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MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twenty-three bills were introduced in the 109th 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 23, 2006, House Judiciary Committee Chairman F. James Sensenbrenner, Jr., wrote to Judicial Conference Secretary Leonidas Ralph Mecham requesting that the Judicial Conference initiate rulemaking to address the waiver of the attorney-client privilege and work product protection. Chairman Sensenbrenner expressed concern that the inadvertent waiver of privilege and protection is causing significant expense and delay in the litigation process and urged the Conference to promulgate a rule that would: (1) protect against inadvertent waiver of privilege and protection, (2) permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and (3) allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in subsequent proceedings. Chairman Sensenbrenner recognized that legislation would be necessary to implement the rule under the Rules Enabling Act. (See attached.)

Secretary Mecham responded to Chairman Sensenbrenner on February 13, 2006, advising him that the Advisory Committee on Evidence Rules would be holding a mini-conference in April 2006 to discuss the law of privileges and work product protection and that the advisory committee will be considering a proposed new rule on waiver of privilege and protection. (See attached.) At its April 24-25, 2006, meeting, the Evidence Rules Committee approved for publication proposed new Evidence Rule 502, which the Standing Committee will be considering at its June 2006 meeting.

Bankruptcy

The "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (Pub. L. No. 109-8) (hereinafter "the Act") did not provide sufficient time to prescribe national rules under the Rules Enabling Act. In August-September 2005, the Bankruptcy Rules Committee developed Interim Rules to implement the Act, which the Executive Committee then authorized for distribution to the courts to be adopted as local rules. The Bankruptcy Rules Committee has proposed amendments to the Federal Rules of Bankruptcy Procedure largely based on the Interim Rules.

On March 13, 2006, Senators Charles Grassley and Jeff Sessions wrote to Chief Justice Roberts expressing concerns that the Interim Rules did not faithfully implement the Act. Specifically, the senators indicated that the Interim Rules: (1) place an unfounded burden on creditors by requiring that motions to dismiss be filed "with particularity," and (2) fail to require the debtor's counsel to attest, under oath, to the accuracy of the debtor's schedules and statements. These concerns were raised in an earlier letter from Senator Grassley to Chief Justice Rehnquist on August 18, 2005. (In responding to Senator Grassley, Secretary Mecham wrote to the senator on September 15, 2005, informing him of the work of the Rules Committees to implement the Act. Secretary Mecham also enclosed a memorandum from Professor Jeffrey Morris, which responded that the Interim Rules did, in fact, implement the Act's provisions. See attached.)

The Bankruptcy Rules Committee considered these concerns at its March 8-10, 2006, meeting. The Committee concluded that the motion to dismiss must be pleaded with particularity to: (1) comply with general standards applicable to all motions under the Federal Rules of Bankruptcy Procedure; and (2) give the debtor enough information to properly respond. The Committee also concluded that amending the rules and Official Forms to reiterate the effect of an attorney's signature on a pleading was not necessary or appropriate because the statutory requirement is self-executing.

In addition to the above concerns, Senators Grassley and Sessions raised two new concerns with Official Forms 22A-C, the means-testings forms. The first questions whether the Official Forms satisfy the statutory requirement showing "how each such amount [income and calculations that determine whether a legal presumption of abuse arises] is calculated." The second suggests a possible double counting of the debtor's housing expenses as part of the means-testing calculations. On April 6, 2006, Secretary Mecham wrote the senators, advising them of the Committee's actions on their concerns. Secretary Mecham also enclosed another memorandum from Professor Morris, which responded that the means-testing forms are consistent with the statutory requirements. (See attached.) Secretary Mecham said that the Rules Committees would be considering afresh all comments on proposed permanent changes to the Federal Rules of Bankruptcy Procedure during the public comment period.

USA PATRIOT Act

In August 2005, the Rules Committees published for comment a proposed amendment to Criminal Rule 32(k), which would have required a court to enter its statement of reasons on a uniform judgment form prescribed by the Judicial Conference. In December 2005, the Criminal Law Committee approved a recommendation to the Judicial Conference that the Statement of Reasons form be separated from the Judgment and Conviction form. The Criminal Law Committee also recommended to the Criminal Rules Committee that the proposed amendment to Criminal Rule 32(k) require the use of both the Judgment form and Statement of Reasons form as approved by the Judicial Conference.

On March 9, 2006, the President signed the "USA PATRIOT Improvement and Reauthorization Act of 2005" (Pub. L. No. 109-177). Section 735 amends 28 U.S.C. § 994(w) to require the sentencing court to enter a written statement of reasons on a form issued by the Judicial Conference and approved by the United States Sentencing Commission. The legislation effectively rendered moot the Criminal Rules Committee's proposal to amend Criminal Rule 32(k). In light of the legislation, the Criminal Law Committee expressed its intent to withdraw its recommendation. The Committee voted to withdraw the proposed amendment at its April 2006 meeting. Judge Cassell wrote to Judge Bucklew on May 8, 2006, formally withdrawing the Criminal Law Committee's recommendations on the proposed amendment to Criminal Rule 32(k). (See attached.)

(In addition, Section 507 of the Act is similar to provisions in the "Streamlined Procedures Act of 2005," which generally limits federal habeas corpus review of state court convictions in capital and non-capital cases. *See* S. 1088 and H.R. 3035, 109th Cong., 1st Sess.)

Cameras in the Courtroom

On March 30, 2006, the Senate Judiciary Committee approved two bills that would permit televising proceedings in federal courts. S. 1768 would, among other things, amend title 28, United States Code, "[t]o permit the televising of Supreme Court proceedings." (109th Cong., 1st Sess.) 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. S. 829 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. ("Sunshine in the Courtroom Act of 2005," 109th Cong., 1st Sess.)

On November 9, 2005, the House passed the "Secure Access to Justice and Court Protection Act of 2005" (H.R. 1751, 109th Cong., 1st Sess.). Section 22 of the bill is similar to S. 829 and provides discretion to the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings. (The legislation also has a sunset provision that rescinds the authority of a district court judge three years after enactment of the Act.) In addition, H.R. 1751 authorizes the Judicial Conference to promulgate advisory

guidelines on the use of electronic media in the courtroom. 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.) Justices Anthony Kennedy and Clarence Thomas spoke against legislation permitting televising Supreme Court oral arguments at a House Appropriations Subcommittee hearing on April 4, 2006. There is no provision governing televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings.

Other Developments of Interest

Class Actions. Section 6 of the "Class Action Fairness Act of 2005" (Pub. L. No. 109-2) required the Judicial Conference to report by February 18, 2006, on actions taken by the Conference to improve the fairness of class action settlements and attorneys fees awards in class actions. In February 2006, the Executive Committee on behalf of the Judicial Conference adopted the report on class action settlements and attorney fee awards in class actions, which was submitted by the Committee on Rules of Practice and Procedure, and transmitted it to Congress. (See attached.)

Asbestos. In February 2006, the Senate postponed further consideration of the "Fairness in Asbestos Injury Resolution Act of 2005" (S. 852, 109th Cong., 1st Sess.). The bill's proponents fell one vote short of the necessary 60 votes to proceed. There has been no further action on the legislation and passage remains uncertain.

James N. Ishida

Attachments