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MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twenty-five bills were introduced in the 110th 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.

Cameras in the Courtroom

United States Supreme Court. On January 22, 2007, Senator Arlen Specter (R-PA) introduced S. 344 (110th Cong., 1st Sess.) that would, among other things, amend title 28, United States Code, “[t]o permit the televising of Supreme Court proceedings.” The legislation requires the Supreme Court to allow television coverage of all open sessions unless the Court decides, by a majority vote, that such coverage would violate a party’s due process rights. The bill is similar to legislation approved by the Senate Judiciary Committee in the last Congress. Associate Justice Anthony Kennedy testified against televising Supreme Court proceedings at a hearing before the Senate Judiciary Committee on February 14, 2007. On December 6, 2007, the Senate Judiciary Committee voted, 11-7, in favor of the bill, but there was a technical violation of committee voting rules requiring approval by a majority of senators present and voting. To avoid a potential parliamentary dispute, the committee has scheduled another vote on December 13, 2007, to ratify the earlier vote.

On March 1, 2007, Representative Ted Poe (R-TX 2nd) introduced H.R. 1299 (110th Cong., 1st Sess.), which is identical to S. 344. The bill was referred to the House Judiciary Committee. There has been no further action on the legislation.

Federal Appellate and District Courts. On May 3, 2007, Representative Steve Chabot (R-OH) introduced the “Sunshine in the Courtroom Act of 2007” (H.R. 2128 110th Cong., 1st Sess.), which provides discretion to the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings over which he or she presides. At the House Judiciary Committee markup session on October 24, 2007, three sets of amendments were adopted by voice vote. The first set of amendments: (1) barred interlocutory appeals of decisions to permit, deny, or terminate electronic media coverage; (2) expanded the current bar of “televising” jurors to include the other forms of electronic media coverage

identified elsewhere in the bill; and (3) barred electronic media coverage of the jury selection process. The second set of amendments gave the presiding judge “discretion to promulgate rules and disciplinary measures for the courtroom use of any form of media or media equipment and the acquisition or distribution of any of the images or sounds obtained in the courtroom.” They also gave the presiding judge the discretion to require written acknowledgment of the rules by anyone before being allowed to acquire any images or sounds from the courtroom. The third set of amendments deleted from the bill the description of any guidelines promulgated by the Judicial Conference as being “advisory” and struck the language indicating that presiding judges may, “at the discretion of that judge,” refer to the Conference guidelines. The House Judiciary Committee approved the legislation, as amended, by a vote of 17 to 11.

On January 22, 2007, Senator Charles Grassley (R-IA) introduced the “Sunshine in the Courtroom Act of 2007” (S. 352, 110th Cong., 1st Sess.), which is identical to H.R. 2128 and similar to legislation approved by the Senate Judiciary Committee in the last Congress. On December 6, 2007, the committee held a mark-up session on S. 352 and adopted some but not all of the changes which had been previously adopted for H.R. 2128 at its markup. During the mark-up session, however, S. 352 was withdrawn from further consideration and held over, at the request of Senator Schumer (one of the bill’s sponsors).

The Judicial Conference generally opposes cameras in the courtroom (see, e.g., JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) (The Second and Ninth Circuits allow broadcast coverage of their proceedings, upon approval of the presiding panel.) There is no provision governing televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings. On November 5, 2007, Secretary Duff sent a letter to the Senate Judiciary Committee on behalf of the Judicial Conference strongly opposing S. 352. (See attached.) The Department of Justice also sent a letter on October 30, 2007, strongly opposing the same bill. There has been no further action on H.R. 2128 or S. 352.

