2015 Fed. Cts. L. Rev. 8 (June 2015), https://www.fclr.org/article-list/patterns-and-trends-in-federal-pro-se-defense-1996-2011-an-exploratory-study/

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Comment from New York City Bar Association

Posted by the **United States Courts** on Feb 13, 2026

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Please see the attached comment on behalf of the New York City Bar Association's White Collar Committee.

Attachments 1

20221588-CommentsOnRule17_FINAL

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REPORT BY THE WHITE COLLAR CRIME COMMITTEE

COMMENTS ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO FEDERAL RULE OF CRIMINAL PROCEDURE 17 PUBLISHED AUGUST 2025

The New York City Bar Association ("City Bar") appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the proposed amendments to Rule 17 of the Federal Rules of Criminal Procedure ("Rule 17").[1]

The City Bar, founded in 1870, has over 20,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. It includes among its membership lawyers in many areas of law practice, including current and former prosecutors, public defenders, and other attorneys who represent corporate and individual defendants in criminal cases. The City Bar's White Collar Crime Committee focuses on legal practice in the white-collar criminal space. It includes former federal prosecutors, public defenders, and other defense attorneys with substantial experience in federal criminal cases.[2]

The City Bar, by and through the White Collar Crime Committee, respectfully submits the following comments to the Advisory Committee on Criminal Rules ("Advisory Committee") in response to the request for comments on the proposed amendments to Rule 17.

I. INTRODUCTION

The City Bar previously submitted a letter to the Advisory Committee proposing amendments to Rule 17 on February 17, 2022 (the "2022 Letter").[3] As we noted in our 2022 Letter, Rule 17 has not been significantly amended since 1944 and has failed to keep up with the realities of modern federal criminal practice. Federal courts across the country have been forced

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[1] *See* Judicial Conference Committee on Rules of Practice and Procedure, Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence 68–99 (2025), *available at:* https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf. (All websites last accessed February 12, 2026)

[2] Any members of the City Bar who are current government attorneys abstained from taking a position on this letter. Accordingly, this letter does not reflect their views or those of the agencies with which they are employed.

[3] Letter from New York City Bar to the Hon. Raymond M. Kethledge, Chair of Advisory Committee on Criminal Rules (Feb. 17, 2022), *available at:* https://www.nycbar.org/wp-content/uploads/2023/05/2022979-ModernizeRule17FedRulesCriminalProcedure.pdf.

About the Association
The mission of the New York City Bar Association, which was founded in 1870 and has over 20,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
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to grapple with an ambiguous, outdated rule, often arriving at different interpretations of the scope of Rule 17. Many of these interpretations have resulted in unduly narrow constructions of Rule 17 that curtail the ability of defendants to obtain pertinent information from third parties. As a result, and in stark contrast to the government's ability to obtain information via grand jury subpoenas, many criminal defendants are left without a way to obtain facts or information that would help them make informed decisions and defend themselves at trial.

The City Bar is grateful for the Advisory Committee's recognition that Rule 17 needs to be reformed and for its careful consideration of the proposals set forth in our 2022 Letter. We believe that the Advisory Committee's thoughtful work on Rule 17 will promote clarity, uniformity, fairness, and, ultimately, greater trust in our criminal justice system. As drafted, the proposed amendments represent a substantial step in the right direction toward much-needed reform of Rule 17. For example, the proposed amendments address several procedural issues that have split the courts, including by codifying the position adopted in many districts that a motion and court order are not typically required to issue a Rule 17 subpoena.[4] Similarly, the proposed amendments promote uniformity in the law by clarifying that a court must, upon showing of good cause, allow a party to file *ex parte* a motion if required for issuance of a subpoena under Rule 17.[5]

While the City Bar fully supports the proposed amendments, in the following comments, we offer one suggested revision to the amendments to Rule 17(c) and an additional amendment to Rule 17(h) for the Advisory Committee's consideration. We believe these edits would further strengthen and clarify application of Rule 17.

II. COMMENT ON PROPOSED AMENDMENTS TO RULE 17(C)

The proposed amendments to Rule 17(c) would permit a party to issue a subpoena *duces tecum* when, *inter alia*, the items sought "are, or contain information that is, <u>likely to be admissible</u> as evidence in the designated proceeding." Proposed Amendments at 82. As the Advisory Committee noted, this change is intended to clarify that courts should not adopt a strict reading of the requirements set forth in *United States v. Nixon*, 418 U.S. 683, 700 (1974). Proposed Amendments at 75. Certain courts have adopted an unduly rigid standard that requires defense counsel specifically to identify the contents of each item sought in a Rule 17 subpoena in order to establish their admissibility. Because parties were seldom able to meet this standard, these interpretations had the effect of essentially barring the use of Rule 17 in some districts.

By relaxing the stringent standard imposed by certain courts, the proposed "likely to be admissible" standard is a significant step towards addressing some of the concerns that we raised in our 2022 Letter. We also appreciate the Advisory Committee's proposed commentary to this amendment that "impeachment evidence should be available to a party by subpoena for use at trial

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[4] *See* Proposed Amendments at 76. As the Advisory Committee noted, a motion requirement puts an excessive burden on both practitioners and the courts. *Id.* Meanwhile, the proposed amendments to Rule 17 safeguard against any dangers of abuse by requiring a motion and court order for subpoenas seeking "certain victim information" and when the issuing party is proceeding *pro se*. *Id.*

[5] *See* Proposed Amendments at 76. The Advisory Committee recognized that the unavailability of *ex parte* motions in some districts left counsel with "two untenable options: either risk harming the client by revealing defense strategy or even uncovering inculpatory information the government would not otherwise have known, or forego a subpoena, abandoning pursuit of information that they believe is essential to defend the client." *Id.* at 73.

when the party knows that a witness will or is likely to testify." Proposed Amendments at 93. This would be an important step forward to promote fairness in our criminal justice system.

The City Bar, however, believes that the "likely to be admissible" standard may still lead to the same issues that animated our initial concerns. Most notably, the "likely to be admissible" standard could lend itself to differing interpretations and applications by federal courts. Courts will be faced with the task of conducting a hypothetical inquiry into whether certain information or items would likely be admissible at a particular future proceeding for which they are sought. Admissibility, however, frequently turns on a nuanced understanding of the evidence at issue, the other evidence presented, and arguments advanced by the parties—all reasons why courts frequently defer admissibility decisions until trial itself, or shortly before trial in the context of *in limine* motions. Moreover, given the numerous circuit splits that currently exist with respect to evidentiary issues, a standard hinging on admissibility will mean that Rule 17 is applied differently depending on where a defendant is charged.[6] Overall, given the complicated nature of the hypothetical inquiry, the City Bar is concerned that the "likely to be admissible" standard will continue to result in non-uniform applications of Rule 17 across the courts. We, therefore, maintain that the Advisory Committee should reconsider adopting the language we initially proposed for Rule 17(c) that would allow a party to obtain information by subpoena based on a showing that the materials sought are "relevant *and material* to the preparation of the prosecution or defense." *See* 2022 Letter at 7.

In addition, as noted by other organizations and practitioners, the proposed "likely to be admissible" standard might still be impossible for parties to meet in certain cases, even though the information sought is relevant and material to the proceeding.[7] For example, if defense counsel is aware that a third party possesses certain relevant footage or phone records, the admissibility of those records may hinge on the application of the hearsay rules, the content of those records (such as whether the probative value of the contents outweighs the danger of unfair prejudice), other facts that would be admitted into evidence at trial, and whether a privilege applies.[8] Yet most of these determinations require the ability to review and understand the content of the materials being requested. As a result, there is a risk that parties find themselves in a "Catch-22" situation. As one practitioner explained to the Advisory Committee, it is a "mystery . . . how [one] could know something was admissible when he had not yet seen it." Minutes of Meeting of Oct. 27, 2022, Advisory Committee on Criminal Rules, at 24.

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[6] *See generally* Capra, *supra* note 6, at 128

[7] *See* Letter from NACDLS to the Hon. James C. Dever, Chair of Advisory Committee on Criminal Rules (Feb. 14, 2023) at 3, 14, available at https://www.nacdl.org/getattachment/9e9a087e-f880-4b1c-983b-0f9305257fd2/nacdl-letter-to-rules-committee-re-rule-17-amendments-02132024.pdf (describing the difficulty of proving admissibility before having access to the materials sought); Proposed Amendments at 70 (quoting a practitioner who stated that "he cannot pass the *Nixon* standard unless he knows 'exactly what this camera is going to show or exactly what the phone records will say.'"); Minutes of Meeting of Oct. 27, 2022, Advisory Committee on Criminal Rules, at 24, available at https://www.uscourts.gov/sites/default/files/2022-10_criminal_rules_committee_meeting_minutes_final_0.pdf

[8] For this reason, courts often reserve decision on admissibility issues until trial. *See, e.g.*, *New Am. Mktg. FSI LLC v. MGA Ent., Inc.*, 187 F. Supp. 3d 476, 481 (S.D.N.Y. 2016) ("A court considering a motion *in limine* may reserve judgment until trial so that the motion is placed in the appropriate factual context.") (citing *Wechsler v. Hunt Health Sys., Ltd.*, 381 F. Supp. 2d 135, 140 (S.D.N.Y. 2003))

A standard based on relevance and materiality would avoid these issues. Courts are already familiar with determining whether certain categories of information may be relevant and material to the prosecution or the defense. This standard, taken from Rule 16 of the Federal Rules of Criminal Procedure, aligns with the policy trend over the last several decades of affording the defense greater opportunities for discovery in criminal cases.[9] Further, as we noted in our 2022 Letter, there is minimal risk of abuse with the relevance and materiality standard. It is substantially more stringent than the standard for civil discovery in federal cases, which allows parties broadly to obtain any discovery that is relevant to a claim or defense and is proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). As the Advisory Committee noted in its May 15, 2025 report, "[d]espite repeated inquiries to practitioners and other experts, no one reported that 'fishing expeditions,' harassment, unwarranted disclosure, or other abuses of Rule 17 existed or were more of a problem in the jurisdictions that follow more flexible interpretations of the rule." *Id.* at 71–72. The same would be true of a standard based on relevance and materiality. Indeed, the proposed amendments include sufficient safeguards for any potential abuse by requiring a motion and court order in the case of self-represented parties. *See* Proposed Amendments at 84.

