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December 7, 2009

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Fifteen 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:

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, the "Free Flow of Information Act of 2009," on February 13, 2009. (S. 448, 111th Cong., 1st Sess.) Both bills are similar to legislation introduced in the last two Congresses. The legislation generally gives 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) nondisclosure of the information is contrary to public interest; and (5) 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.

On March 31, 2009, the House passed H.R. 985 by voice vote. The Senate Judiciary Committee has considered a series of proposed amendments to S. 448 at several meetings held to mark up pending legislation. On September 10, 2009, the Senate Judiciary Committee adopted a substitute amendment to S. 448 by unanimous consent. This amendment narrowed the field of reporters eligible for protection under the bill to those whose "primary intent" is to "investigate events and procure material in order to disseminate to the public news or information concerning,

local, national, or international events or other matters of public interest.” The amendment also provides for in-camera review and an expedited appeal process.

Several Judiciary Committee members expressed concerns that S. 448 would not sufficiently protect national security. In late October, Senators Arlen Specter and Charles E. Schumer (D-NY) reached an agreement with the Obama administration that addressed the national security concerns raised about the bill. At its November 18, 2009, markup session, the Senate Judiciary Committee adopted a substitute amendment offered by Senator Specter that incorporated this agreement. Specifically, the substitute amendment provides: (1) the burden would be on media organizations to show that the disclosure of information sought in criminal matters would be contrary to the public interest; (2) the Attorney General would be required to certify that the government sought the information in accordance with Justice Department guidelines for subpoenaing the media; and (3) the shield would not apply to national security matters in which the government seeks to prevent future acts. The Committee considered S. 448 again on December 3, 2009, but adjourned after considering only two amendments. No further action has been taken on the legislation, and the next markup session has been scheduled for December 10, 2009.

#### 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 (R-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.) On June 25, 2009, Representatives William Delahunt (D-MA) and Dan Lungren (R-CA) introduced a similar bill, the “Sunshine in the Courtroom Act of 2009.” (H.R. 3054, 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 their discretion, permit the photographing, electronic recording, broadcasting, or televising of any court proceeding over which that judge presides. The bill also provides that the presiding judge must not allow electronic media coverage if it is determined that such coverage would constitute a violation of the due process rights of any party.

Under the Senate bill, the legislation also authorizes the Judicial Conference to promulgate advisory guidelines on the management and administration of electronic media coverage. The Conference must, however, 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 February 13, 2009, Senator Specter introduced S. 446, a bill to permit the televising of Supreme Court proceedings. (111th Cong., 1st Sess.) This bill is identical to H.R. 429, which

was introduced on January 9, 2009, by Representative Ted Poe (R-TX). The bills 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. On November 5, 2009, Senator Specter introduced S. Res. 339, a resolution expressing the sense of the Senate that the Supreme Court should permit live television coverage of its proceedings unless it decides that allowing such coverage would constitute a due process violation of the rights of one or more parties. (111th Cong., 1st Sess.) No further action has been taken on the legislation.

On July 23, 2009, Secretary Duff sent a letter to the Senate Judiciary Committee expressing strong opposition to the Senate camera bill. (See attached.) Secretary Duff sent a second letter to the Senate Judiciary Committee on September 23, 2009, stating that the Conference would oppose S. 448, the "Free Flow of Information Act of 2009," if S. 657, the "Sunshine in the Courtroom Act of 2009," was added as an amendment to S. 448. No further action has been taken on the legislation.

The Judicial Conference does not speak for the Supreme Court on the issue of cameras or other policy matters. The Conference strongly opposes 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 upon approval of the presiding panel.) There is no provision governing the televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings.

#### Protective Orders and Sealed Settlements

On March 5, 2009, Senators Herb Kohl (D-WI) and Lindsay Graham (R-SC) introduced the "Sunshine in Litigation Act of 2009." (S. 537, 111th Cong., 1st Sess.) One week later, Representatives Robert Wexler (D-FL) and 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 are similar to legislation introduced in the last several Congresses.

On June 4, 2009, the House Judiciary Subcommittee on Commercial and Administrative Law held a hearing on H.R. 1508. Judge Kravitz testified at the hearing on behalf of the Rules

Committees. A written statement submitted by Judge Kravitz at the hearing is attached. No further action has been taken on the legislation.

#### Notice Pleading

On July 22, 2009, Senator Arlen Specter (D-PA) introduced the “Notice Pleading Restoration Act of 2009.” (S. 1504, 111th Cong., 1st Sess.) The legislation provides that courts must not dismiss a complaint under Civil Rule 12 except under the standards set forth in *Conley v. Gibson*, 355 U.S. 41 (1957), effectively overruling the Supreme Court’s decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Although several hearings have been held on the legislation, no further action has been taken.

On November 19, 2009, Representative Jerrold Nadler (D-NY) introduced a similar bill, “Open Access to Courts Act of 2009.” (H.R. 4115, 111th Cong., 1st Sess.) The bill provides, among other things, that a court must not dismiss a complaint under Civil Rule 12 unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. No further action has been taken on the legislation.

#### Other Developments of Interest

Time Computation — Bankruptcy Rules. The time-computation rules amendments to the Federal Rules of Appellate Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, and Federal Rules of Criminal Procedure and parallel changes to 28 statutory deadlines took effect on December 1, 2009.

Last month, Congressional staffers raised concerns that time changes to 12 Bankruptcy Rules that shorten the time to act from 15 to 14 days would cause problems for debtors and bankruptcy attorneys who are unaware of the changes. To address the concerns, the staffers proposed legislation that would delay for six months the effective date of the 12 Bankruptcy Rules amendments. Judge Rosenthal, Judge Swain, and AO staff successfully convinced Congressional staffers that actions taken by the Rules Committees and the Judiciary would obviate the need for legislation.

On November 16, 2009, Judge Rosenthal and Judge Swain sent a memorandum to the courts advising them that it is the position of the Bankruptcy Rules Committee that for a six-month transition period starting on December 1, 2009, a filing that was timely under the current versions of the 12 rules but late under the amended rules should be treated as the product of “excusable neglect” within the Rule 9006(b)(1) provision authorizing an enlargement of time requested after the deadline has expired. The memorandum also requested that courts continue their efforts to publicize the time-computation rules changes. (See attached.)

Habeas Rule 11. New Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts and new Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts also took effect on December 1, 2009. The new rules require the district court to issue or deny a certificate of appealability simultaneously with the filing of the final order disposing of the petition or motion on the merits. The National Association of Criminal Defense Lawyers raised a concern about the last two sentences of amended Rule 11 that provides that the denial of a certificate of appealability is not separately appealable and that motions for reconsideration of the denial of a certificate does not extend the time to file an appeal from the underlying judgment denying habeas relief. Congressional staffers asked for clarification on the amended rules and Judge Tallman provided a memorandum clarifying the amendments do not change or limit existing law on the tolling effect of timely motions for reconsideration of the judgment denying relief or the deadlines for filing a notice of appeal challenging the underlying judgment. (See attached.) A similar clarification was sent in a memorandum by Secretary Duff to the courts on November 25, 2009. (See attached.)

Heather Williams

Attachments