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May 9, 2008

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twenty-nine 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.

Protective Orders

On December 11, 2007, Senator Herb Kohl (D-WI) introduced the "Sunshine in Litigation Act of 2007" (S. 2449, 110th Cong., 1st Sess.), which is similar to legislation that has been introduced regularly since 1991. S. 2449 provides, among other things, that before a judge enters a protective order under Civil Rule 26(c), the judge must make findings of fact that the discovery sought is not relevant for the protection of public health or safety or, if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information and the protective order is narrowly drawn to protect only the privacy interest asserted. The bill would apply to protective orders sought by motion as well as agreed to by stipulation.

On March 6, 2008, the Senate Judiciary Committee adopted a substitute version of S. 2449 and then reported it favorably by a vote of 12 to 6. The substitute amendment added two provisions to the original bill: (1) there is a rebuttable presumption that the interest in protecting a person's financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information. On April 23, 2008, Representative Robert Wexler (D-FL) introduced H.R. 5884 ("Sunshine in Litigation Act of 2008," 110th Cong., 2nd Sess.), which is virtually identical to S. 2449, as passed by the Senate Judiciary Committee. There has been no further action on the legislation.

On March 4, 2008, Judge Rosenthal, on behalf of the Standing Committee and with the concurrence of the Executive Committee, sent a letter to the Senate Judiciary Committee expressing strong concerns with S. 2449, stating that "the legislation is not necessary to protect the public health and safety and that the discovery protective order provision would make it more difficult to protect important privacy interests and would make civil litigation more

expensive, more burdensome, and less accessible.” (See attached.) The Department of Justice also wrote a letter to the Judiciary Committee to share its concerns with the bill. (See attached.)

Cameras in the Courtroom

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 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. This aspect of S. 352 is identical to H.R. 2128 and similar to legislation approved by the Senate Judiciary Committee in the last Congress. On March 6, 2008, the Senate Judiciary Committee approved S. 352 by a vote of 10-8 after adopting several amendments to the bill, including the first two sets of amendments adopted by the House Judiciary Committee (described below). New amendments adopted include: (1) requiring the Judicial Conference to promulgate mandatory guidelines on shielding certain witnesses from camera coverage, including crime victims, families of crime victims, cooperating witnesses, undercover law enforcement officers, witnesses relating to witness relocation and protection, or minors under the age of 18; and (2) specifying that nothing in the bill limits the inherent authority of a court to protect witnesses, preserve the decorum and integrity of the legal process, or protect the safety of an individual. An amendment to remove the district courts from the legislation was defeated by a tie vote of 9-9.

On May 3, 2007, Representative Steve Chabot (R-OH) introduced H.R. 2128, the “Sunshine in the Courtroom Act of 2007” (110th Cong., 1st Sess.). 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.

In 2007, Secretary Duff sent letters to the House and Senate Judiciary Committees on behalf of the Judicial Conference strongly opposing S. 352 and H.R. 2128. (See attached.) The Judicial Conference has strongly opposed cameras in the trial courts (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, if approved by individual panels.) There is no provision governing televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings.

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.

On xxx, Secretary Duff sent a letter to the Senate Judiciary Committee expressing the Judicial Conference’s opposition to H.R. 2286. (See attached.) There has been no further action on the legislation.

Evidence Rule 502

On December 11, 2007, Senator Patrick Leahy (D-VT) introduced legislation to enact proposed Evidence Rule 502 on waiver of attorney-client privilege and work-product protection (S. 2450, 110th Cong., 1st Sess.), which is identical to the proposed rule approved by the Judicial Conference at its September 2007 session. On February 27, 2008, the Senate approved by unanimous consent without amendment S. 2450. There has been no further action on the legislation.

Other Developments of Interest

Crime Victims’ Representative on Rules Committee. On March 24, 2008, Director Duff sent a letter to Professor Douglas Beloof regarding his proposal to appoint a crime victims’ rights representative as a permanent member of the Criminal Rules Committee. Director Duff advised Professor Beloof that the Chief Justice had decided against appointing a victims’ rights representative to the advisory committee. The Chief Justice, Director Duff wrote, shares the Rules Committees’ concerns that “it is inadvisable to add representatives of interest or advocacy groups as permanent members of rules committees.” (See attached.)

On June 29, 2007, Senator Kyl introduced the “Crime Victims’ Rights Act of 2007” (S. 1749, 110th Cong., 2nd Sess.). The bill would amend 33 Criminal Rules and create two new rules that would explicitly apply the Crime Victims’ Rights Act to many court proceedings and procedures. The legislation also expresses a sense of Congress that the “Chief Justice . . . should designate not fewer than 1 member on each of the Committee on Rules of Practice and Procedure and the Advisory Committee on Criminal Rules for the purpose of ensuring that the rights and standing of crime victims are accounted for in the Federal criminal justice system.” There has been no further action on the bill.

James N. Ishida

Attachments