Relatedly, we believe that the proposed relevant and material standard, along with the additional safeguards included in the proposed amendments, will adequately protect victims from any potential abuse of Rule 17. We are sensitive to the concerns raised by victims' advocates during the January 22, 2026 public hearing regarding the proposed amendments. Many of their concerns focused on the potential harm and violation of privacy that victims could experience if the standard for issuing a Rule 17 subpoena were loosened. As members of the Advisory Committee rightfully noted at the hearing, however, the proposed amended Rule 17(c) will adequately protect victims from such potential harm and abuse. For instance, a subpoena seeking personal or confidential information about a victim would require a motion and could only be served with court approval. This gatekeeping function will enable federal judges to intervene if a proposed Rule 17 subpoena poses any risk of harm or abuse to a victim. *See* Proposed Amendments at 84. Federal courts are well equipped to balance the need to protect a victim from such harm or abuse with the right of criminal defendants to obtain evidence that is material to their defense. Indeed, every case will present unique facts and circumstances, and the current proposed amendments will provide courts with discretion in evaluating these weighty and competing interests. Furthermore, unless a defendant can demonstrate exceptional circumstances, notice to a victim must be provided when a Rule 17 subpoena seeks production of personal or confidential information. *See* Proposed Amendments at 85. The "exceptional circumstances" standard, as described in the Advisory Committee's notes to the 2008 amendments to Rule 17(c), is a high bar that courts can be trusted to apply.[10] This standard will also ensure that victims have an opportunity to move to quash the Rule 17 subpoena or to move for a protective order. Lastly, the Advisory Committee has already thoroughly considered and decided against adopting amendments

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[9] *See, e.g.*, *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993) ("Relevance, within the meaning of [Rule 16,] is to be interpreted broadly in deference to the policy judgment that 'disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.'" (quoting *Dennis v. United States*, 384 U.S. 855, 870 (1966))).

[10] The Advisory Committee notes explain that the "exceptional circumstances" standard may be met when "evidence . . . might be lost or destroyed if the subpoena were delayed" or "where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy." Fed. R. Crim. P. 17(c)(3) Advisory Committee's note to 2008 amendment.

that would impose separate substantive standards for subpoenas that seek protected and unprotected information. *See generally* Minutes of Meetings of Nov. 6-7, 2024, Advisory Committee on Criminal Rules. As several participants explained, a bifurcated approach based on the type of information requested by a Rule 17 subpoena would create burdensome and unnecessary litigation. *See e.g.*, *id.* at 19, 43.

III. SUGGESTED AMENDMENT TO RULE 17(H)

We urge the Advisory Committee to consider amending Rule 17(h) as the City Bar proposed in our 2022 Letter.[11] When first enacted, Rule 17(h) provided that "[s]tatements made by witnesses or prospective witnesses may not be subpoenaed *from the government or the defendant* under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2." Order of the Supreme Court, 207 F.R.D. 89, 440 (2002) (emphasis added). As our 2022 Letter noted, this rule was intended to implement the Jencks Act, which directs the government to produce witness statements in its possession after the witness "testified on direct examination." 18 U.S.C. § 3500(a), (b). Rule 26.2 of the Federal Rules of Criminal Procedure similarly governs the production of witness statements after testimony. Neither Rule 26.2 nor the Jencks Acts, however, provide any limitations on the production of witness statements in possession of third parties.

The italicized language above was removed in 2002 when the Advisory Committee made certain stylistic changes to the rules. It is clear, however, that these amendments were not intended to effect a substantive change. *See* Order of the Supreme Court, 207 F.R.D. at 443 (Committee Note explaining that, with the exception of Rule 17(c)(1), "[t]hese changes are stylistic only."). Nonetheless, the government has argued in several cases that Rule 17(h) prohibits the use of a subpoena to obtain witness statements not just from the government, but also from third parties. Courts have taken different positions on this issue, with some barring the use of Rule 17 to obtain *any* witness statements, including those possessed by third parties. *Compare United States v. Yudong Zhu*, No. 13 Cr. 0761, 2014 WL 5366107, at *3 & n.3 (S.D.N.Y. Oct. 14, 2014) (holding that any statements of a witness or of a prospective witness are not subject to a Rule 17 subpoena); *United States v. Vasquez*, 258 F.R.D. 68, 73 (E.D.N.Y. 2009) (same), *with United States v. Goldstein*, No. 21 Cr. 550 (DC), 2023 WL 3662971, at *5-6 (E.D.N.Y. May 25, 2023) (adopting defendants' view that "Rule 17(h) operates to prevent discovery only of statements in the possession of the Government"); *United States v. Hussain*, No 16 Cr. 0462, 2018 WL 1091083, at *2 (N.D. Cal. 28, 2018) ("Rule 17(h) only applies to statements in the possession of the government.").

To resolve this ambiguity and inconsistent application of Rule 17(h), we urge the Advisory Committee to reconsider our proposed amendment to Rule 17(h). Specifically, we propose amending Rule 17(h) to state that "[n]o party may subpoena a statement of a witness or of a prospective witness, <u>from the other party,</u> under this rule. Rule 26.2. governs the production of the statement." By explicitly stating that Rule 17(h) applies only to requests for a statement "from

[11] The Advisory Committee thoroughly considered many of the proposals included in our 2022 Letter, but we have not been able to locate any discussion regarding our proposal to amend Rule 17(h).

the other party," the Advisory Committee can clarify that parties are still free to seek witness statements from third parties by subpoena.

IV. CONCLUSION

The City Bar fully supports the amendments to Rule 17 proposed by the Advisory Committee and appreciates this opportunity to provide our comments. For the reasons set forth above, we urge the Advisory Committee to consider replacing the "likely to be admissible" standard with a "relevant and material" standard for Rule 17(c), as we originally proposed in 2022. In addition, we urge the Advisory Committee to consider amending Rule 17(h) to make clear that parties may seek witness statements from third parties by way of subpoena.

White Collar Crime Committee
James P. Loonam, Chair

February 2026

Contact
Mary Margulis-Ohnuma, Senior Policy Counsel | 212.382.6767 | mmargulis-ohnuma@nycbar.org

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Comment from Judicial Conference Committee on Criminal Law

Posted by the **United States Courts** on Feb 13, 2026

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Attachments 1

2026-02 CLC Comment Letter on Proposed Amendments to Federal Rule of Criminal Procedure 17

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February 13, 2026

Honorable James C. Dever III
Chair, Committee on Rules of Practice and Procedure
United States District Court
Eastern District of North Carolina
310 New Bern Avenue
Raleigh, NC 27611

Dear Judge Dever:

I write on behalf of the Committee on Criminal Law of the Judicial Conference of the United States to offer comment on the proposed amendments to the Federal Rules of Criminal Procedure under consideration by your Committee.

As a Judicial Conference committee, our jurisdiction includes overseeing the federal probation and pretrial services system and reviewing issues related to the administration of criminal law. Consistent with that jurisdiction, the Committee here offers comments on and proposes adjustments to Criminal Rule 17(c)(3)(A) and (B) Producing Documents and Objects, Subpoena for Personal or Confidential Information About a Victim, Motion and Order Required and Notice to a Victim.

At the outset, the Criminal Law Committee agrees that amendments are needed to clarify when and how Criminal Rule 17 applies. As the Standing Rules Committee notes, "the rule's existing guidance about obtaining, reviewing, and responding to subpoenas to produce items is ambiguous and incomplete, and it has produced conflicting interpretations that afflict multiple

aspects of subpoena practice." Comm. on Rules of Pract. and Proc., Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence (Aug. 2025). We congratulate the Standing Rules Committee, the Criminal Rules Committee, and their staff for advancing important improvements to Rule 17 after extensive effort. In that spirit, the Criminal Law Committee offers the following suggestions intended to avoid potential confusion on how the new rule would be applied and to help ensure its effective application.

I. Criminal Rule 17(c)(3)(A): Motions to Issue Subpoenas for Personal or Confidential Information

Since 2008, Rule 17(c)(3) has required parties to obtain a court order before serving on a non-party a "subpoena *requiring* the production of personal or confidential information about a victim …." Fed. R. Crim. P. 17(c)(3) (emphasis added). In the Committee's experience, there has—so far—been no significant misapplication of this provision by parties in narrowly interpreting what is "personal or confidential" information in order to avoid seeking a court order. But if the proposed amendment on the more-flexible standard for issuance of a subpoena is adopted (slated to be Rule 17(c)(2)(B)), then the issuance of subpoenas will likely increase, perhaps substantially. An increase in the number of subpoenas poses a corresponding risk that parties will interpret the current term—"requiring" the production of personal or confidential information—as meaning that no court order is needed unless the party knows to a *certainty* that the subpoena will result in the production of a victim's personal or confidential information. That would be inadequately protective of victim privacy.

Instead, the Committee suggests that the amended Rule require motion practice whenever there is a "reasonable possibility" that protected-victim information will be produced. A reasonable-possibility standard will capture a broader set of subpoenas and expand victim protections in these situations. The proposed language, in redline on top of the proposed amendment, would be as follows:

> (c)(3)(A) Motion and Order Required. After a complaint, indictment, or information is filed, a non-grand-jury subpoena that has a reasonable possibility of requiring the production of personal or confidential information about a victim may be served on a third party only by court order upon motion.

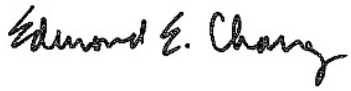
II. Criminal Rule 17(c)(3)(B): Notice to Victims of Subpoenas for Personal or Confidential Information

Since 2008, Rule 17(c)(3) has required courts to give notice to victims when entering an order authorizing a subpoena for their private or confidential information (unless there are exceptional circumstances). It is the Committee's understanding that courts have implemented this notice requirement by directing the government to notify the victim. Again, the Committee is not aware of significant burdens or litigation arising out of the notice requirement—so far. But given the likely increase in the issuance of subpoenas arising out of the amendment's more-flexible standard, the Committee suggests that the Rule make explicit that the notice requirement requires nothing more (absent exceptional circumstances) than to direct the government to notify the victim. Without this clarification, parties or (more importantly) victims might assume that (or have a basis for arguing that) the Court itself has some notification requirement beyond simply directing the government to provide notice. And this change would align the text's rule with actual practice. The proposed redline would be as follows:

> (c)(3)(B). Unless there are exceptional circumstances, the court must, before entering the order, require that the government give~~giving~~ notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

The Committee appreciates the opportunity to comment on the proposed amendments and the ongoing work of the Standing Rules Committee and its Advisory Committees on this important subject.

Respectfully submitted,



Honorable Edmond E. Chang
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

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Comment from National Association of Criminal Defense Lawyers

Posted by the **United States Courts** on Feb 17, 2026

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Comment on proposed amendment to Fed.R.Crim.P. 17 from Nat'l Ass'n of Criminal Defense Lawyers is attached

Attachments 1

NACDL comments FRCrP17 final 021526

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National Association of Criminal Defense Lawyers
12th Floor, 1660 L Street, NW
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February 15, 2026
Submitted online

Carolyn A. Dubay, Esq., Chief Counsel
Committee on Rules of Practice & Procedure
Members and Reporters, Advisory Committee on Criminal Rules
Judicial Conference of the United States

AMENDMENT TO CRIMINAL RULES PROPOSED FOR COMMENT, Aug. 2025

To the Committee and Staff:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments on the proposed amendments to Rule 17 of the Federal Rules of Criminal Procedure. While we had argued for more extensive reforms during the Advisory Committee deliberation process, the proposed amendments would resolve many ambiguities in the current rule and would overall constitute an improvement. Accordingly, with a few relatively minor exceptions, NACDL supports the amendment.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has more than 10,000 direct members. With NACDL's 90 state and local affiliates spanning nearly every state, we represent a combined membership of some 40,000 private attorneys, public defenders, and interested academics.

