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March 11, 2011

Honorable Trent Franks
Chair, Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
Washington DC, 20515

Dear Mr. Chairman:

I am writing to express the views of American Bar Association on H.R. 966, the Lawsuit Abuse Reduction Act of 2011, which is the subject of today's hearing before your subcommittee. I request that you make this letter part of the hearing record.

H.R. 966 seeks to amend Rule 11 of the Federal Rules of Civil Procedure through the legislative process by reinstating a mandatory sanctions provision, which was adopted in 1983 and eliminated in 1993. It also would require, rather than permit, the imposition of monetary sanctions, consisting of attorney's fees and other costs resulting from the violation, and eliminate a provision adopted in 1993 that allows parties and their attorneys to avoid sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions is served.

While we appreciate that this latest version of the Lawsuit Abuse Reduction Act does not contain provisions present in earlier bills that would have applied Rule 11 to civil actions brought in state courts and imposed venue requirements under certain conditions, we still consider the bill to be ill-advised and unnecessary.

The ABA opposes enactment of H.R. 966 for three main reasons. First, it would circumvent the procedures Congress itself has established for amending the Federal Rules of Civil Procedure. Second, there is no demonstrated evidence that the existing Rule 11 is inadequate or needs to be amended. Third, by ignoring the lessons learned from ten years of experience under the 1983 mandatory version of Rule 11, there is a real risk that the proposed changes would result in unintended adverse consequences that would encourage additional litigation and increase court costs and delays.

H.R. 966 contravenes the established Rules Enabling Act process for amending the Federal Rules of Procedure.

As a threshold matter, the ABA opposes the legislation because it circumvents the Rules Enabling Act, 28 U.S.C. §§ 2072-74, a balanced and inclusive process established by Congress to assure that amendment of the Federal Rules occurs only after a comprehensive review is undertaken.

This well-settled, congressionally specified procedure contemplates that evidentiary and procedural rules or amendments will in the first instance be considered and drafted by committees of the Judicial Conference of the United States. Thereafter, they will be subject to thorough public comment and reconsideration, and then, if approved by the Judicial Conference, will be submitted to the United States Supreme Court for its consideration and promulgation. Finally, proposed rules or amendments will be transmitted by the Supreme Court to Congress, which retains the ultimate power to reject, modify, or defer any rule or amendment before it takes effect.

This time-proven process is predicated on respect for separation-of-powers and recognition that: 1) rules of evidence and procedure are matters of central concern to the judiciary, lawyers and litigants, and have a major impact on the administration of justice; 2) each rule constitutes one small part of a complicated, interlocking system of court administration procedures, all of which must be given due consideration whenever Rules changes are contemplated; and 3) judges have expert knowledge and a critical insider's perspective with regard to the application and effect of the Federal Rules.

The Proposed Revisions to Rule 11 are Unnecessary and Counterproductive

On its face, H.R. 966 seems straightforward and has an understandable appeal. To those who believe frivolous lawsuits have skyrocketed, it seems equally reasonable to believe that the problem will be alleviated if attorneys who violate Rule 11 know they will be sanctioned and will have to pay for resulting attorneys' fees and court costs.

Unfortunately, the premise is not based on an empirical foundation, and the proposed amendments ignore lessons learned.

There is no dispute that the filing of frivolous claims and defenses is an important issue that deserves attention. We do, however, question assertions there has been a significant increase in the filing of non-meritorious litigation in the 18 years since Rule 11 was revised to permit the discretionary imposition of sanctions. While anecdotal stories can be riveting and take on a life of their own, they are an inadequate substitute for concrete empirical data of lawsuit abuse.

During the decade that the 1983 version of the Rule requiring mandatory sanctions was in effect, 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, in a 2004 letter to Hon. James Sensenbrenner, 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 conflicts of interest between clients and lawyers, who advised withdrawal of particular claims despite the clients' preference; 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.

Judges, lawyers and clients all found the Rule to be counterproductive and harmful to the resolution of civil litigation. According to academics and court administration scholars who have previously testified before Congress on this issue, multiple empirical studies of the experience under the 1983 Rule support these conclusions.

Even if the filing of frivolous lawsuits has increased recently -- which, again, has not been substantiated -- the ABA is not convinced that the proposed changes to Rule 11 would act as a deterrent or reduce the incidence of frivolous or non-meritorious filings. In fact, past experience strongly suggests that, if enacted, these proposed changes will encourage additional litigation and increase costs and delays without accomplishing the stated goal of deterrence.

Rule 11, of course, does not operate in a void but rather is one part of a complex, coordinated and sometimes overlapping system that governs court administration. Often ignored is the fact that a court may invoke other rules of procedure, statutes, or its own inherent authority to prevent frivolous or non-meritorious lawsuits from going forward or impose sanctions when appropriate.

The ABA is not aware of any compelling evidence that there is a demonstrable need to revise Rule 11 or that the proposed amendments would remedy alleged problems. However, if legitimate concerns are raised, we urge Congress to defer to the Rules Enabling Act process to assure a comprehensive and dynamic examination of the issues and avoid taking action that results in unintended or adverse consequences.

Sincerely,



Thomas M. Susman

cc: Members, House Judiciary Subcommittee on the Constitution