COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

March 14, 2011

Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"), we write to oppose H.R. 966, which seeks to reduce lawsuit abuse by amending Rule 11 of the Federal Rules of Civil Procedure. The bill would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The bill would also eliminate a provision adopted in 1993 to allow a party to withdraw challenged pleadings on a voluntary basis, without the added costs and delay to the challenging party of seeking and obtaining a court order. The concerns we express are the same concerns expressed by the Judicial Conference in 2004 and 2005, when similar legislation was introduced.

We greatly appreciate, and share, your desire to improve the civil justice system in our federal courts, including by reducing frivolous filings. But legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a "cure" far worse than the problem it is meant to solve. Such legislation also contravenes the longstanding Judicial Conference policy

opposing direct amendment of the federal rules by legislation instead of through the careful, deliberate process Congress developed in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077.

The 1993 changes followed years of examination and were made on the Judicial Conference's strong recommendation, with the Supreme Court's approval, and after congressional review. The 1983 provision for mandatory sanctions was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address. Instead, it generated wasteful satellite litigation that had little to do with the merits of cases and that added to the time and costs of litigation.

The 1983 version of Rule 11 required sanctions for every violation of the rule. The rule was abused by resourceful lawyers. An entire "cottage industry" developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims. Rule 11 motions came to be met with counter-motions that sought Rule 11 sanctions for making the original Rule 11 motion.

The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism. As letters from the Judicial Conference commenting on prior similar bills pointed out, some of the serious problems caused by the 1983 amendments to Rule 11 included:

1. creating a significant incentive to file unmeritorious Rule 11 motions by providing a greater possibility of receiving money;

2. engendering potential conflicts of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;

3. exacerbating tensions between lawyers; and

4. providing a disincentive to abandon or withdraw a pleading or claim that lacked merit — and thereby admit error — after determining that it no longer was supportable in law or fact.

The 1993 amendments to Rule 11 were designed to remedy the major problems with the rule, strike a fair and equitable balance between competing interests, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. Since 1993, the rule has established a safe harbor, providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. The 1983 version of Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee reviewed a significant number of empirical examinations of the 1983 version of Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987.

After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial and clearly called for a change in the rule. The Advisory Committee concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process.

Experience with the amended rule since 1993 has demonstrated a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. In June 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers and 148 judges on the effects of the 1993 Rule 11 amendments. About 580 attorneys and 120 judges responded to the survey. The Center found general satisfaction with the amended rule. It also found that more than 75% of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated.

In 2005, the Federal Judicial Center surveyed the trial judges who apply the rules to get a clearer picture of how the revised Rule 11 was operating. A copy of the study is enclosed. The results of the Federal Judicial Center's study showed that judges strongly believed that the current Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The study's findings include the following highlights:

- more than 80 percent of the 278 district judges surveyed indicated that "Rule 11 is needed and it is just right as it now stands";
- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 (the Lawsuit Abuse Reduction Act of 2004) or H.R. 420 (the Lawsuit Abuse Reduction Act of 2005));
- 85 percent strongly or moderately support Rule 11's safe harbor provisions;
- 91 percent oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;

- 84 percent disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation;

- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the federal bench, and 54 percent noting that such litigation has remained relatively constant; and

- 72 percent believe that addressing sanctions for discovery abuse in Rules 26(g) and 37 is better than in Rule 11.

The findings of the Federal Judicial Center underscore the judiciary's united opposition to legislation amending Rule 11. Lawyers share this view. In 2005, the American Bar Association issued a resolution opposing an earlier, similar proposed bill.

Minimizing frivolous filings is, of course, vital. But there is no need to reinstate the 1983 version of Rule 11 to work toward this goal. Judges have many tools available to respond to, and deter, frivolous pleadings. Those tools include 28 U.S.C. § 1915e, which authorizes courts to dismiss, *sua sponte*, before an answer is filed, a lawsuit that is frivolous or malicious. Rule 12(b)(6) authorizes courts to dismiss pleadings that fail to state a claim on which relief can be granted. Section 1927 of Title 28 of the United States Code authorizes sanctions against lawyers for "unreasonably and vexatiously" multiplying the proceedings in any case. And the present version of Rule 11 itself provides an effective, balanced tool, without the problems and satellite litigation the 1983 version created.

In May 2010, the Advisory Committee on the Civil Rules held a major conference on civil litigation, examining the problems of costs and delay — which encompass frivolous filings — and potential ways to improve the system. The Conference encouraged, and generated, a broad spectrum of criticisms by lawyers, litigants (including businesses and governmental entities), judges, and academics of the current approaches to federal civil cases, including the rules, and proposals for change. Conspicuous in its absence was any criticism of Rule 11 or any proposal to restore the 1983 version of the rule.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Rules Committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. There is no need to reinstate the 1983 version of Rule 11 that proved contentious and diverted so much time and energy of the bar and bench. Doing so would add to, not improve, the problems of costs and delay that we are working to address. I urge you on behalf of the Rules Committees to not support the proposed legislation amending Rule 11.

We greatly appreciate your consideration of the Rules Committees' views. We look forward to continuing to work together to ensure that our civil justice system is working well to fulfill its vital

role. If you or your staff have any questions, please contact Andrea Kuperman, Chief Counsel to the Rules Committees, at 713-250-5980.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

Enclosure

cc: Honorable Trent Franks

Identical letter sent to: Honorable John Conyers, Jr.