CRIMINAL RULE 17 – SUBPOENAS

NACDL adheres to its position, advanced throughout the Criminal Rules Advisory Committee's consideration of this amendment,[1] that *ex parte* subpoena power should be made available to defense counsel for investigative purposes as soon as charges are brought, as would be allowed in a federal civil case. (Such investigative subpoenas are sometimes referred to as "third-party discovery." Defense discovery from the government is regulated solely by Rule 16, of course.) In particular, our suggested approach would have allowed subpoenas for information likely to "lead to" the revelation of admissible evidence, and not just for the potential evidence itself. Likewise, we favored allowing the use of subpoenas not tied to any scheduled hearing. Those reforms would still have fallen short of "leveling the playing field" – given the Government's exclusive access to search warrants and grand jury subpoenas – but would have served as a powerful if imperfect check on erroneous accusations and overcharging.

[1] The chair of NACDL's Rule 17 Task Force appeared before the subcommittee on October 27, 2022, and the Task Force submitted detailed letters to the subcommittee and then to the Advisory Committee during its deliberations, dated February 13, 2024, and April 16, 2025, respectively.

At the same time, we recognize that these suggestions found insufficient support in the Advisory Committee. Accordingly, we do not rely on them here in response to the reforms now proposed for comment. NACDL recognizes that others of our concerns were heard and implemented, at least in part, in the current proposal. Because adoption of the Advisory Committee's proposal would represent a significant improvement over the existing Rule, NACDL supports the published draft, subject only to a few points identified in this comment. As these points seek clarification rather than change, we do not think they would require republication if adopted.

A. Scope and Organization of the Revised Rule

Our principal critical comment calls for a bit of (hopefully non-controversial) reorganization and/or clarification of the revised rule. A subpoena may require the testimony of a person (traditionally called *ad testificandum*), the production of documents or other evidentiary items (*duces tecum*), or both (requiring a witness to appear for testimony and to produce one or more specified items in court at the same time). On its face the proposed rule appears not to address the third category, however. *See* Prop.R. 17(a) (subpoena may require recipient to "attend and testify <u>or</u> produce designated items ….") (emphasis added). That leaves unclear whether the protections and restrictions set forth in Proposed Rule 17(c) apply to subpoenas requiring testimony and production at a hearing, which are not uncommon, or only to subpoenas calling for production prior to the hearing (the innovation the original Rule 17(c) introduced).

The Advisory Committee wisely suggests addressing "testimony" expressly in Proposed Rule 17(a), which the current Rule 17 does not. But the Proposed Rule's use of "or" between "testify" and "produce designated items" creates ambiguity about a common practice: does instructing a witness to produce designated items *in court* when the witness appears to testify convert the subpoena from one governed by Proposed Rule 17(a) to one governed by Proposed Rule 17(c)? We think not, and suggest the rule say so clearly. Our first suggestion is therefore to amend the language at line 6 to read, "to attend and produce designated items and/or to testify ...." The proposed amendment to section (b) is fine; that rule does not address subpoenas *ad testificandum* in general, but only the special case of such subpoenas when needed by an indigent defendant. And Rule 17(c), then, would apply only – as it always has – to the special case of production of things prior to a hearing, that is, not in connection with a subpoena to testify.

Courts and litigants understand the restrictions of the current Rule 17(c) to apply only when a party seeks to inspect documents and things *in advance* of the subject proceeding – not when a witness is subpoenaed to produce them in court in conjunction with testimony. A subpoena *duces tecum* is not necessarily a "Rule 17(c) subpoena." The Supreme Court drew that distinction in *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951), explaining that the "chief innovation" of Rule 17(c) "was to expedite the trial" by permitting courts to direct advance production for inspection by a litigant. It noted in contrast that "Rule 17 provided" – in general, that is – "for <u>the usual</u> subpoena *ad testificandum* <u>and</u> *duces tecum*, which may be issued by the clerk." *Id.* (emphasis added). And then the Criminal Rules added, as an important innovation codified in Rule 17(c), the possibility of compelling production of evidentiary material prior to the hearing (and necessarily, then, not accompanied by compelled testimony).

We think it unlikely that the Advisory Committee intended in the current proposal to discard, particularly without saying so, the distinction that has animated practitioners' and the Supreme Court's understanding of Rule 17 from its first iteration, that is, the difference between production in advance of a hearing (Rule 17(c)) and production in connection with testimony (the traditional

subpoena power, as now to be referenced in Prop.R. 17(a)). Nor can we think of any rationale for such a substantial change. A non-17(c) subpoena requiring production *in conjunction with testimony* is by definition a subpoena requiring production in court *at a hearing or trial*, where the court will control the disposition of the items produced. Otherwise, it would be a subpoena for a sort of deposition, which is plainly not at present allowed outside the exceptional circumstances covered by Rule 15.

Because Rule 17(c), as a matter of history and structure, applies only to subpoenas that call for production at a time or place *other than* at a scheduled hearing, it follows that none of the *limitations* in Prop.R. 17(c)(2) (*i.e.*, subsections (c)(2)(A)–(D), in large part[2]) should be understood to apply to subpoenas under Prop.R. 17(a) for testimony *at a hearing*, even if that subpoena calls as well for production by the witness, at that proceeding, of certain items. At the same time, it should be made clear that the addition of specific protections for counsel's authority to issue subpoenas under PropR. 17(c)(2) *(e.g.*, the authority to issue such subpoenas *ex parte* ((c)(2)(E)) and without prior judicial approval ((c)(2)(C), in part)) should not be understood as implying any limitations on the traditional availability of subpoenas under the general rule of 17(a). This could be accomplished by amending the Advisory Committee Note (perhaps at line 191 *et seq*.) to say expressly that nothing in Prop.R. 17(c) limits the existing authority of counsel to serve subpoenas, both *ad testificandum* and *duces tecum*, that are returnable at any scheduled court proceeding.

B. Relaxation of the "*Nixon* test" that elaborated the prior version of Rule 17(c)

The so-called "*Nixon* test" derives from the Supreme Court's 1974 decision allowing the Watergate Special Prosecutor's Rule 17(c) subpoena for specified Oval Office recordings in anticipation of the trial of certain White House aides and others. NACDL supports the committee's proposal to replace the standard articulated there for the substantive scope of a permissible Rule 17(c) subpoena with a more realistic rule that does not require that the issuing party be able to describe with precision, before seeing the evidence, what the evidence will show. "Reasonable particularity" will suffice, and the material summoned need only contain information that is "likely to be admissible as evidence" in the kind of proceeding to which it relates. We note with approval that under this wording the scope of information subject to subpoena for a sentencing or revocation proceeding (particularly as mitigation) is significantly broader than that which applies at trial. *See* Fed.R.Evid. 1001(d)(3) (rules of evidence, other than privileges, do not apply at revocation or sentencing). For these reasons, NACDL supports the proposed amendment codified at Rule 17(c)-(2)(B).

C. Procedural aspects

The published draft authorizes the issuance of 17(c) subpoenas by counsel – both defense attorneys and AUSAs – without leave of court, for use at trial as well as in connection with a short list of four specified types of evidentiary hearings. Prop. R. 17(c)(2)(A). NACDL supports that provision insofar as it makes expressly clear that the right to issue a subpoena in counsel's professional discretion is not limited to trial, nor is it limited to subpoenas returnable at the proceeding.

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[2] In short, paragraph (A) under Prop.R. 17(c)(2) makes explicit that a subpoena *duces tecum* is available for hearings as well as for trial, but introduces the limitation that leave of court is required if the hearing is not one of four specified kinds. Paragraph (B) articulates and thus limits the characteristics of the items that may be sought. Paragraph (C) states when a motion is be required seeking leave to serve a Rule 17(c) subpoena, while paragraph (D) articulates what must be included in such a motion.

But this reform does not go far enough. We cannot see why leave of court should be required for the issuance of a subpoena *duces tecum,* wherever returnable, in connection with other, equivalent evidentiary hearings, just as there is no such requirement for subpoenas *ad* testificandum at those hearings. No particular risk of abuse has been identified, nor any special risk of unfair burden on third parties. Accordingly, NACDL opposes the limitation in Prop.R. 17(c)(2)(A) to the four types of proceedings. Instead, we suggest that this paragraph be revised to authorize issuance of a subpoena *duces tecum* in counsel's sound professional judgment in connection with "any scheduled evidentiary hearing, including" any of the four listed examples.

NACDL fully supports the proposed rule insofar as it requires that any subpoena issued to a third party for production of records may, in counsel's professional discretion, be made returnable to counsel's office. Prop.R. 17(c)(5).[3] This allows orderly review of records and preparation for the hearing, while protecting the privacy of the defense function. Similarly, as already noted, NACDL supports allowing counsel to issue a subpoena *duces tecum* without prior leave of court (Prop. R. 17(c)(2)(C)). And we support the rule authorizing issuance *ex parte*, even where a motion may be required (Prop. R. 17(c)(2)(E,F)).

We are concerned, however, about the allowance of an override of each these reforms by local rule. The Federal Rules are intended to establish a national set of procedures based on the Advisory and Standing Committees' best, considered judgment. We are not aware of any other significant points of practice and procedure where local rules have been expressly authorized to reject a national reform wholesale, in contravention of the uniformity and consistency standard established by Rule 57(a)(1). There is no sound reason to depart from that norm here. Disallowing an override by local rule would still leave the option of a "court order" for a particular case if specially warranted. At the very least, if these opt-outs are not removed then NACDL strongly suggests that language be added to the Committee Note (at line 448 *et seq*.) discouraging a particular district from effectively overriding these reforms by general local rule. For the same reason, a showing of special local circumstances should be required to justify maintaining or imposing the more restrictive past practices, formerly prevalent in a minority of districts, that these amendments now wisely reject.

NACDL agrees with the committee that the Victims Rights Act, 18 U.S.C. § 3771(a)(8), is reasonably understood to justify a motion requirement before issuance of a subpoena to a third party for "personal or confidential" information about an alleged crime victim. Prop.R. 17(c)(3). But we note with concern that the quoted term has not been defined, leaving this exception open to abuse, to the detriment of defendants' due process rights and the legitimate exercise of the defense function. NACDL suggests that the Advisory Committee Note (at line 402 *et seq*., be amended to clarify that "personal or confidential," as used in this provision, is to be narrowly construed. It should be made clear, for example, that criminal history information, security camera footage in the hands of a third party, non-content telephone toll and usage records, and bank records of an

[3] The proposed Advisory Committee Note requires correction at lines 322–326. As published, the Note mistakenly states that under Prop.R. 17(c)(5) "the court has discretion ... to order that the recipient produce the items to the court instead of directly to the requesting party's counsel." In fact, under proposed (c)(5) such judicial discretion applies only to subpoenas issued by *pro se* defendants, where greater judicial control is required to compensate for the lack of professional responsibility and judgment that counsel representation ensures.

alleged crime victim, for example, are not "personal or confidential" within the meaning of this new rule.

