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MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Thirty-three bills were introduced in the 109<sup>th</sup> Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following matters.

Privilege Waiver

In January 2006, House Judiciary Committee Chairman F. James Sensenbrenner, Jr., wrote to then Judicial Conference Secretary Leonidas Ralph Mecham requesting that the Judicial Conference initiate rulemaking to address issues arising from disclosure of matter subject to attorney-client privilege or work product protection. At its Spring 2006 meeting, the Evidence Rules Committee approved for publication proposed new Evidence Rule 502, which includes the following provisions: (1) inadvertent disclosure does not constitute a waiver if the holder of the privilege or work product protection took reasonable steps to prevent disclosure and rectify the error once it was discovered; (2) parties may protect against the consequences of waiver by seeking a confidentiality order from the court, which is binding on nonparties in federal and state court; (3) subject-matter waiver may be found only when privileged or work product materials have been disclosed and a further disclosure "ought in fairness" be required to avoid any misrepresentation that may arise from the earlier disclosure; and (4) the privileged or protected status of matter disclosed to law enforcement officials as part of an investigation is maintained as against all third parties. The proposed new rule was published for comment in August 2006, with the comment period ending on February 15, 2007.

There are several related developments. First, the Conference of Chief Justices adopted a resolution on August 2, 2006, expressing concerns with proposed Evidence Rule 502. (See Attachment A.) The Rules Committee's chair and reporter met with representatives of the Conference to discuss their concerns.

Second, the ABA House of Delegates adopted a resolution at its August 7-8, 2006, recommending that "consistent rules be established throughout the federal, state, and territorial courts to address how the courts and counsel should resolve issues involving claims of

inadvertent disclosure of materials protected by the attorney-client privilege or attorney work product doctrine.” (See Attachment B.)

Third, the President signed the “Financial Services Regulatory Relief Act of 2006” on October 13, 2006 (Pub. Law. No. 109-351). Section 607, which amends the Federal Deposit Insurance Act, has a selective waiver provision protecting disclosures to a federal banking agency, state bank supervisor, or foreign banking authority made “in the course of any supervisory or regulatory process of such agency, supervisor, or authority[.]” (See Attachment C.)

The Senate Judiciary Committee held a hearing on September 12, 2006, regarding “The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations.” The “Thompson Memorandum,” written by former Deputy Attorney General Larry Thompson, sets forth a number of factors a federal prosecutor must consider in determining whether to seek an indictment against a corporation. A subsequent clarification was issued by Associate Deputy Attorney General Robert McCallum. (The Memoranda require prosecutors to consider, among other things, a corporation’s payment of employees’ legal fees, retention of personnel who assert the Fifth Amendment privilege against self-incrimination during a government investigation, and refusal to waive the attorney-client privilege or work product protection.) The Evidence Rules Committee takes no position on this issue, and there is nothing in proposed Evidence Rule 502 that is intended either to promote or deter government attempts to seek waivers of privilege or work product protection. On December 12, 2006, Deputy Attorney General Paul McNulty issued new policy guidelines superseding the “Thompson” and “McCallum” memoranda. (See Attachment D.) The new policy requires the approval of the Deputy Attorney General before a government prosecutor may request a corporation to waive its attorney-client privilege or work product protection. If the requested privileged or protected matter consists only of “purely factual information,” the approval of the assistant Attorney General for the Criminal Division is required.

#### Marital Communication/Spousal Privilege

On July 27, 2006, the President signed the “Adam Walsh Child Protection and Safety Act of 2006” (Pub. L. No. 109-248). Under section 214, the Standing and Evidence Rules Committees are to consider whether the Federal Rules of Evidence should be amended to make the confidential marital communications privilege and the adverse spousal privilege inapplicable “in any Federal proceeding in which a spouse is charged with a crime against . . . (1) a child of either spouse; or (2) a child under the custody or control of either spouse.” (See Attachment E.) The Evidence Rules Committee discussed the matter at its November 2006 meeting and will continue to consider it for action at its Spring 2007 meeting.

### Journalists' Shield

On July 18, 2005, Representative Pence introduced the "Free Flow of Information Act of 2005" (H.R. 3323, 109<sup>th</sup> Cong., 1st Sess.). Senator Lugar introduced similar legislation on May 18, 2006. ("Free Flow of Information Act of 2006," S. 2831, 109<sup>th</sup> Cong., 2nd Sess.) Both bills generally give journalists a limited privilege to withhold the identity of a confidential informant or other confidential information. A party seeking to overcome the privilege must generally show, by clear and convincing evidence, that the information is relevant and critical and cannot reasonably be obtained from any other source.

At the request of staff for House and Senate Judiciary Committee members, comments on the legislation, prepared by Professor Capra and approved by Judges Smith and Levi, were transmitted to Congress this past summer. On September 20, 2006, the Senate Judiciary Committee held a hearing on S. 2831. There has been no further action on the legislation.

### American Samoa

On February 8, 2006, Representative Faleomavaega introduced the "Federal District Court of American Samoa Act of 2006" (H.R. 4711, 109<sup>th</sup> Cong., 2nd Sess.), which would, among other things, establish an Article I federal district court in American Samoa. The bill was referred to the House Judiciary Committee on February 8, 2006. There has been no further action on the legislation.

We are monitoring the bill because a proposed amendment to Criminal Rule 41 was published in August 2006, which authorizes a magistrate judge to issue a search warrant for property located within United States jurisdiction, but outside any state or federal judicial district. At the request of the Ninth Circuit Judicial Council's Pacific Islands Committee, the proposal excluded American Samoa although comments were invited on its exclusion.

### Other Developments of Interest

Time Computation. In September 2006, Judge Levi met with staff for the House Judiciary Committee and discussed the Time Computation Project and its aim of simplifying time counting in litigation. Judge Levi mentioned that the time-counting provisions in the rules also apply to deadlines imposed by statutes, which may create conflicts and ambiguities. Judge Levi noted that statutory amendments may also be needed. House staff indicated general approval of the concept and suggested the Rules Committees work with the Congressional Research Service to identify all statutes that may be affected by the project.

Bankruptcy Reform Act. The Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts scheduled an oversight hearing on December 6, 2006, regarding the implementation of the *Bankruptcy Abuse Prevent and Consumer Protection Act of 2005*. A statement from Judge Zilly on behalf of the Judicial Conference was transmitted to the

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subcommittee. (See Attachment F.) In addition, a letter was sent to Senator Grassley explaining the rules committees' reasons in adopting a provision, recognizing an allowance for transportation expense, in an Official Bankruptcy Form which the senator criticized. (See Attached G.)

James N. Ishida

Attachments A-G