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MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Sixteen 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.

Privilege Waiver

On January 4, 2007, Senator Arlen Specter (R-PA) introduced the "Attorney-Client Privilege Protection Act of 2007" (S. 186, 110th Cong., 1st Sess.). The legislation would, among other things, prohibit federal prosecutors and investigators from requesting waivers of attorney-client privilege and work-product protection from an organization or a person affiliated with that organization in any federal investigation, criminal proceeding, or civil enforcement proceeding. The legislation would also prohibit federal officials from conditioning a charging decision in a civil or criminal proceeding on whether an organization: (1) asserts the attorney-client privilege or work-product protection, (2) provides counsel or pays attorney's fees for an employee, (3) enters into a joint-defense, information-sharing, or common-interest agreement with an employee, (4) shares information relevant to the investigation or enforcement matter with the employee, or (5) fails to terminate or sanction an employee because the employee invokes his or her constitutional rights in response to a government request. There has been no further action on the legislation.

On March 8, 2007, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing titled, "The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations."¹

¹The "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.) On December 12, 2006, Deputy Attorney General Paul McNulty issued new policy guidelines superseding the "Thompson" and "McCallum" memoranda. (See Attachment A.) The new policy requires the approval of the Deputy Attorney

In August 2006, the rules committees published for comment proposed new Evidence Rule 502, which would govern the consequences of disclosing privileged or protected matter. The Evidence Rules Committee invited comment on whether to include in the rule a selective waiver provision governing disclosures made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority. The advisory committee received 73 comments on the proposed new rule and also heard testimony from more than 30 witnesses at two public hearings, which included extensive comments on the proposed selective waiver provision.

Civil Rule 11

On February 13, 2007, Representative Vern Buchanan (R-FL) introduced the “Small Business Growth Act of 2007” (H.R. 1012, 110th Cong., 1st Sess.). The legislation contains a proposed amendment to Civil Rule 11, which is similar to earlier bills that were passed by the House of Representatives but not taken up by the Senate during the last two Congresses. Title IV of H.R. 1012 would, among other things: (1) reinstate sanctions provisions deleted in 1993 from Civil Rule 11 and require a court to impose sanctions for every violation of the rule; (2) make the rule applicable in state cases affecting interstate commerce; (3) alter the venue standards for filing tort actions in state and federal court; (4) require a federal district court to suspend an attorney from the practice of law in that court for one year if the attorney had violated Rule 11 three or more times; (5) create a rebuttable presumption of a rule violation whenever a party relitigates an issue that had previously been decided; (6) provide for enhanced sanctions for anyone who “influences, obstructs, or impedes, or attempts to influence, or obstruct, or impede” a pending federal court case through the willful and intentional destruction of documents that are “highly relevant” to the case; and (7) prohibit a judge from sealing a court record in a Rule 11 proceeding unless the judge specifically finds that the justification for sealing the record outweighs any interest in public health and safety. The bill was referred to the House Judiciary Committee Subcommittee on Courts, the Internet, and Intellectual Property on March 19, 2007. There has been no further action on the legislation.

Cameras in the Courtroom

On January 22, 2007, Senator Specter 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. On the same day, Senator Chuck Grassley (R-IA) introduced the “Sunshine in the Courtroom Act of 2007” (S. 352, 110th Cong., 1st Sess.), which provides discretion to the presiding judge of a federal appellate or district court to permit the

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.

photographing, recording, or televising of court proceedings over which he or she presides. The bills are 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. There has been no further action on the legislation.

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.

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.). Senator Richard Lugar (R-IN) introduced identical legislation on the same day, the "Free Flow of Information Act of 2007" (S. 1267, 110th Cong., 1st Sess.) The bills are similar to legislation introduced in the 109th Congress and 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 a preponderance of the evidence, that the information is relevant and critical and cannot reasonably be obtained from any other source. The bills differ from legislation introduced in the last Congress in that H.R. 2102 and S. 1267 expand the category of protected journalists to include individuals maintaining web logs ("blogs") on the internet. (See Attachment B.)

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) limiting the authority of the 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.

Other Developments of Interest

American Samoa. On March 29, 2007, Representative Eni F.H. Faleomavaega (D-AS) introduced H.R. 1785 (110th Cong. 1st Sess.). Among other things, the bill requires that the Secretary of the Interior place certain questions on the ballot of the 2008 general election in American Samoa, including whether a federal court with limited jurisdiction should be established for American Samoa. The bill was referred to the House Committee on Natural Resources. No further action has been taken on the legislation.

In August 2006, the rules committees published for comment a proposed amendment to Criminal Rule 41(b), 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. No comments were submitted on the proposed exclusion of American Samoa. At its April 2007 meeting, the Criminal Rules Committee approved the proposed amendment to Rule 41(b), and it revised the amendment to include American Samoa. The proposed amendment is on the Standing Committee's agenda for this meeting.

James N. Ishida

Attachments