D. Relationship with Rule 26.2

NACDL agrees with the comment submitted by the New York City Bar that the words "from the other party" should be added to the amended Rule 17(h), to clarify that this Rule does not extend Jencks Act-type limitations to otherwise-permissible subpoenas issued to third parties.

* * *

NACDL thanks the Committee for its valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the Advisory Committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
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Chair, Committee on Rules of Procedure

Lisa A. Mathewson
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Comment from Cassell, Paul

Posted by the **United States Courts** on Feb 17, 2026

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Comment

Attached are comments regarding proposed amendments to Rule 17 of the Federal Rules of Criminal Procedure.

Attachments 1

Cassell Testimony Updated Final PDF - 2-15-26

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REVISED 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

FEBRUARY 15, 2026

FOLLOWING THE JANUARY 22, 2026 (VIRTUAL) HEARING

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 broadly to all federal crimes.

My analysis of the proposed changes proceeds in seven 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 only for purposes of a trial, 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 that a defendant could make a "fishing expedition" demand

of a victim, and (despite the promise in the notes to proposed rules) there potentially 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 victims in "exceptional circumstances." That poorly defined exception allows defense attorneys to avoid notice to victims by raising nebulous fears about revealing "trial strategy." Revealing victims' confidential records to a defendant without notification raises both constitutional right to privacy concerns and Crime Victims' Rights Act (CVRA) rights to "fair treatment" and "dignity and respect" concerns.[1] The solution to this problem is to eliminate the vague "trial strategy" exception to the requirement that a victim receive notice. The defendant has no constitutional or statutory right to avoid disclosing trial strategy. Moreover, there is no good policy argument for allowing a defendant to shield such alleged "strategy" considerations.

In Part VI, I explain problems with the "ex parte" options that the new proposed rules encourage. Issuing "ex parte" subpoenas for the defense without notice to the Government creates the risk of confusing crime victims, who will often lack legal counsel to help them understand the legal process. Moreover, to keep such subpoenas truly ex parte, the issuing court will likely need to issue a gag order to the recipient—such as a crime victim—preventing disclosure to the government. But such gag orders directed to victims would violate the victim's CVRA right to confer with prosecutor. These gag orders would also raise serious jurisdictional and free speech concerns, as they would constitute a court order directed to a non-party in a criminal case restricting the person's ability to speak on important issues. Concerns that involving prosecutors might reveal "trial strategy" are unwarranted, given that the Supreme Court has rejected the "sporting contest" theory of criminal justice.

In Part VII, I explain some potential drafting answers to these concerns. 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. And the Committee should proceed

[1] 18 U.S.C. § 3771(a)(8).

incrementally, by carving out crimes of violence and other victim-sensitive crimes from the new subpoena provisions. 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 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 written testimony is a revision of the draft testimony that I presented to the Committee during its January 22, 2026, virtual hearing.[6]

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.[7] 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.[8] In

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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] In addition to correcting a few minor errors, this revised testimony has new proposal for a "carve-out" for violent and other serious crimes as well as a new section VI, discussing "ex parte" procedures and their impact on crime victims. I've also tried to clarify my discussion of "ex parte" subpoenas (e.g., subpoenas without notice to the Government) versus subpoenas without notice to victims.

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

[8] 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).

such settings, modifications to Rule 17 may (or may not) 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 defense practice and case contexts[9] 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.[10] 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*.[11] 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.[12]

Lack of legal counsel for victims has long been a problem.[13] 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.[14] 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.[15] A 2012 report in California continued to identify the need for legal counsel as a significant unmet need.[16]

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."[17]

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[9] 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.").
[10] *See generally* Cassell, *The Victims' Rights Movement*, *supra* note 3, at 508-09.
[11] 372 U.S. 335 (1963).
[12] *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 . . . .").
[13] *See generally* Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN'S J. LEGAL COMMENT. 177 (1992).
[14] *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).
[15] *See id.* at 692.
[16] *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].
[17] *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).

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.[18] 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.[19]

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.[20] But for most crime victims, legal representation remains elusive—a problem that scholars have increasingly recognized.[21] 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), where the Special Victim Counsel (SVC) program was created to provide lawyers for sexual assault victims.[22] 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."[23]

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,[24] 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,[25] 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 person was the victim; the Commission identified 6,671 individual victims across such federal violent crimes.[26] Moreover, many other federal offenses can

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[18] *Id.*
[19] *Id.*
[20] *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).
[21] *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).
[22] *See* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67 (2015).
[23] *Id.* at 85.
[24] *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).
[25] *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.
[26] *Id.* at 1.

involve direct impacts on individual victims, even though they might not be immediately categorized as "violent" or victim-related crimes.[27]

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.[28]

The Advisory Committee Memorandum summarizing the rule changes (hereinafter referred to as "The Committee Memo"[29]) 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.[30]

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.

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[27] *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).

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

[29] *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.

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

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,[31] no victim subpoenas were commonly issued. The new rule thus expands the 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."[32] 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.[33] 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.[34] 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.[35]

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.[36]

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.[37] 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

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[31] *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).
[32] Committee Memo, *supra* note 29, at 74.
[33] *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").
[34] 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.
[35] *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).
[36] Committee Memo, *supra* note 29, at 74.
[37] *Id.*

rule now clearly would allow defense counsel to seek issuance of a subpoena for the 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]…."[38] It is interesting to think about who was 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 for detention hearings (and any follow-up motions).

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"[39]—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."[40]

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"[41]—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,

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[38] *Id.*

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

[40] *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").

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

the requirement that the records "are, or contain information that is, likely to be admissible as evidence in the designated proceeding"[42] 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."[43]

That leaves only the last requirement—"not reasonably available to the party from another source."[44] 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."[45] 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.[46] Notably, this federal rule is consistent with the weight of authority in the states.[47] 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.[48]

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

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[42] Proposed Rule 17(c)(2)(B)(iii).
[43] 18 U.S.C. § 3142(f)(2)(B).
[44] Proposed Rule 17(c)(B)
[45] Proposed Rule 17(c)(3)(B).
[46] *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. Kirb*y*, 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).
[47] *See* Cassell & Erez, *supra* note 46, 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").
[48] *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 46, at 170.

delivering a victim impact statement at trial, making the "price of admission" for exercising a CVRA right to be heard at sentencing[49] 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 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.[50] 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.[51] 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.[52] 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.[53]

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."[54] The defense has no obligation at all, and thus does not generally need to subpoena records and the like.[55] And Rule 32 already contains discretionary rules giving district judges authority to handle evidentiary issues as necessary at sentencing hearings.[56] 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.

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[49] 18 U.S.C. § 3771(a)(4).
[50] Fed. R. Crim. P. 32(c)(1)(B).
[51] 18 U.S.C. § 3664(a).
[52] Fed. R. Crim. P. 32(f).
[53] Fed. R. Crim. P. 32(i)(3).
[54] 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").
[55] *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.").
[56] *See* Fed. R. Crim. P. 32(i)(2).

B. The Proposed Rule Contains an Apparent Drafting Error That Inappropriately Lowers 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.

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.[57]

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.[58]

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.[59]

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."[60] 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 do

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

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 otherwise."[61] 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."[62]

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."[63] But at a detention hearing, the rules of evidence are not enforced. As the detention hearing statute provides:

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[61] Proposed Rule 17(c)(2)(F).

[62] 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.

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

"The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing."[64] 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 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).[65] 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.[66]

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.[67] 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."[68] 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.[69]

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

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[64] 18 U.S.C. § 3142(f)(2)(B).

[65] 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).

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

[67] *See* Part I, *supra*.

[68] Committee Memo, *supra* note 29, at 75.

[69] 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.*

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.[70]

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 victim the rights listed in the CVRA.[71] 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."[72] 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[73] 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.[74]

Similar problems arise at sentencing hearings. As with detention hearings, the Federal Rules of Evidence are inapplicable, by their own terms.[75] 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, apparently *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."[76] And courts have noted that restricting the information district judge use in determining

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[70] *See, e.g.,* In re Grand Jury, 478 F.3d 581, 585 (4th Cir. 2007).
[71] 18 U.S.C. § 3771(d)(1).
[72] 18 U.S.C. § 3771(a)(8).
[73] 18 U.S.C. § 3771(a)(5).
[74] *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).
[75] Fed. R. Evid. 1101(d) ("These rules—except for those on privilege—do not apply to the following: … sentencing ….").
[76] 18 U.S.C. § 366.

a sentence "would conflict with federal law and improperly hinder district courts' pursuit of the ultimate goal: imposing an appropriate sentence."[77]

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 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.[78] 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.'"[79] 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

[77] United States v. Ellington, 2025 WL 2793737 at *3 n.3 (6th Cir. 2025).
[78] *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.").
[79] 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)).

CVRA responsibilities—to use their "best efforts" "to see that crime victims are notified of, and accorded, the rights described [in the CVRA]."[80]

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 courts to order in camera review before disclosure to anyone."[81] 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.[82] 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.[83] 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."[84]

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.

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[80] 18 U.S.C. § 3771(d)(1).
[81] Committee Memo, *supra* note 29, at 19.
[82] 18 U.S.C. § 3771(a)(8).
[83] *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).
[84] *Id.* at 109.

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,[85] 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 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.[86]

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[87] 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.[88]

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.[89] 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

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[85] *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure*, *supra* note 5.
[86] *Id.* at 835.
[87] The term "ex parte" can have two different meanings in this subpoena context: without notice to the Government (the other party in the criminal case) or without notice to the victim, who is not a party to the criminal case. In the 2007 discussions, it appears that the predominant concern was subpoenas without notice to the victim. In the current discussions, there has been a focus on subpoenas without notice to the Government. I turn to that second issue (subpoenas without notice to the Government) in the following section of this testimony—Part VI.
[88] Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure*, *supra* note 5, at 835.
[89] *See* Cassell, *Treating Victims Fairly*, *supra* note 5, at 904-05.

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."[90] 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 "a poker game in which players enjoy an absolute right always to conceal their cards until played."[91]

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.[92] 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."[93] 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.[94] 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.[95]

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."[96] When defense attorneys obtain ex parte subpoenas for a victim's confidential information, they may very well violate the

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[90] *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).

[91] 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).

[92] 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.

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

[94] *Id.*

[95] *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)).

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

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.[97] 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 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.[98]

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.[99] Moreover, rape counselors—and, indeed,

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

[98] *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.

[99] 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*

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.[100] 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 information concerning an individual believed by the defendant to be the government's main witness at trial.[101] 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."[102] 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.[103]

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."[104] 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."[105] 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"

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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).

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

[101] 136 F.R.D. 55, 551-57 (W.D.N.Y. 1991).

[102] *Id.* at 556.

[103] *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").

[104] 18 U.S.C. § 3771(a)(8).

[105] *See* Proposed 2007 Amendments, Proposed Rule 17, at 8. As discussed below, the Advisory Committee later changed this comment.

to "be treated . . . with respect for the victim's dignity and privacy."[106] 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.[107] 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]."[108]

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[109] and to an opportunity to attend that hearing, unless the victim's testimony would clearly be materially affected from attending the hearing.[110] 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."[111] 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.[112]

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[106] *See* 18 U.S.C. § 3771(a)(8).

