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MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twelve bills were introduced in the 111th 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.

Time Computation

On March 18, 2009, Senator Patrick Leahy (D-VT) introduced the "Statutory Time-Periods Technical Amendments Act of 2009." (S. 630, 111th Cong., 1st Sess.) The next day, Representative Henry C. "Hank" Johnson (D-GA 4th) introduced H.R. 1626, which is identical to S. 630. (See attached.) Both bills amend 28 statutory deadlines making them consistent with time-computation amendments to the Federal Rules of Appellate Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, and Federal Rules of Criminal Procedure approved by the Supreme Court on March 26, 2009. In May 2009, the President signed H.R. 1626 after it was passed by the House and Senate on April 22, 2009, and April 27, 2009, respectively. Both the rules amendments and changes to the statutory deadlines are expected to take effect on December 1, 2009.

On May 1, 2009, Judge Rosenthal sent a memorandum to all chief judges informing them that the national rules amendments will affect the time deadlines contained in local rules and suggesting that the courts review every time deadline in their local rules and consider making appropriate adjustments. (See attached.) Judge Rosenthal also suggested that amendments to local rules take effect on December 1, 2009, consistent with the effective date of the federal rules amendments and statutory changes.

Judge Rosenthal met with Congressional Members and their staff and worked tirelessly to get the legislation introduced and passed. Judge Thomas Thrash, Jr., a former member of the Standing Rules Committee, played a key role.

Protective Orders.

On March 5, 2009, Senator Herb Kohl (D-WI), along with Senator Lindsay Graham (R-SC), introduced the “Sunshine in Litigation Act of 2009” (S. 537, 111th Cong., 1st Sess.), which is similar to legislation that had been introduced regularly since 1991. On March 12, 2009, Representative Robert Wexler (D-FL), along with Representative Jerry Nadler (D-NY), introduced the same proposal as H.R. 1508. (111th Cong., 1st Sess.)

The legislation 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.

The bills have been referred to the Senate and House Judiciary Committees. No further action has been taken on the legislation.

The ABA adopted a resolution at its February 2009 meeting in which it “reaffirms its support for the Congressionally-enacted, judicial rulemaking process set forth in the Rules Enabling Act and opposes those portions of the Sunshine in Litigation Act of 2007 of the 110th Congress (S. 2449) or other legislation that would circumvent that process” and “opposes the Sunshine in Litigation Act of 2007 of the 110th Congress . . . or other legislation that would impose similar requirements or burdens on the federal courts above and beyond the current (2008) provisions of Fed. R. Civ. P. 26(c) for entering or modifying protective orders or sealing settlements.” On April 13, 2009, the ABA wrote to the Senate and House Judiciary Committees expressing its strong opposition to the Sunshine in Litigation Act of 2009. (See attached.)

In the last Congress, Judge Rosenthal, on behalf of the Standing Committee and with the concurrence of the Executive Committee, sent a letter to the Senate Judiciary Committee on March 4, 2008, 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.” The Department of Justice also wrote a letter to the Judiciary Committee to share its concerns with the bill.

Journalists’ Shield

On February 11, 2009, Representative Rick Boucher (D-VA) introduced the “Free Flow of Information Act of 2009.” (H.R. 985, 111th Cong., 1st Sess.) Senator Arlen Specter (D-PA) introduced a similar bill on February 13, 2009. (S. 448, 111th Cong., 1st Sess.) Both bills are similar to legislation introduced in the last two Congresses. H.R. 985 and S. 448 generally give

journalists a limited privilege to withhold the identity of a confidential informant or other confidential information unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the information sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the information sought is essential to the successful completion of that matter; (4) in any matter in which the information sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information is contrary to public interest.

On March 31, 2009, the House passed H.R. 985 by voice vote. There has been no further action on the legislation.

Cameras in the Courtroom

On March 19, 2009, Senator Charles Grassley (R-IA), joined by Senators Charles Schumer (D-NY), Patrick Leahy (D-VT), Arlen Specter (D-PA), Lindsey Graham (R-SC), Russ Feingold (D-WI), John Cornyn (R-TX), and Richard Durbin (D-IL), introduced the "Sunshine in the Courtroom Act of 2009." (S. 657, 111th Cong., 1st Sess.) The legislation is similar to bills introduced in the past two Congresses and generally provides that the presiding judge of proceedings in the district court, court of appeals, and Supreme Court, may, at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising of any court proceeding over which the judge presides. S. 657 also provides that the presiding judge must not allow electronic media coverage if that judge determines that such coverage would violate the due process rights of any party. In appellate proceedings involving more than one judge, if a majority of judges participating determine that the electronic media coverage would violate the due process rights of any party, then the presiding judge must not permit media coverage in that case.

S. 657 also directs the Judicial Conference to promulgate mandatory guidelines no later than six months after enactment that shield certain witnesses from electronic media coverage, including minors, crime victims, and undercover law enforcement officers. Media coverage is not permitted until the Conference promulgates the mandatory guidelines.

On January 9, 2009, Representative Ted Poe (R-TX) introduced H.R. 429, a bill permitting the televising of Supreme Court proceedings. (111th Cong. 1st Sess.) Senator Specter introduced S. 446, a bill identical to H.R. 429, on February 13, 2009. The legislation would require the Supreme Court to permit television coverage of all open sessions unless the Court

decides, by majority vote of the justices, that allowing such coverage would constitute a violation of the due process rights of one or more parties before the Court.

The bills were referred to the Senate and House Judiciary Committees. No further action has been taken 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. In November 2007, Secretary Duff sent letters to the House and Senate Judiciary Committees on behalf of the Judicial Conference strongly opposing the legislation. The Department of Justice also sent a letter on October 30, 2007, strongly opposing it.

Other Developments of Interest

Privacy. On February 27, 2009, Senator Joseph Lieberman (I-CT) wrote to Judge Rosenthal expressing, among other things, concerns about the presence of personal information contained in publicly available court records. (See attached.) Judge Rosenthal responded on March 12, 2009, agreeing that incidents of personal identifier information in court filings is disturbing and must be addressed. Judge Rosenthal reported on the immediate steps taken by the Judiciary to address the problem as well as ongoing efforts by the Standing Committee's Privacy Subcommittee, which has been tasked with examining how the 2007 privacy rules amendments have worked in practice, why personal identifier information continues to appear in some court filings, whether the privacy rules should be amended, and how to make implementation of the rules more effective. (See attached.)

Bankruptcy Home Mortgages. On January 6, 2009, Senator Richard Durbin (D-IL) introduced the "Helping Families Save Their Homes in Bankruptcy Act of 2009." (S. 61, 111th Cong., 1st Sess.) On the same day, Representative John Conyers, Jr. (D-MI) introduced H.R. 200, a bill identical to S. 61. (H.R. 200, 111th Cong., 1st Sess.) The legislation would, among other things, authorize bankruptcy courts to modify ("cramdown") both the interest and principal amount due on a mortgage on a debtor's principal residence.

On March 5, 2009, the House of Representatives passed H.R. 1106 by a vote of 234-191, a bill that included provisions of H.R. 200. However on April 30, 2009, the Senate rejected an amendment offered by Senator Durbin that would have added to S. 896, a bill aimed at reducing foreclosures, provisions that would have authorized a bankruptcy court to modify a home mortgage.

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Attachments