AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 14, 2005

RESOLVED, That the American Bar Association reaffirms its support for the judicial rulemaking process set forth in the Federal Rules Enabling Act and opposes those portions of the proposed "Lawsuit Abuse Reduction Act" of the 108th Congress (H.R. 4571) or other similar legislation that would circumvent that process.

FURTHER RESOLVED, That the American Bar Association opposes enactment of any Congressional legislation that would violate principles of federalism by 1) imposing the provisions of Rule 11 of the Federal Rules of Civil Procedure upon any civil action filed in a state or territorial court; or 2) imposing venue designation rules or provisions upon a personal injury claim filed in a state or territorial court.

FURTHER RESOLVED, That the American Bar Association supports the current version of Rule 11 of the Federal Rules of Civil Procedure, which became effective December 1, 1993, as a proven and effective means of discouraging dilatory motions practice and frivolous claims and defenses.

FURTHER RESOLVED, That the American Bar Association opposes enactment of any Congressional legislation that would: 1) change the current version of Rule 11 for the purpose of imposing mandatory sanctions and removing its current provisions that encourage attorneys to correct, modify or withdraw pleadings or motions; 2) impose any form of mandatory suspension due to prior violations of Rule 11; or 3) extend Rule 11 to problematic discovery motions, requests, responses or non-responses that are subject to Rule 26(g) or Rule 37.

Report

Among its primary goals, the American Bar Association strives "to preserve the independence of the legal profession and the judiciary as fundamental to a free society," and to "achieve the highest standards of professionalism, competence and ethical conduct."[1] The Association's longstanding commitment to an independent, well functioning, ethical legal system is evidenced by the extensive policy developed in support of these primary Association goals. This Recommendation, supported by this Report, continues the ABA's efforts to preserve an independent, efficient judiciary and an ethical legal system by building on existing ABA policy to address the legislation introduced in the 108th Congress entitled the "Lawsuit Abuse Reduction Act." As noted in the dissenting views to the United States House of Representatives report, "[t]his sweeping overhaul of our civil justice system is being completed on the thinnest conceivable record of a single cursory hearing and the basis of a few anecdotes and hypothetical concerns."[2]

The legislation, as adopted by the House of Representatives, would change many aspects of Rule 11 of the Federal Rules of Civil Procedure. These amendments to Rule 11 are being proposed without first being submitted to the process set forth in the Rules Enabling Act, a process fully supported by the ABA that is based on three fundamental concepts: (1) the central role of the judiciary in initiating judicial rulemaking, (2) procedures that permit full public participation, including by members of the legal profession, and (3) recognition of a congressional review period. 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, will then be submitted to the United States Supreme Court for consideration and promulgation, and will finally be 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, rules of evidence and procedure are inherently a matter of intimate concern to the judiciary, which must apply them on a daily basis; each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential to avoid unintended consequences; and 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.

Mandatory Application of Rule 11

[1] Goals XI and V of the American Bar Association as adopted by the House of Delegates.
[2] House Report 108-682, Lawsuit Abuse Reduction Act of 2004, at 95.

The Recommendation supports the current version of Rule 11 of the Federal Rules of Civil Procedure as an effective means of discouraging dilatory motions practice and frivolous claims and defenses. The previous version of Rule 11, adopted in 1983, required mandatory sanctions for every violation. During the decade this version was in effect, from 1983 to 1993, an entire industry of litigation revolving around Rule 11 claims inundated the legal system and wasted valuable court resources and time. The Judicial Conference of the United States has noted that a mandatory application of Rule 11 created "a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty; engender[ed] potential conflict of interest between clients and lawyers, who advised withdrawal of particular claims despite the clients' preference; exacerbate[ed] tensions between lawyers; and provid[ed] little incentive…to abandon or withdraw a pleading or claim – and thereby admit error – that lacked merit after determining that it no longer was supportable in law or fact."[3]

The current version of Rule 11, which came into effect through amendments in 1993, allows courts to focus on the merits of the cases instead of extensive Rule 11 motions, while maintaining the ability to sanction attorneys for frivolous claims or defenses, relying on the court's established ability to adjudicate such issues. The current version of Rule 11 allows for judicial discretion in imposing sanctions for frivolous lawsuits and provides a 21-day period to withdraw a particular claim or defense subject to a Rule 11 challenge. Since the amendments to Rule 11 in 1993, the Judicial Conference reports a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. There has been no demonstrated problem with the enforcement or operation of Rule 11. A return to the mandatory imposition of sanctions for Rule 11 violations, without extensive study and public comment, would frustrate the purpose of the Rules Enabling Act and potentially harm the effective functioning of the judicial system.