[107] 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").

[108] 18 U.S.C. § 3771(b)(1) (emphasis added).

[109] 18 U.S.C. § 3771(a)(2).

[110] 18 U.S.C. § 3771(a)(3).

[111] 18 U.S.C. § 3771(a)(1).

[112] 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.

Senator Kyl went on to say he "fully endorse[d]" my specific proposals, indicating that they were, however, in some areas "too cautious."[113]

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 third-party subpoenas for victim information to "exceptional circumstances." The accompanying Advisory Committee note then offered two illustrations of exceptional circumstances. One was narrowly cabined and 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 I 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.[114]

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,[115] crime victims typically will not have legal

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[113] *Id.*
[114] Fed. R. Crim. P. 17(c)(3), Adv. Comm. Note (2008 Amendment).
[115] *See* Part I, *supra*.

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.[116] 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.

Under the CVRA, there is an appellate mechanism for obtaining review of district court decisions—filing a petition for a writ of mandamus.[117] But those petitions must link directly to a CVRA violation.[118] 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 from third parties.[119] 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."[120] 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."[121] 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."[122] As the Supreme Court has

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[116] *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.").
[117] *See* 18 U.S.C. § 3771(d)(3).
[118] *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.").
[119] Fed. R. Crim. P. 17(c)(3).
[120] Fed. R. Crim. P. 17(c)(3) advisory committee's note (2008 amendment).
[121] 18 U.S.C. § 3771(a)(8).
[122] 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

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."[123] 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.[124] Without notice, victims cannot challenge the subpoena or seek protective orders limiting disclosure of sensitive details that may be irrelevant to the defense.[125] 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.

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.[126] Against that backdrop, "federal constitutional law recognizes a 'right to informational privacy' stemming from 'the individual interest in avoiding disclosure of personal matters.'"[127] To be sure, the right of privacy is "notoriously nebulous."[128] But the existence of the right is recognized in many cases.[129]

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."[130] 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

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[123] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (internal citations omitted).
[124] United States v. McClure, 2009 U.S. Dist. LEXIS 29247 (E.D. Cal. Apr. 6, 2009).
[125] *Id*.
[126] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
[127] 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)).
[128] Varo v. Los Angeles Cnty. Dist. Attorney's Off., 473 F. Supp. 3d 1066, 1072 (C.D. Cal. 2019).
[129] *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).
[130] 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).

witnesses[131]—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.[132]

The Supreme Court long ago rejected constitutional challenges to such disclosure requirements, endorsing "the move away from the 'sporting contest' idea of criminal justice."[133] 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 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."[134] 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."[135]

At the same time, it would be possible for the Advisory Committee to retain a very narrow, "exigent circumstances" requirement for certain subpoenas for third party information. The Advisory Committee note accompanying Rule 17 refers to "evidence that might be lost or destroyed if the subpoena were delayed …."[136] 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 later in this testimony.[137]

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[131] *See* Fed. R. Crim. P. 16(b).
[132] *See* Fed. R. Crim. P 12.1, 12.2, and 12.3.
[133] *See* Williams v. Florida, 399 U.S. 78, 106 (1970) (Burger, C.J., concurring).
[134] 150 Cong. Rec. S10911 (Apr. 22, 2024) (statement of Sen. Kyl).
[135] 28 U.S.C. § 2072(b).
277 Proposed Amendments,
[136] Fed. R. Crim. P. 17 Adv. Comm. Note (2008 Amendments).
[137] *See* Part VII, *infra.*

VI. Ex Parte Procedures for Personal and Confidential Victim Information Violate the Crime Victims' Rights Act, Due Process and the First Amendment.

The proposed rules create significant new problems for crime victims by directly authorizing "ex parte" procedures for issuing subpoenas—that is, as relevant here, procedures without notice to the Government.[138] Under the new proposed rule, a defendant could, in some circumstances, obtain a subpoena for victim records that goes directly to the victim without notice to the prosecutors. And then, if the ex parte procedure is to have any practical meaning, the victim must be "gagged"—told not to inform the prosecutors—about the subpoena that has been served. As I explain in this Part, gagging crime victims violates both the CVRA and the First Amendment.

A. The New Rule Creates Two Pathways for Ex Parte Subpoenas to Crime Victims—Both of Which Would Facilitate Gag Orders.

The new proposed rule creates two paths for "ex parte" subpoenas: (1) no-motion situations; and (2) motion situations. To be clear, in this section, I discuss "ex parte" subpoenas, defined as subpoenas without notice to the Government. I discuss the two situations in turn.

First, in situations where no motion is required, the new rule provides that "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 otherwise."[139] Here again, as elsewhere in my testimony, I focus on situations involving subpoenas for the confidential or personal information of a victim. And I start by focusing on situations where a subpoena is served on the victim directly—which seemingly does not require a motion under the current draft.[140]

Consider a situation where a defense attorney serves on a sexual assault victim—ex parte, without notice to the Government—a subpoena for all her confidential medical and psychological counseling records. Most victims will lack legal counsel, and presumably virtually all victims will want to discuss the issue with the prosecutor. In virtually all situations, then, there will be victim-to-prosecutor contact—unless the unrepresented victim is confused or uncertain about how to contact the prosecutor.

Against that backdrop, it makes no sense to have a rule permitting direct, ex parte subpoenas to victims. Such a rule creates an obvious risk of discrimination and unequal treatment, where victims who have the least understanding of the criminal justice system are most likely to be confused and misunderstand what is happening—and thus least likely to contact the prosecutor. For all subpoenas the defense serves directly on the victim, notice should be required to the prosecutor so that the prosecutor is in a position to help explain what is happening to all victims.

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[138] As noted earlier, "ex parte" can also refer to subpoenas without notice to the crime victim. Here, I focus on the implications of procedures that the defense can employ to obtain a subpoena without notice to the Government.

[139] Proposed Fed. R. Crim. P. 17(c)(2)(D)(ii).

[140] This may be the result of a drafting error in the current proposed rule, which does not appear to require a motion for subpoenas served directly on victims for their personal or confidential information. If so, the Committee should correct it. *See* Part II.B, *supra.*

Recognizing that a subpoena served directly on the victim will quickly be disclosed to the prosecutor (unless the victim is confused), the defense may instead proceed through the second option: a motion to the court for an ex parte subpoena—perhaps with attendant restrictions preventing the victim from contacting the prosecutor. The new proposed rule specifically allows such an approach:

> Ex-Parte Motion.
> The court must, for good cause, permit the party to file the motion ex parte.[141]

The Advisory Committee notes explain:

> Rule 17(c)(2)(E) ensures that a court must, for good cause, allow a party to file a motion for a subpoena to produce items ex parte. Whether a party may seek a subpoena ex parte has been another contested question under the prior language of Rule 17(c). Although some courts have read the Rule to preclude ex parte subpoena practice, most allow it, some by local rule. 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. Without the ex parte option, defense counsel may face the impossible choice of either not seeking a subpoena and violating the ethical duty to prepare a plausible defense, or seeking the subpoena and disclosing their trial strategy, work-product, and other confidential information to the government and co-defendants (who may have adverse interests).[142]

Again, my testimony focuses on situations involving crime victims. And the proposed rule and Advisory Committee Note envision situations where a defendant could go directly to the court and argue that disclosure of the subpoena to the victim would reveal "trial strategy." The defendant could then obtain a court order directing the victim to produce items ex parte—that is, without notice to the Government.

But for such production to be effectively ex parte, the recipient of the subpoena must be required not to notify the government. Indeed, a member of this Committee recognized as much at the April 2024 meeting, observing that when defense counsel requests a victim's records, "the same statute would likely require notice to that victim and the government will immediately know that a subpoena has been issued."[143] The member found "the idea that a gag order would be issued by a court was hard to imagine where a subpoena seeks the victim's records."[144] Yet, this hard-to-imagine situation is what has happened in some cases currently. Some courts have applied similar language in subpoena rules to issue subpoenas to crime victims with "gag orders"—that is, with a court direction that the victim not inform the prosecutor of the subpoena.

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[141] Proposed Fed. R. Crim. P. 17(c)(2)(E).
[142] Advisory Committee Note to Proposed Fed. R. Crim. P. 17(c)(2)(E).
[143] Advisory Committee on Criminal Rules, Draft Minutes, April 8, 2024, at 23.
[144] *Id.*

In a sexual assault case in the District of Columbia from 2016, a defense attorney filed an ex parte motion for a subpoena to obtain the victim's mental health records, claiming the records were needed for impeachment purposes.[145] Neither the victim nor her counsel received notice of the motion or had any opportunity to respond. The Superior Court judge granted the motion in less than 24 hours.[146] The order stated that the parties "shall not disclose the Defense's Motion or its contents to the Government."[147] The defendant's motion represented that the subpoena sought only those records relating to "the complainant's therapy records and notes in the above-captioned case," but the judge authorized the issuance of a subpoena commanding the facility where the victim was seen to produce "all documents pertaining to [the victim's] mental health records . . . including but not limited to diagnosis, evaluation, assessment, medications, psychiatrist notes, and case manager notes," with no time limitation whatsoever.[148]

What happened next illustrates the gag order problem. When the victim's counsel finally learned of the proceedings and asked permission to contact the prosecutor to discuss the subpoena motion, the trial judge denied the request. The judge stated that "the reason why we're doing it the way we're doing it"—that is, holding the hearing on the subpoena motion under seal without the Government's knowledge—"is because it's the right to mount a defense that is at issue here, and not having the Government involved in it is largely because of that."[149] At the time a mandamus petition was filed on the issue, the victim remained unable to speak with anyone from the U.S. Attorney's Office about her mental health records or their disclosure to the defense.[150]

This is not a one-off incident. Victims' rights advocacy organizations have reported to me that other such cases exist. And presumably there are other cases in which unrepresented victims never realize their rights are being violated—particularly when the very mechanism designed to protect those rights, the CVRA's guarantee of a reasonable right to confer with the prosecution, is itself what is being extinguished.

B. Gag Orders Preventing Crime Victims from Conferring with Prosecutors Violate the Crime Victims' Rights Act.

As just explained, the new proposed rule appears to expand the situations where defendants will attempt to subpoena victims (and victims' records) without notice to the Government and then, as natural corollary, will attempt maintain the subpoena as an ex parte subpoena through gag orders. But such gag orders directed to victims violate the Crime Victims' Rights Act.

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[145] Ex Parte Motion for Issuance of Subpoenas Duces Tecum For Complainant's Mental Health Records and P.&A in Support Thereof REDACTED, No. REDACTED (D.C. Super Ct. REDACTED), D.C. Super. Ct. Crim. Div. (filed under seal) (on file with author).

[146] Ex Parte Order Under Seal, D.C. Super. Ct. Domestic Violence Div. (filed under seal; redacted) (on file with author).

[147] Redacted Subpoena*, Supra note 5*

[148] Petition for Writ of Mandamus Pursuant to the Crime Victims' Rights Act at 4, D.C. Ct. App. (filed Feb. 16, 2016) (filed under seal; redacted) (on file with author).

