



JAMES C. DUFF
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JOHN K. RABIEJ
Chief

JILL C. SAYENGA
Deputy Director

WASHINGTON, D.C. 20544

Rules Committee Support Office

May 18, 2010

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Nineteen 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:

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. On December 11, 2009, H.R. 4115 was referred to the Subcommittee on Courts and Competition Policy. The subcommittee held a hearing on the bill on December 16, 2009.

In March 2010, Judge Rosenthal and Judge Kravitz wrote to Representative Henry C. "Hank" Johnson (D-GA), chair of the Subcommittee on Courts and Competition Policy, and Representative John Conyers, Jr. (D-MI), chair of the House Judiciary Committee, commenting on the legislation and informing them of the work of the Rules Committees in this area. (See attached.)

On May 11, 2010, Secretary Duff on behalf of the Judicial Conference wrote to Chairman Conyers and Representative Lamar Smith (R-TX) opposing the legislation and urging them to allow the Rules Enabling Act process to work through the Supreme Court's decision in *Twombly* and *Iqbal*. (See attached.) A mark-up of the bill has been scheduled for May 25.

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 any party’s due process rights.

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 April 29, 2010, the Senate Judiciary Committee passed without amendment S. 657.

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.) The Senate Judiciary Committee passed without amendment S. 446 on April 29, 2010.

On July 23, 2009, Secretary Duff sent a letter on behalf of the Judicial Conference to the Senate Judiciary Committee expressing strong opposition to the Senate camera bill. 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.

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.

Costs

On April 20, 2010, Representative Johnson introduced the “Fair Payment of Fees Act of 2010.” (H.R. 5069, 111th Cong., 1st Sess.) H.R. 5069 amends Civil Rule 68 and Appellate Rule 39 to authorize the waiver of court fees if the court determines that the interests of justice justifies such a waiver, and that “the interest of justice includes the establishment of constitutional or other important precedent.” The Supreme Court granted certiorari in the underlying case that prompted the legislation. It is expected that no further action on the legislation will be taken until the Court decides the case.

Other Developments of Interest

Extensions of Time for Federal Officers/Employees Sued in their Individual Capacity.

In 2003, the Department of Justice proposed amending Appellate Rules 4 and 40. Both rules provide extra time when the United States or its officer or agency is a party. The Department’s proposal would make clear that additional time is provided when a federal officer or employee is sued in his or her individual capacity for an act or omission occurring in connection with official duties. In November 2004, the Appellate Rules Committee approved the proposed amendments to Rules 4 and 40 for publication. The Standing Committee approved them for publication, and the proposals were published for public comment in August 2007.

After the proposed rules amendments were published for public comment, the Supreme Court issued its decision in *Bowles v. Russell*, 551 U.S. 205 (2007). *Bowles* held that the limits set forth in 28 U.S.C. § 2107(a) to reopen the time to file an appeal are jurisdictional in nature. The advisory committee concluded that it did not have the authority to amend Appellate Rule 4 because they are based on the statutory deadline. The Department eventually withdrew its proposal to amend Appellate Rule 4, but recommended moving forward on its proposal to amend Appellate Rule 40 because Rule 40 did not raise *Bowles* concerns. The advisory committee, however, was reluctant to seek an amendment to Rule 40 without a corresponding change in Rule 4 because both rules use the same language. The advisory committee eventually decided, with the Department’s concurrence, to seek legislation that would amend 28 U.S.C. § 2107, in addition to a coordinated package of proposed amendments to Rules 4 and 40.

James Ishida