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MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Thirty-one 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.

Evidence Rule 502

On September 19, 2008, the President signed into law S.2450, a bill adding new Evidence Rule 502 to the Federal Rules of Evidence (Pub. L. No. 110-322, 122 Stat. 3537) (see attached). Among other things, the new rule protects against the waiver of the attorney-client privilege or the work product protection when information is inadvertently disclosed.

New Evidence Rule 502 is the culmination of three years of intense work by the Rules Committees and supporters of the rule. In 2005, the Evidence Rules Committee began work on a draft rule. The advisory committee held a mini-conference in April 2006 with a distinguished group of judges, lawyers, law professors, bar organizations, and government regulators to review the proposed rule. The committee also solicited input on the draft rule from the Conference of Chief Justices, revising the rule by limiting its scope to address the Conference's federalism concerns. After making these and other changes, the advisory committee published the revised rule for public comment in August 2006. The response to the proposed rule was significant. The committee received more than 70 comments and heard testimony from over 30 witnesses at two public hearings. In light of the public comment and witness testimony, the advisory committee made further changes to the rule. The revised rule was subsequently approved by the Committee on Rules of Practice and Procedure and the Judicial Conference. On September 26, 2007, Judge Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure, transmitted to Congress proposed new Evidence Rule 502.

Though the Senate passed the bill containing Rule 502 in February 2008, further progress was stymied in the House. During the next six months, Judge Rosenthal worked tirelessly to pass the bill. Persuaded by Judge Rosenthal, and with the strong support of the major bar associations, prominent lawyers, and others interested in the improvement of judicial

administration, the House passed the Rule 502 legislation without change in September 2008. (Congress later added additional language to the explanatory note accompanying Rule 502.)

New Evidence Rule 502 applies to all cases filed after September 19, 2008, and, in so far as is just and practicable, to all pending cases. The text of the new rule, statement of Congressional intent, and other background information are posted on the Judiciary's Federal Rulemaking web site at <http://www.uscourts.gov/rules/evidence502.html>.

Other Developments of Interest

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 had 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 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. On July 31, 2008, the House Judiciary Subcommittee on Commercial and Administrative Law held a hearing on H.R. 5884. Judge Kravitz testified and submitted a written statement on behalf of the Judicial Conference, opposing H.R. 5884. (See attached.) Judge Kravitz's follow-up response is also attached.

James N. Ishida

Attachments