Venue

The Recommendation further opposes attempts by Congress to alter venue designation rules established in both federal and state courts. Although Congress has the power to designate venue for federal courts, for example, Title 28 § 1391 of the United States Code is the general federal venue statute for federal courts, it should not dictate venue rules for state courts, or change the established rules for federal courts without due deliberation. Designating venue for state courts undermines federalism principles, as discussed in the next section of this Report, and changing the rules for federal courts will at the least cause confusion. The existing federal provisions specify specific rules for determining venue in a variety of circumstances and for a variety of defendants and were the product of a series of carefully constructed amendments by Congress over the last decades, after careful study. The venue rules are well established and are an integral part of the functioning of the courts. Amendments to rules relating to venue and jurisdiction should be supported by extensive study, vetted publicly, and subject to comment by the

[3] Letter from the Judicial Conference of the United States to Hon. James Sensenbrenner, July 9, 2004.

legal profession. It is important that changes to venue and jurisdiction rules do not create unintended consequences, such as providing a safe haven for foreign corporations by eliminating the long-arm statutes that allow a corporation to be subject to suit wherever the corporation does business or has minimum contacts. Transparency and clarity are important for venue and jurisdiction rules. Changes to venue and jurisdiction rules that, for instance, provide for mandatory dismissal if a court determines another venue would be the most appropriate venue would be confusing and potentially injurious to litigant's rights. Without clear guidance for what is the most appropriate venue it would be impossible for litigants to navigate the justice system and seek appropriate redress for valid claims.

State Court Proceedings

The Recommendation recognizes the time-honored principles of federalism and opposes any efforts by Congress to make certain federal rules applicable to state court actions, or to make rule changes that affect purely state court rules. The debate over the role of the 10th Amendment and the balance of power between the federal government and state governments has been a central theme to our republican system of government since the founding of the country. It is a well-established principle that the federal government, via the 10th Amendment, vests in the states the power to establish laws and rules in a variety of areas. Actions by Congress that circumvent this established system of federalism would have serious repercussions throughout the legal system, calling into question the power of states to establish a body of laws and rules that relate to state matters and moving away from a current trend of devolution, which generally shifts more powers from the federal government to the state courts.

Sanctions for frivolous lawsuits in the federal courts are regulated by Rule 11 of the Federal Rules of Civil Procedure. For the most part, state courts have established rules of civil procedure governing the filing of frivolous claims that are similar to Rule 11. Rules relating to civil procedure should be designed to provide clear and appropriate guidelines for attorneys and users of the legal system. The rules should be designed to achieve the goals, as proscribed by the state, to provide litigants with fair and unbiased access to the court system as well as for the timely handling of civil claims. It should remain solely within the purview of the states to establish local rules for procedures, either through the state legislature or through a grant of rulemaking authority to the state judiciary. The intimate acquaintance with the local procedures and uses of the courts in each state lends support to maintaining a system that allows states to establish their own procedural rules. Even with separate rule-making authority between the state and federal governments, and the possibility for different rules of procedure between the federal and state systems, and even among the states themselves, there is no empirical evidence to suggest that the procedures for moving civil cases through the courts are not working efficiently and effectively.

Venue and jurisdiction rules are another area that illustrates the ability for state and federal court systems to operate effectively and efficiently with separate systems of rules. An effort at the federal level to change the venue of state courts in relation to a

particular type of proceeding would be overreaching the bounds of state/federal relations. An effort by Congress to carve out venue and jurisdiction rules for personal injury claims in state courts undermines the legitimacy of such courts and may disrupt the effective functioning of state court systems and certainly raise serious questions as to whether litigants would be able to adequately address legitimate civil claims in state courts.

As an association representative of the legal profession, it should be of paramount importance to the ABA that all rules related to procedures, whether in state or federal courts, should be amended only after careful study, extensive public comment, and based on a showing of serious problems with the existing system. The effective functioning of the courts demands nothing less.

Penalties to Attorneys with Rule 11 Violations

The Recommendation opposes any effort 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 was 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 may disproportionately impact attorneys who practice in particular areas, such as civil rights. 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. Such a rule is even more troublesome if it is allowed to apply retroactively to violations that occurred before the rule was in place.

A system that ensures professional conduct and respects the procedures and validity of the legal process is crucial to the effective functioning of our courts. This type of system, though, does not stem from arbitrary rules that sanction particular attorneys disproportionately. The current system that allows for judicial discretion in the imposition of sanctions for frivolous lawsuits serves the laudatory goal of reducing claims and defenses designed to waste time or intimidate without imposing mandatory sanctions on attorneys who may be representing clients with complex or new claims. Recent studies have shown that a significant percentage of cases where Rule 11 sanctions have been imposed are civil rights cases.[4] In addition, other studies show that when Rule 11 required the mandatory imposition of sanctions for violations many legitimate civil rights claims were stifled out of a fear that large attorney fees would be imposed as the

[4] House Report 108-682, Lawsuit Abuse Reduction Act of 2004, at 96.

sanction.[5] An arbitrary "three strikes you're out" rule does not effectively accomplish the goal of reducing frivolous lawsuits and would drastically impact the legal profession by suspending, indefinitely, many fine attorneys willing to take on controversial, yet important, litigation.

Extension of Rule 11 to Problematic Discovery Issues

The Recommendation opposes efforts by Congress to extend Rule 11 to problematic discovery motions, requests, responses or non-responses because Rules 26(g) and 37 of the Federal Rules of Civil Procedure are better tailored to address these issues.