[149] *Id.* at 6. The court cited the defense's supposed "right to have their defense kept confidential" and therefore barred the victim's counsel from "telling the Government or revealing it until the time of the defense case in the trial."

[150] *Id.*at 7

A gag order blocking a victim from disclosing the existence of the subpoena to the Government obviously prevents the victims from conferring with the prosecutor about that subpoena. Yet the CVRA promises victims a "reasonable right to confer with the attorney for the Government."[151] The definitive legislative history surrounding the right explains that Congress was providing "a right to confer with the attorney for the Government in the case. This right is intended to be expansive. For example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case. The right, however, is not limited to these examples."[152]

Conferring about the subpoenas issued for confidential victim records is surely a "critical stage" of a criminal case. Today prosecutors frequently help victims litigate Rule 17 issues. They can explain whether disclosure is truly necessary in the context of other discovery already provided to the defense. They can help victims understand their options. They may even persuade the defense that a subpoena is overbroad or unnecessary. But if a victim cannot speak to the prosecutor, she will often be left to litigate pro se against defense counsel—navigating complex procedural issues without guidance or support.

When a court prohibits a victim from discussing a subpoena for her own confidential records with the prosecutor handling her case, the court eliminates the victim's ability to exercise this statutory right at precisely the moment when conferral is most critical to protecting the victim's privacy and other CVRA rights. The victim cannot alert the prosecutor that the subpoena appears to be overbroad. She cannot learn whether the information sought is already in the government's possession and could be provided through other channels. She cannot obtain the assistance that prosecutors routinely provide in navigating these complex procedural issues.

These issues are particularly acute for the substantial majority of crime victims who lack legal representation. Without access to prosecutors, unrepresented victims must navigate complex legal proceedings alone against experienced defense counsel. To be sure, the problem exists even when victims *do* have representation—the D.C. case discussed above involved a represented victim—which itself illustrates the depth of the problem, since represented victims are the only ones whose cases have come to light.

Whatever else might be said about such a system, it is not the system Congress envisioned when it promised victims in the CVRA an "expansive" right to confer with prosecutors about "any critical stage" of the case.

C. Gag Orders on Crime Victims Are Unconstitutional Prior Restraints on Speech.

Gag orders issued through these mechanisms are also problematic on other, constitutional grounds. It is important to notice that neither the proposed rule nor its Advisory Committee Note seems to contemplate—much less require—that the district court give the recipient of the subpoena an opportunity to be heard about a gag order before it is issued. This raises a substantial due process concern. Standard due process doctrine requires that "parties whose rights are to be affected are

[151] 18 U.S.C. § 3771(a)(5).
[152] 150 CONG. REC. S4260-01, S4268, 2004 WL 867940 (Apr. 22, 2004).

entitled to be heard and, in order that they may enjoy that right, they must first be notified."[153] As the Court has stated, "The right to be heard has little reality or worth unless one is informed that the matter [affecting one's rights] is pending and can choose for himself whether to appear or default, acquiesce or contest."[154]

When a gag order is issued ex parte, the victim has no opportunity to contest its necessity, no opportunity to argue that a less restrictive alternative would serve the same purpose, and—perhaps most fundamentally—no opportunity to inform the court of her statutory rights under the CVRA before those rights are extinguished by judicial order. The D.C. case discussed above is illustrative: the order was entered in less than twenty-four hours, without any input from the victim or her counsel, and it prohibited the victim from exercising her right to confer with the prosecutor for what could have been the duration of the case.

Of course, after receiving a gag order, it might be possible for a victim to move to reconsider. But overturning an order already put in place is a challenging task. And victims may be uncertain as to their ability to challenge the order in the first place.

There is also a fundamental jurisdictional issue. It is unclear what authority a court could claim for imposing on a crime victim penalties for violating a gag order, given her non-party status.[155] As a leading criminal procedure hornbook explains:

> there continues to be considerable uncertainty as to the extent to which it is proper, as a matter of public policy and constitutional interpretation, for the trial judge to restrict public statements by those participants in the process who are not traditionally regulated by the court. As a result, the major focus in restricting statements has been upon restricting the extrajudicial statements of defense counsel and prosecutors, who are "officers of the court" and traditionally regulated under court-adopted standards of professional responsibility.[156]

Of course, the victim is not party to the criminal case and has not been traditionally regulated by court rules. She is not the defendant. She is not legal counsel. Nor is she an "officer of the court." She is, in most cases, the person who was harmed by the crime at issue—and, via a gag order, is potentially being ordered by a court acting on the motion of the person accused of harming her, that she may not seek help from the government attorney assigned to her case. The legal authority for imposing such an obligation—and for enforcing it—is, at best, uncertain.

To be sure, the court may have authority to direct a victim to appear at a criminal trial, given the Constitution's right for defendants "to have compulsory process for obtaining *witnesses* in his favor"[157]—that is, witnesses at his trial. But a gag order does not serve that interest in

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[153] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (internal citations omitted).
[154] Nazarove v. IN*S,* 171 F.3d 478, 482-83 (7th Cir. 1999).
[155] The same problem exists with regard to imposing penalties or otherwise enforcing gag orders on institutions possessing victim-related records.
[156] *See* WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 23.1(b) at 1316 (6th ed. 2017).
[157] U.S. CONST. amend. VI.

obtaining a witness at trial. And beyond that, federal courts do not have the ability to create new rights for criminal defendants.[158]

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."[159] This analysis appears to be incomplete. The premise that disclosing the subpoena to the prosecutor would be improperly "harming the client" rests on the long discredited "ambush theory" of litigation.[160] 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 defense" that is "both obvious and legitimate."[161] 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."[162] 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."[163]

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

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[158] The Advisory Committee Note refers to the risk of disclosure of "work product" information as a ground for ex parte subpoenas. But work product protections conventionally operate as a "shield" against disclosure requests from an adverse party. *See, e,g.*, Fed. R. Civ. P. 26(b)(3). They do not operate as a "sword" that can be swung to prevent other persons from disclosing information that is being requested from them.

[159] *Id.*

[160] *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.").

[161] 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").

[162] Williams v. Florida, 399 U.S. 78, 82 (1973; *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).

[163] Fed. R. Crim. P. 16, Adv. Comm. Note. (1974 Amendment).

prosecution."[164]

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 compelling 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).[165] The Memorandum seems to back the defense attorney's theory that disclosing that subpoena would have improperly "tipped the hand" of the defense[166]—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.[167] 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 Government to the jury through expert testimony.[168] 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 concealment serve the broader interests of justice.

These implicit due process problems with gag orders are serious enough on their own. But gag orders on crime victims raise an even more fundamental constitutional concern: they operate as prior restraints on speech—a category of government restriction that the Supreme Court has called "the most serious and the least tolerable infringement on First Amendment rights."[169] In *Nebraska Press Association v. Stuart*, the Supreme Court addressed whether courts could issue gag orders restricting the press from publishing prejudicial pretrial publicity. As the Court explained, if a threat of sanctions after publication "chills" speech, a prior restraint "freezes" it.[170] That is precisely what happens when a court orders a crime victim not to discuss a subpoena for her confidential records with anyone—including the prosecutor handling her case. The victim's speech is not chilled. It is frozen entirely.

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[164] Michigan v. Lucas, 500 U.S. 145, 150 (1991).
[165] *See* Committee Memo., *supra* note 29, at 71.
[166] *Id.*
[167] 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.
[168] *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).
[169] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976).
[170] *Id.* at 559.

The Supreme Court has never directly addressed the constitutionality of imposing gag orders on attorneys and other trial participants.[171] While some lower courts have developed somewhat less demanding standards for gag orders on trial participants—attorneys, parties, and witnesses—than for gag orders on the press, even these orders involving participants face significant constitutional constraints. The distinction between press and participant gag orders reflects that attorneys are officers of the court and that trial participants are more directly subject to judicial control than the independent media. But as one leading First Amendment scholar notes, the law in this area is in "significant disarray," with appellate courts tending to reverse gag orders "when they do not pose serious and imminent threats to the fairness of the proceedings" while sustaining orders only when they are "narrowly tailored to eliminate serious and imminent threats."[172]

A gag order imposed on a crime victim departs from gag orders imposed on trial participants in a fundamental way. Typically gag orders (and other similar restrictions) are designed to prevent prejudicial pretrial publicity.[173] These restrictions are thus grounded in the court's role in protecting a defendant's constitutional due process right to a fair trial—which may be harmed by excessive publicity.[174] Thus, a traditional gag order might tell a prosecutor or defense attorney not to hold a public press conference about the case.

But when a court orders a crime victim not to discuss a subpoena for her confidential records with the prosecutor handling her case, it does something far more suspect. In most cases, the only purpose of the gag order is to protect the secrecy of a defendant's "trial strategy"—which (as just discussed) is not a conventionally recognized, stand-alone legal interest that can be asserted against third parties. And the gag order severs a channel of communication through which Congress intended victims to vindicate their rights. Again, the CVRA guarantees victims "the reasonable right to confer with the attorney for the Government in the case."[175]

Additionally, these gag orders are incongruous with confidentiality obligations imposed on other witnesses. Grand jury secrecy requirements—among the most stringent confidentiality obligations in our legal system—do not extend to prevent witnesses from discussing their participation with others. Indeed, in the federal system, grand jury secrecy obligations do not extend to grand jury witnesses at all.[176] Yet under the "ex parte" framework that the proposed rules encourage, defense attorneys could persuade courts to impose gag orders prohibiting crime victims from even contacting the prosecutor about a subpoena seeking their confidential records. A defendant can thus bind a victim to secrecy more strictly than the government can bind a grand jury witness. This inversion of normal legal principles should give this Committee pause.

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[171] *See* WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 23.1(b) (6th ed. 2017); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §11.2.3 at 1047 (6th ed. 2019), .
[172] RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 8-4 (1994).
[173] *See generally* WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 23.1(a) (6th ed. 2017).
[174] *See, e.g.,* Sheppard v. Maxwell, 384 U.S. 333 (1966).
[175] 18 U.S.C. § 3771(a)(5).
[176] *See* Fed. R. Crim. P. 6(e); *see also* WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 8.5(d) at 541 (6th ed. 2017) ("In the vast majority of jurisdictions, the [grand jury] witness is not bound by secrecy").

VII. The Committee Should Consider a More Narrowly Drafted Rule 17(c) With the Following Proposed Language.

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."

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 proceedings against those who kidnapped Elizabeth from her home. Attorneys for one of Elizabeth's kidnappers 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"[177] because it simply handed the materials over to the defense—in possible contravention of the Family Educational Rights and Privacy Act.[178] 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.[179] 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

[177] 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.
[178] 20 U.S.C. § 1232g(b) (2006).
[179] Cassell, *Treating Victims' Fairly*, *supra* note 5, at 904.

> 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 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.[180]

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."[181] But a result of that decision is that defense subpoenas to crime victims (and third parties holding crime victims' records) will now, seemingly inevitably, cover "protected" information. And the Committee does not appear to have analyzed carefully how typically 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 in prosecutors helps to facilitate prosecutors in discharging their obligations under Utah's crime victims' rights enactments.

