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October 10, 2005

Dear Representative:

I write regarding H.R. 420, the "Lawsuit Abuse Reduction Act." The American Bar Association strongly opposes this legislation and respectfully urges you to vote "No" when it is brought to the floor of the House of Representatives in the near future.

Without any demonstrated problem with the enforcement or operation of Rule 11, H.R. 420 would (1) impose mandatory sanctions for any violation of Rule 11 of the Federal Rules of Civil Procedure and remove its current "safe harbor" provisions; (2) enforce a mandatory suspension from practicing law of an attorney who has violated Rule 11 three times; (3) impose federal mandatory Rule 11 sanctions upon any civil state court claim that materially affects interstate commerce; and (4) impose specific venue designation rules upon any personal injury claim filed in any state or federal court.

As a threshold matter, the ABA strongly opposes the legislation because these amendments to the Federal Rules of Civil Procedure are being proposed without utilizing the process set forth in the Rules Enabling Act. This departure from the procedure of the Rules Enabling Act is also being proposed without any demonstrated problem with the operation of the Rules Enabling Act. The ABA fully supports the Rules Enabling Act process, which is based on three fundamental concepts: (1) the essential and central role of the judiciary in initiating judicial rulemaking; (2) the use of procedures that permit full public participation, including participation by members of the legal profession; and (3) provision for a Congressional review period. We view the proposed rules changes to the Federal Rules in H.R. 420 as an unwise retreat from the balanced and inclusive process established by Congress when it adopted the Rules Enabling Act.

In 28 U.S.C. §§ 2072-74, Congress prescribed the appropriate procedure for the formulation and adoption of rules of evidence, practice and procedure for the federal courts. This well-settled, congressionally specified procedure contemplates that evidentiary and procedural rules will in the first instance be considered and drafted by committees of the United States Judicial Conference, will thereafter be subject to thorough public comment and reconsideration, and will then be submitted to the United States Supreme Court for consideration and promulgation. Finally and most importantly, the proposed rules resulting from the inclusion of all of the stakeholders, is transmitted to Congress, which retains the ultimate power to veto any rule before it takes effect.

This time-proven process proceeds from separation-of-powers concerns and is driven by the practical recognition that, among other things:

- 1) rules of evidence and procedure are inherently a matter of intimate concern to the judiciary, which must apply them on a daily basis;
- 2) each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential to avoid unintended consequences; and
- 3) the Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation.

We do not question Congressional power to regulate the practice and procedure of federal courts. Congress exercised this power by delegating its rulemaking authority to the judiciary through the enactment of the Rules Enabling Act, while retaining the authority to review and amend rules prior to their taking effect. We do, however, question the wisdom of circumventing the Rules Enabling Act, as H.R. 420 would do. The fact that the proposed changes to the Rules are flawed should give pause to those who are asked to support the circumvention of the process of the Rules Enabling Act. Not following the processes set forth in the Rules Enabling Act would frustrate the purpose of the act and potentially harm the effective functioning of the judicial system.

The ABA supports the current version of Rule 11 because it has proven to be an effective means of discouraging dilatory motions practice and frivolous claims and defenses. There has been no demonstrated problem with the enforcement or operation of Rule 11. The ABA opposes the provisions in H.R. 420 to enforce a mandatory suspension of an attorney for Rule 11 violations. The filing of frivolous claims and defenses is an important issue that deserves attention. It is appropriate and right for courts to have the ability to sanction attorneys for abusing the legal system by filing claims meant to harass or intimidate litigants. It is, however, important to remember that Rule 11 violations can be levied even when, in hindsight, there may have been a legitimate claim, especially for civil rights cases or environmental litigation. Attorneys practicing in these areas may be subject to more Rule 11 sanctions than attorneys who handle other types of cases.

A system that provides for mandatory suspension of attorneys with three Rule 11 violations would have an extremely chilling effect on the justice system and could disproportionately impact attorneys who practice in particular areas, such as civil rights or environmental law. This type of mandatory suspension is even more damaging when taken in combination with efforts to require mandatory sanctions for Rule 11 violations, which cannot be appealed until after a judgment is rendered in a case.

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Equally important, the ABA strongly opposes enactment of H.R. 420 because Congress should not dictate venue rules for state courts. State rules relating to venue and jurisdiction should be developed at the state level and supported by extensive study, vetted publicly, and made subject to comment by the legal profession. To do otherwise would violate our long-established principles of federalism. It should remain solely within the purview of the individual states to establish local rules for procedures, either through their state legislatures or through a grant of rulemaking authority to their state judiciaries.

The imposition of Rule 11 mandatory sanctions upon the individual state courts would also violate our time-honored principles of federalism. Earlier this year, the Conference of Chief Justices adopted a resolution in opposition to federal usurpation of state court authority as guaranteed by the United States Constitution. This resolution “strongly opposed” the enactment of any federal legislation that would “drastically change the traditional state role in determining ethics, jurisdiction and venue rules in state litigation.” The determination of the states to establish and operate their judicial systems in accordance with principles important to each state is entitled to respectful deference from the federal government. Great deference should also be given to the views of these state court leaders.

For these compelling reasons the ABA strongly opposes the enactment of H.R. 420. We respectfully urge you to vote “No” on this legislation.

Sincerely,

A handwritten signature in dark ink, reading "Michael S. Greco". The signature is written in a cursive, flowing style with a large initial "M".

Michael S. Greco