Journalists’ Shield

On May 2, 2007, Representative Rick Boucher (D-VA) introduced the “Free Flow of Information Act of 2007” (H.R. 2102, 110th Cong., 1st Sess.). On September 10, 2007, Senator Arlen Specter (R-PA), joined by Senators Charles Schumer (D-NY) and Richard Lugar (R-IN), introduced the “Free Flow of Information Act of 2007” (S. 2035, 110th Cong., 1st Sess.). Both bills are similar and they are similar to legislation introduced in the 109th Congress. The legislation generally gives journalists a limited privilege to withhold the identity of a confidential informant or other confidential information. A journalist may be required to reveal the identity of a confidential informant or disclose confidential information if a court finds, by a preponderance of the evidence, that a “party seeking to compel production of such testimony or document has exhausted all reasonable alternative [sources] of the testimony or document” and that “nondisclosure of the information would be contrary to the public interest, taking into

account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.” In a criminal investigation or prosecution, there must also be reasonable grounds to believe a crime has occurred and the information is critical to the investigation, prosecution, or defense. In addition, the bills specify that the content of any compelled information must be limited to the purpose of verifying published information and be narrowly tailored to avoid compelling the production of peripheral information.

On August 1, 2007, the House Judiciary Committee marked up and passed H.R. 2102, as amended. The amended bill limits the scope of a journalist’s privilege to withhold confidential information by: (1) requiring disclosure of information to prevent or identify the perpetrator of a terrorist attack or harm to national security; (2) requiring disclosure of the identity of a person involved in leaking properly classified information; and (3) authorizing law enforcement officers to seek a court order compelling production of documents and information obtained as the result of eyewitness observations of alleged criminal or tortious conduct. The bill limits coverage to a person who “regularly” engages in the listed journalistic activities and includes exceptions to the definition of “covered person.” The House passed the legislation by a vote of 398-21 on October 16, 2007.

On October 4, 2007, the Senate Judiciary Committee passed S. 2035 by a vote of 15-2. There has been no further action on the legislation.

Bail Bonds

On May 10, 2007, Representative Robert Wexler (D-FL) introduced the “Bail Bond Fairness Act of 2007” (H.R. 2286, 110th Cong., 1st Sess.). The bill is similar to legislation introduced in the 108th Congress and several previous Congressional sessions. Among other things, H.R. 2286 amends Criminal Rule 46(f)(1) by limiting the authority of a court to declare bail forfeited. (Criminal Rule 46(f)(1) provides that the court must declare bail forfeited if a person breached a condition of the bail bond.) H.R. 2286 amends the rule to limit the court’s authority to declare bail forfeited only when the person actually fails to appear physically before a court as ordered, and not when the person violates some other collateral condition of release. The House passed the bill by voice vote on June 26, 2007. There has been no further action on the legislation.

Evidence Rule 804

On January 31, 2007, Senator Dianne Feinstein (D-CA) introduced the “Gang Abatement and Prevention Act of 2007” (S. 456, 110th Cong., 1st Sess.). Section 205 directs the Judicial Conference to study the necessity and desirability of amending Evidence Rule 804(b) to allow the admission into evidence of a statement of a witness who is unavailable to testify due to a party’s wrongdoing. The Senate Judiciary Committee passed the bill with amendments on June 14, 2007, and the legislation was passed by the Senate on September 21, 2007. The bill was

received in the House and referred to the Committees on the Judiciary, Energy and Commerce, and Education and Labor. There has been no further action on S. 456.

Other Developments of Interest

Report to Congress on “Harm to Child” Exception. At its September 2007 session, the Judicial Conference adopted the Rules Committees’ “Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a ‘Harm to Child’ Exception to the Marital Privileges.” The report was prepared in response to the *Adam Walsh Child Protection and Safety Act of 2006* (Pub. L. No. 109-248), which directed the Rules Committees to study the desirability of amending the Evidence Rules to “provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime” against a child. The report was transmitted to Congress on September 18, 2007. (See attached.)

Privilege Waiver. Also at its September 2007 session, the Judicial Conference approved proposed new Evidence Rule 502 on waiver of attorney-client privilege and work-product protection. Because the Rules Enabling Act requires that an evidentiary privilege must be enacted by an affirmative act of Congress, the Conference transmitted the proposed rule to the House and Senate Judiciary Committees on September 26, 2007, with a recommendation that it be enacted according to law. (See attached.) A slightly revised committee note clarifying the intent of the rule was transmitted to Congress in late November 2007. (See attached.) On December 11, 2007, Senator Patrick Leahy (D-VT) introduced legislation to enact proposed Evidence Rule 502 (S. 2450, 110th Cong., 1st Sess.), which is identical to the proposed rule approved by the Conference in September. (See attached.)

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Attachments