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[180] Utah R. Crim. P. 14(b).
[181] Committee Memo., *supra* note 29, at 73.

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 a victim or a third party only by court order upon motion and only to obtain information relevant and admissible at trial. ~~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 of the victim's right to move to quash or modify the subpoena so that the victim can move to quash or modify the subpoena or otherwise object. 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.
>
> (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 also consider carving out violent crime and all sexual offense cases (including trafficking cases), as well as domestic violence and stalking cases.[182] As discussed at length here, these cases present special privacy and related issues. It appears that the main concerns presented to the Committee involved white-collar and other clearly non-violent cases and subpoenas directed at targets other than the personal and confidential information of victims of violent and similar crimes. 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.

To define the crimes that are carved for these purposes, the Committee could begin by using the definition of a crime of violence found in U.S.S.G. § 4B1.2(a), which is:

> A "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that:
>
> (1) Elements (Force) Clause
>
> has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) Enumerated Offenses Clause
>
> is one of the following offenses:
>
> - Murder
> - Voluntary manslaughter
> - Kidnapping
> - Aggravated assault
> - A ~~forcible~~ sex offense<u>, including any sex trafficking or sexual exploitation offense</u>
> - Robbery
> - Arson
> - Extortion
> - Use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) (e.g., sawed-off shotgun, machine gun), or
> - Unlawful possession of explosive material.[183]

As indicated in the list above, the Sentencing Commission uses the term "*forcible* sex offense," which is presumably appropriate for the purposes of dictating recommended federal prison sentences. In the context of subpoenas for personal information, however, the qualifier "forcible" is inappropriate. Sex offenses of all types raise unique and important privacy concerns—and before allowing subpoenas against victims of such crimes, the Committee should obtain

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[182] *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).

[183] U.S.S.G. § 4B1.2(a) (deletion added per recommendation).

further experience with how the rule operates in other areas. Accordingly, in light of my recommendation, the limitation to "forcible" sex offenses is stricken above.

In addition, sex trafficking crimes are added to the definition above, in light of privacy and dignity interests that potentially implicated. Such crimes are defined in 18 U.S.C. § 1591 and Chapter 77 of Title 18 (§§ 1581-1597). And sexual exploitation crimes should be included, which are found in Chapter 110 of Title 18 (§§ 2251 – 2260A).

To define "domestic violence and stalking" for these purposes, the Committee could refer to any offense covered by Chapter 110 of Title 18, e.g., 18 U.S.C. §§ 2261 – 2266.

The Committee should also include any comparable state law crimes being prosecuted under the Assimilative Crimes Act (ACA), 18 U.S.C. § 13.

Putting these all together, then, the carve out should prevent subpoenas for personal or confidential information of victims of the following crimes:

> Any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that:
>
> (1) Elements (Force) Clause
>
> has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) Enumerated Offenses Clause
>
> is one of the following offenses:
>
> - Murder
> - Voluntary manslaughter
> - Kidnapping
> - Aggravated assault
> - Sex offense, including any sex trafficking offense (e.g., 18 U.S.C. § 1591 and Chapter 77 of Title 18 (§§ 1581-1597)) and any sexual exploitation offense (e.g., Chapter 110 of Title 18 (§§ 2251 – 2260A)
> - Robbery
> - Arson
> - Extortion
> - Use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) (e.g., sawed-off shotgun, machine gun)
> - Unlawful possession of explosive materials
> - Any comparable state law crime being prosecuted under the Assimilative Crimes Act (ACA), 18 U.S.C. § 13.

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.[184]

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.

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.[185] 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."[186]

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.[187] While these cases do not directly

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[184] Cassell, *Recognizing Victims in the Federal Rules*, *supra* note 5, at 912-17.
[185] *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).
[186] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).
[187] *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

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 of Nebraska in *Bothwell v. Republic Tobacco Co.*[188] 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.[189]

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.[190] 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."[191] No financial incentive will drive lawyers to represent victims in criminal cases.[192] 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.

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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).

[188] 912 F. Supp. 1221 (D. Neb. 1995).

[189] *Id.* at 1229.

[190] *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).

[191] *Bothwell,* 912 F. Supp. at 1229.

[192] *See* Gillis & Beloof, *supra* note 190, at 698-700.

Accordingly, courts have inherent authority to appoint counsel to represent indigent victims and, indeed, may even be able to require counsel to serve without compensation.[193] The local rules of some federal courts already explicitly recognize this power.[194]

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."[195] 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.[196] 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.[197]

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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[193] *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).

[194] *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.").

[195] 28 U.S.C. § 1915(e)(1) (2000) (emphasis added).

[196] 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).

[197] *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."[198]

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."[199] 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.[200] 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.[201]

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,[202] 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.[203] 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."[204] 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.[205] 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.*[206]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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[198] United States v. Bendawald, 2025 WL 2240421 at *2 (D. Idaho Aug 6, 2025)
[199] 18 U.S.C. § 3771(c)(2) (2004).
[200] *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).
[201] *See id.* at 941-42.
[202] *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).
[203] Mallard v. U.S. Dist. Court, 490 U.S. 296, 307, 308 n.8 (1989).
[204] 28 U.S.C. § 1915(e)(1) (2006) (emphasis added).
[205] *See* BELOOF, CASSELL ET. AL, *supra* note 4, at 317-18.
[206] 766 F. Supp. 1396, 1397 (W.D.N.C. 1991).

counsel to protect her privacy interests.[207] After consulting with the victim, the court appointed counsel for her.[208] The court then allowed her counsel to participate in hearings regarding the evidence, including cross-examination of the relevant witnesses.[209] 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."[210] 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."[211]

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 hope this testimony is helpful as the Committee considers these important issues.

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[207] *Id.* at 1397.
[208] *Id.*
[209] *Id.*
[210] Naranjo v. Thompson, 809 F.3d 793 (2015).
[211] Perez v. Barr, 957 F.3d 958 (2020).

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REVISED STATEMENT OF

KRISTIN ELIASON, ESQ.

HEAD OF SERVICES

VOLARE

BEFORE

THE JUDICIAL CONFERENCE ADVISORY COMMITTEE

ON CRIMINAL RULES

REGARDING

PROPOSED AMENDMENTS TO

FEDERAL RULE OF CRIMINAL PROCEDURE 17

FEBRUARY 16, 2026

FOLLOWING THE 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"). My testimony also incorporates the testimony of Professor Paul Cassell, other members' of Volare's staff attorney team, and two *pro se* survivors who responded to requests for testimony and interviews from Volare. Additionally, I support and echo the testimony provided by Professor Cassell and Meg Garvin at the Committee's January 22, 2026 virtual hearing.

I. Introduction.

Volare is a non-profit organization in the District of Columbia that provides free legal assistance, crisis response, advocacy, case management, restorative justice, and therapeutic services to victims of crime in the District of Columbia.[1] Volare advocates for restorative, systemic 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 in a variety of proceedings, including those 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 survivors' 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.[4] Among other changes, these amendments abridge 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.

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[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.*

[4] The amendments may have many positive impacts, including increasing defendants' ability to engage in preliminary fact-finding that may reveal exculpatory evidence, such as alibi videos. Volare encourages such changes, but urges that they be made without endangering victims' statutory and privacy rights.

While Volare provides legal assistance to hundreds of crime 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 for DC. 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 is amended as proposed. As such, Volare strongly opposes the implementation of these amendments to Rule 17.

II. 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 criminal 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.

It is already common practice for defendants and defense counsel[5] to be granted subpoenas for highly sensitive victim information, such as medical records,[6] mental health records,[7] a social worker's treatment records,[8] social media records,[9] bank records,[10] records of a victim's

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[5] 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.

[6] *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."

[7] 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/.

[8] 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.

[9] 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/.

[10] 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,

consultation with a domestic violence and sexual assault crisis center,[11] and even the diary of a minor rape victim.[12] 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, the court's capacity, and what state and federal statutes protect them.

Depending on the jurisdiction, 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 court rules. While some legislative initiatives have sought to afford victims some kind of representation during the prosecutions of the crimes they experienced,[13] 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 federal prosecutors refer crime victims for independent legal advice related to their substantive rights, very few referrals are actually made by the U.S. Attorneys' Offices for the volume of victims that they interact with.[14] 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.[15]

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 prosecution of the harm-doers—and victims are regularly retraumatized by the trial process, especially 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

Do Records Victimize Victims?, Wilmington StarNews (Feb. 24, 2003), https://www.starnewsonline.com/story/news/2003/02/24/do-records-victimize-victims/30509279007/.

[11] 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).

[12] 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.

[13] *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*.

[14] In Volare's experience, the lack of referrals are often attributed to prosecutors having extremely large caseloads and little time to interact directly with victims prior to trial and/or a lack of available free crime victims' rights attorneys in the jurisdiction where the case is being prosecuted.

[15] 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).

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

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.[16] 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.[17]

The current system requires the court to affirmatively approve subpoena requests that seek personal or confidential information about a victim, with Rule 17 obliging those requests to be served "only by court order."[18] In addition, the rule requires providing notice to the victim regarding the subpoena so they have an opportunity to move to quash it. While what qualifies as personal or confidential information varies, and is not defined in the current rule or proposed amendments, victims can generally claim that their medical and mental health information, sexual history, personal communications, identity, and financial information qualify as such. If content within these categories is contested, victims have the right to be heard on the issue, which would include moving to quash the subpoena and explaining why granting a subpoena would violate their 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 amended rule is poised to create.

III. 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 the victim, victims' counsel, or the court.

The Advisory Committee has specified a number of primary amendments to Rule 17,[19] each of which poses significant risks to victims and their participation in the legal system, as will be discussed below.

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[16] *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.").
[17] *See* Fed. R. Crim. P. 17(c)(2).
[18] *See* Fed. R. Crim. P. 17(c)(3).
[19] 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.

Of the amendments to Rule 17, Volare is particularly concerned that **the following three amendments** risk creating 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 requests for subpoenas 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. Gives defendants the ability to, after approval from the court, subpoena victims' information, and receive responsive documents directly—without any rule specified limitation and without court review of the documents;

3. Entrusts defendants with the ability to bypass victim notifications *prior to the issuance* of the subpoena 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. This issue is further exacerbated by the amendment allowing the records to go directly to the moving party, bypassing any ability for the victim to make objections regarding the responsiveness of the documents prior to them being in the possession of the moving party.

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,[20] 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."[21] According to the Advisory Committee, this change was necessary to prevent inconsistent

[20] *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").
[21] 2025 Draft Amendments at *93.

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*."[22]

Indeed, the proposed Rule contemplates defendants' ability 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,[23] the proposed Rule enables defendants to subpoena victims' personal and confidential information 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 commonly issued. The new rule thus expands the possible situations where victims could be subpoenaed by something like 20-fold..."[24]

However, the proposed Rule goes even further, not only exponentially increasing the number of settings in which subpoenas can be used to obtain victims' personal and confidential 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. Nevertheless, in many non-trial scenarios, the concept of admissibility is more illusory,[25] and in some settings, the FRE does 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. In circumstances where the rules of evidence and admissibility do not apply, the "likely to be admissible" standard offers victims and other non-parties almost no shelter at all. 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.