As currently drafted, the Federal Rules of Civil Procedure apply appropriate mechanisms for addressing discovery abuses. Willful or intentional efforts to obstruct or impede a proceeding through the intentional destruction of important documents are a serious problem that should be regulated by the imposition of strong sanctions. The Federal Rules of Civil Procedure allocate two rules to address the seriousness of discovery violations. Rule 26(g) is designed to apply a Rule 11 type standard of conduct to discovery. The rule mandates the imposition of sanctions for violations and designates attorney fees as the appropriate sanction. This rule does not allow any type of "safe harbor" provision, such as the 21-day period to withdraw in Rule 11, and it applies to disclosure as well as discovery responses and requests. Rule 37 is similar and applies to discovery motions. An effort to address discovery violations in a third provision, specifically Rule 11, would be cumbersome and confusing as well as redundant. The discovery sanctions covered by Rules 26(g) and 37 adequately address the very serious issues of intentional document destruction during discovery. There is no need to address discovery in a rule that relates to claims and defenses.

Conclusion

The effective and efficient functioning of our court systems, at both the state and federal levels, is of paramount importance. The well-established process of court rule-making, as provided for in the Rules Enabling Act, allows the court system to craft appropriate, useful rules that address the specific problems of managing cases within the court system. It is important that rules affecting the functioning of the court be thoroughly vetted and supported by ample evidence that change is indeed needed to keep the courts functioning. The judiciary is in the unique position to best analyze what rules improve or hinder the court's day-to-day functions. In addition, it is crucial that the time-honored principles of federalism be honored throughout the rule making process. State courts retain the right to design rules that appropriately address issues germane to the particular state or district. A one-size-fits-all federal standard rarely works and often creates unintended consequences. Frivolous lawsuits, forum shopping and discovery violations should be taken very seriously by the judicial system and the legal profession. Hastily crafted federal legislation, written without the input of the judiciary or the aid of a thorough review, can cause more harm than good when attempting to address these

[5] Id.

serious, nuanced issues. The Association should support procedures that require judicial input in rule-making and should advocate against efforts that attempt to usurp state rule-making powers by imposing federal standards on state court proceedings.

Respectfully submitted,

Dennis Drasco, Chair
Section of Litigation

James K. Carroll, Chair
Tort Trial and Insurance Practice Section

February 2005

GENERAL INFORMATION FORM

Submitting Entities:

Dennis Drasco, Chair
Section of Litigation

James K. Carroll, Chair
Tort Trial and Insurance Practice Section

1. Summary of Recommendation(s).

This Recommendation expresses support for the judicial rulemaking process set forth in the Rules Enabling Act, for principles of federalism and for the current version of Rule 11 of the Federal Rules of Civil Procedure and opposes legislative change to Rule 11, including changes proposed in the "Lawsuit Abuse Reduction Act" (H.R 4571).

. The issues addressed in this Recommendation include the Lawsuit Abuse Reduction Act's proposals to extend Rule 11 to civil actions in state courts, impose venue designation rules on state personal injury cases, remove the current "safe harbour" provisions and instead impose mandatory sanctions, impose mandatory suspension in the case of a prior violation of Rule 11, and expand the scope of Rule 11 to include problematic discovery matters.

2. Approval by Submitting Entity.

Approved by the Council of the Tort Trial & Insurance Practice Section on November 15, 2004.

Approved by the Council of the Section of Litigation on October 9, 2004.

3. Has this or a similar recommendation been submitted to the House or Board previously?

As a result of passage by the House of Delegates of the policies described in Section 4, below, the ABA is on record in support of the Congressionally-enacted judicial rulemaking process set forth in the Rules Enabling Act and is opposed to legislation that would circumvent that process. The other aspects of this recommendation have not previously been submitted to the House or Board.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

In February 1995, the House of Delegates adopted policy supporting the Congressionally-enacted judicial rulemaking process set forth in the Rules Enabling Act and opposing legislation that would circumvent that process. In February 1982, the House of Delegates adopted a recommendation urging, among other things, that the delegation of rule-making authority should be granted by Congress to the Judicial Conference of the United States. In addition to

developing additional policy to address various provisions in pending federal legislation called the "Lawsuit Abuse Reduction Act," (H.R. 4571) the 1995 and 1982 policies would be reaffirmed by adoption of this recommendation.

5. What urgency exists which requires action at this meeting of the House?

The leadership of the House and Senate have announced their intention of moving legislation like HR 4571 in the next Congress.

6. Status of Legislation. (If applicable.)

H.R 4571 was passed by the House is pending in the United States Senate. It has been announced by the leadership of the Senate that the Senate will take up similar legislation in the 109th Congress as the House of Delegates prepares to meet.

7. Cost to the Association. (Both direct and indirect costs.)

None, except the indirect cost of any lobbying efforts by the Association's Government Affairs Office.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

Simultaneously with this submission, referral is being made to:
All Sections and Divisions

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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