These changes will burden federal and, very likely, 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.

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[22] *Id.* at *92.

[23] *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).

[24] Revised Statement of Paul G. Cassell, Ronald N. Boyce Professor of Crim. Law, S.J. Quinney College of Law at the Univ. of Utah, Before the Judicial Conference Advisory Comm. on Crim. Rules, at 7 (Feb. 15, 2026).

[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).

B. 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 be expected to litigate subpoenas throughout the entire pre-trial and sentencing processes, the amendments to Rule 17 also make it easier for their intimate information to be accessed directly by defendants, exacerbating victims' retraumatization, revictimization, and safety risks.

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 produced to defendants. These protective orders often redact portions of the documents to preserve victims' privacy, or tailor the manner in which defendants access the personal information altogether.[27] 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. Moreover, 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's access to significantly more sensitive and private information from victims directly—such as reproductive health, mental health, and citizenship records—because Rule 17 will no longer contemplate the court's involvement as both the court's responsibility under the Crime Victims' Rights Act (CVRA)[28] and as a safeguard in ensuring that victims are afforded their rights. Because documents will be delivered directly to defense counsel, the court, victims, and their counsel 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 representing a victim 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 victim provide the government with their medical records. When the third-party responded with production of the requested documents, in addition to containing a host of information about the victim, including her driver's 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.

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[27] 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.

[28] 18 USC § 3371. When records no longer pass through chambers, judges lose a crucial opportunity to review documents for responsiveness. This safeguard is an important part of enabling judges to comply with the requirements of the CVRA, which specifies that judges must ensure that victims are "afforded their rights." 18 USC § 3371(b)(1). But, where such records may be produced directly to counsel, judges will be unable to engage in this crucial safeguard of initial review—one which enables them to comply with their statutory obligations under the CVRA.

In a world where this rule is passed, this staff attorney confirmed that, had defense counsel requested the same records and received them directly, without redaction, 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 therapy practice." This sort of information, in addition to other more seemingly innocuous subpoena requests for information such a victim's social media activity, create an avenue for perpetrators to gather information on their victims that could very well enable them to commit further crimes against them. This is a serious risk for victims, especially victims of interpersonal crimes like domestic violence, which are often charged as misdemeanors where the defendants are on pre-trial release in the community.

This leaves victims in an untenable position, forced to choose between reporting a crime to protect themselves where they know the defendant will have unfettered, direct access to information about them, and not reporting the crime 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.

Without review of records turned over to defense, the court is no longer able to strike non-responsive requests, implement redactions, and create guardrails around defendants' access to sensitive information *before* defense has access to the information. The amended rule alienates judges from their rightful duty to ensure victims are afforded their rights.[29] This alienation is tragic considering the positive role that judges *have* previously played.[30] Volare has been called upon to represent victims after the judge engaged in a cursory review of documents produced to chambers. These judges, often concerned by the over breadth and overinclusion of private or sensitive information provided by third parties in even routine subpoenas, bring in victim's rights attorneys like those at Volare to engage in extensive redaction of non-responsive private or sensitive victim information.

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.

Furthermore, subpoenaed 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 victims' rights and information, and are vastly more likely to

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[29] *See footnote 30.*

[30] 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.

simply turn over the evidence. In practice, this is exactly what we have seen— providers are advised by their counsel, whether it be their general counsel or counsel provided through their malpractice insurance, to comply with subpoenas without any objections. 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 over disclosure, 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, the staff 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 victims' rights is not merely unrealistic—it actively divests victims of their ability to defend themselves.

To be sure, the revised Rule offers a more expedient process for defendants to get information, 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.[31] 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.

While the rule's amendments, if passed, would immediately apply to the federal courts, I believe it is helpful to make a comparison to the judicial caseloads we see in the DC Superior Court, which has proven 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.[32] Of those 13,800 cases, over 10,000 were new filings or reopened cases.[33] Using the most recent judicial assignment data, less than 45 DC Superior Court judges have criminal cases as part of their caseloads this year.[34] 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 receive victims' subpoenaed records directly without court involvement because the

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[31] 18 U.S.C. § 3771(a)(8).
[32] *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).
[33] *Id.*
[34] *2026 Judicial Assignments*, DC Courts, https://www.dccourts.gov/sites/default/files/2026-Judicial-Assignments.pdf (last visited Jan. 16, 2026).

court system *itself* is too inefficient is simply divorced from reality. But even if it *were* true, this justification for compromising victims' 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 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 me or the victim with defense's 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.

After some litigation on the issue, the court agreed to subpoena the victim's records and provide them to defense counsel and 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.

C. 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."[35] 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 attorneys 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

[35] 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.").

from their assailant to obtain their personal information until *after* the records have been provided to defense counsel.

Notifying crime victims of their rights to participate in proceedings and providing them with advance notice of criminal proceedings are prerequisites to exercise their rights throughout the criminal process. 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 legal proceedings for almost two decades, including 13 years of representing victims of crime in the assertion of the crime victims' rights in criminal proceedings. This representation occurred prior to and following the formal adoption of the 2008 amendments to D.C.'s own Rule 17.

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.[36] 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 *before* records make it to chambers—or defense counsel—it is highly likely a victim will be revictimized in this process,[37] making it even more difficult to navigate a Rule 17(c) motion without counsel.

However, even 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.

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
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> "(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.

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[36] Note that, under the current proposed rules, *ex parte* requests for victim's records are not required to be sent to chambers if the defendant is represented—they may be sent directly to defense counsel, removing this opportunity for the court to bring in victim's attorneys and advocates. 2025 Draft Amendments at *85-86 (17(c)(5)).

[37] 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).

> "(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 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 DC law requiring notice for request of certain records in spite of exceptional circumstances 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 and their counsel to make arguments about proposed redactions. The proposed amendment will be a step backwards for victims' rights on the federal and District levels.

The amendments will also likely 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.[38] 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."

Volare completed interviews with another survivor, Regan, who suffered sexual assault as a minor and did not have an attorney to represent her during the criminal process. In the course of the

[38] Volare is eternally grateful to Jane for trusting Volare with her story.

interview, Regan explained the experience of cross-examination at trial in one word: "retraumatizing." "I was already there for one thing—to try and say what happened to me, that this is my story, and to explain that." But as she explains, the experience of cross-examination was both overwhelming and incredibly isolating. Regan felt:

> "I was already not my own person. It really feels that way when you're on the stand—it feels like it is you against everybody else. Even with my parents in the gallery that are on my side, very obviously and clearly, the experience was incredibly lonely… And then you have someone grilling you about every little thing, asking 'What happened? Really? Are you sure?'
>
> I can't remember every second, but I remember how it made me feel. It made me feel like I was less than a person. The whole time, they're there, picking apart everything. Not only are they picking apart the scene, how it happened, when it happened, but they are also picking apart every single thing about you. Who they think you are. That's the sad part—they don't know who you are, and they weren't there when it happened. No one really knows except for you and the perpetrator. So when you are up there you are trying to defend *yourself* and plead your case. And no cares and no one is listening. It is so dehumanizing."

When considering the fact that the rules permitted defense counsel to get access to records without her knowledge and surprise her with those records on the stand, Regan said "I couldn't sleep that night. I was so nauseous—nauseous the weeks leading up to [trial] and the weeks following. At trial, I cried the entire day. There was not a second I wasn't sobbing my eyes out. If I had known that was a possibility...I would never have [gone to trial]. It wouldn't have been worth it."[39] Regan says this in spite of the fact that, at the end of the trial, the perpetrator was found guilty.

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,[40] 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. Indeed, Volare attorneys and their clients are regularly prohibited from discussing a defendant's Rule 17 motions with the prosecution, effectively violating a victim's right under the CVRA to confer with the prosecutor and placing stronger restrictions on the victim than they would have as a witness in a grand jury proceeding.[41]

D. 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, proceeding *ex parte* under a trial strategy justification, moves the court to receive the documents. The subpoena goes forward without notice to the victim. These records are delivered directly to defense counsel, who permits the

[39] Volare is immensely grateful to Regan for her bravery in sharing her story with Volare and the public.
[40] 2025 Proposed Amendments at *86 (17(c)(6)).
[41] 18 U.S.C. § 3771(a)(5).

> defendant to review its contents. The 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 the motion proceeded *ex parte*, the prosecutor is entirely unaware of the subpoena and the victim would be notified after defense already had the records in their possession. The court, without receipt of the documents, is likewise unaware of the contents 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.

Ultimately, each of the above three 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.

IV. The proposed rule will severely impair victims' ability to protect their rights in the District of Columbia, whose local rules generally mirror the Federal Rules of Criminal Procedure.

While the proposed rule seeks to amend the Federal Rules of Criminal Procedure, as an organization representing victims of crime in the District, I feel it is important to discuss the impact these changes would have on victims in DC Superior Court criminal proceedings. 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.[42] 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,[43] 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

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[42] *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.").

[43] *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).

ambiguity and confusion on behalf of victims of violent crime in the District who will bear the brunt of this Rule change.[44]

V. To avoid needlessly imposing negative consequences on victims, if the Advisory Committee is still committed to these amendments they 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, in many cases, to be a distinction without a difference.[45] Instead, the Advisory Committee should ensure that the proposed changes are not applied to victims of violent crime, preserving the rights of these individuals whether they proceed *pro se* or under representation.

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 might 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.

A more comprehensive, and therefore much more appropriate, option for the drafters on the Committee would be to engage in the "incremental" approach proposed by Professor Cassell, which comprehensively addresses all crimes that should be carved out:

> A "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that:
>
> (1) Elements (Force) Clause
>
> has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) Enumerated Offenses Clause
>
> is one of the following offenses:

[44] 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.

[45] *See supra* III.C and III.D.

• Murder
• Voluntary manslaughter
• Kidnapping
• Aggravated assault
• Sex offense, including any sex trafficking offense (e.g., 18 U.S.C. § 1591 and Chapter 77 of Title 18 (§§ 1581-1597)) and any sexual exploitation offense (e.g., Chapter 110 of Title 18 (§§ 2251 – 2260A)
• Robbery
• Arson
• Extortion
• Use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) (e.g., sawed-off shotgun, machine gun)
• Unlawful possession of explosive materials
• Any comparable state law crime being prosecuted under the Assimilative Crimes Act (ACA), 18 U.S.C. § 13.[46]

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. It would also allow the Committee to examine the impacts that rule change may have in these contexts before extending it to the fraught context of violent crime. Meanwhile, this revision would 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 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.

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

[46] Revised Statement of Paul G. Cassell, Ronald N. Boyce Professor of Crim. Law, S.J. Quinney College of Law at the Univ. of Utah, Before the Judicial Conference Advisory Comm. on Crim. Rules, at 36-38 (Feb. 15, 2026).

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 respectfully 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.

Thank you very much for your consideration and the opportunity to submit testimony on these issues.

Respectfully submitted,

Kristin Eliason, Esq.
Head of Services
Volare

Testimony of Jane[47], 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.

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.

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

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 be 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