Resolution – Report and recommendations of Commercial and Federal Litigation Section on the Lawsuit Abuse Reduction Act of 2005

Approved by the House of Delegates on November 5, 2005

WHEREAS, the Lawsuit Abuse Reduction Act of 2005, currently pending in Congress, would significantly amend Rule 11 of the Federal Rules of Civil Procedure to make sanctions, including a reasonable attorney's fee, mandatory for a violation; would extend Rule 11 to state court actions found to substantially affect interstate commerce; would restrict possible venues for federal and state personal injury actions; and would require sanctions for document destruction in certain matters; and

WHEREAS, the Association's Commercial and Federal Litigation Section has issued a report concluding that enactment of the Act would (!) largely abrogate the American Rule that parties bear their own legal fees, (2) result in increased collateral litigation, (3) compromise principles of federalism, and (4) encroach upon judicial rule-making authority;

NOW, THEREFORE IT IS

RESOLVED, that the New York State Bar Association approves the report of the Commercial and Federal Litigation Section and opposes the enactment of the Lawsuit Abuse Reduction Act of2005; and it is further

RESOLVED, that the officers of the Association are hereby authorized to transmit the report to appropriate governmental officials and are empowered to take such other and further steps as they may deem warranted to implement this resolution.

REPORT ON THE LAWSUIT ABUSE REDUCTION ACT OF 2005

SUMMARY

The New York State Bar Association Commercial and Federal Litigation Section strongly opposes the Lawsuit Abuse Reduction Act of 2005 ("LARA"), H.R. 420.

- LARA would largely abrogate the long-standing American Rule that litigants bear their own attorneys' fees.

- LARA would seriously compromise principles of federalism by dictating in a wide panoply of state court actions that the American Rule be abrogated, venue in personal injury actions be limited, and spoliation sanctions be imposed.

- Through LARA Congress encroaches upon judicial rule-making authority by modifying a procedural rule to accomplish substantive ends in contravention of the well-established process for the judiciary's control of its procedural rules.

- LARA will hugely increase the cost of litigation by fostering in many, if not most, cases a collateral inquiry into the bases for assertions in the course of a lawsuit and an evaluation of the costs incurred in responding to them.

- LARA will stifle innovation in the law.

LARA'S PROVISIONS

The text of H.R. 420 is attached as Exhibit 1. The changes it would make in Rule 11(c) of the Federal Rules of Civil Procedure are shown in Exhibit 2 (existing language proposed to be omitted is enclosed in bold brackets, new matter is printed in italics, and existing language in which no change is proposed is shown in roman type).

Section 2 of LARA will require federal courts on motion "or upon [their] own initiative" to impose sanctions, "including a reasonable attorney's fee," upon an attorney, law firm or party that files a pleading, motion or other paper that violates Rule 11(b).[1] The function of the sanction is expanded from its current deterrence to both deterrence *and* compensation of the party injured by the conduct. The specific mention of a nonmonetary sanction and payment into court in current Rule 11(c)(2) will be eliminated. For any attorney who violates Rule 11 three or more times during the attorney's career in a particular federal district court, for each violation starting with the third, under Section 6 of LARA, the court "shall suspend that attorney from the practice of law in that Federal district court for 1 year" and may suspend the attorney for an additional appropriate period. Section 5 states that the amendments in Section 2 "shall [not] be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law."

[1] Rule 11(b), which is not amended by LARA, incorporates into each pleading, motion, or other paper presented to a court the representations that "(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

Section 3 of LARA provides that Rule 11 applies in any state court civil action in which the court determines upon a motion that the action "substantially affects interstate commerce" "based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted." The proposed statute requires that the state court make its determination "within 30 days after the filing of such motion," although it does not specify the consequences if the determination is made outside the time period. Section 5 states that Section 3 "shall [not] be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law."

Section 7 of LARA creates a rebuttal presumption of a violation of Rule 11 from an attempt to litigate in any forum an issue that has been lost on the merits on three consecutive prior occasions.

Section 4 of LARA concerns personal injury claims (except for class actions) filed in either federal or state courts and limits venue to the county or federal district where (1) the person bringing the claim resides at the time of filing or the time of the alleged injury; (2) the injury or the circumstances giving rise to the injury allegedly occurred; (3) if the defendant is a corporation, its principal place of business is; and, (4) if the defendant is an individual, the defendant resides. Section 4 does not provide for venue where a corporation is incorporated or does business and does not provide for venue based on a defendant's locale when a defendant is neither a corporation with a principal place of business in the United States nor an individual. Section 4(b) of LARA further provides that, if the injury or circumstances giving rise to the claim occurred in more than one county or federal district, the court "shall determine" the "most appropriate forum" for the claim,

and, if it is elsewhere, dismiss the claim (not transfer it). Any applicable statute of limitations would be tolled only from the filing of the claim to the date of dismissal.

Section 8 of LARA concerns document destruction and applies to any court proceeding in a federal court or in a state court which substantially affects interstate commerce. It provides that whoever intentionally destroys documents "sought in, and highly relevant to," a pending court proceeding "shall" be punished with sanctions commensurate to those available under Rule 11, held in contempt of court, and, if an attorney, referred to appropriate state bar associations for disciplinary proceedings.

The purpose of LARA, according to the Report of the House Judiciary Committee (H.R. Rep. No. 123, 109th Cong., 1st Sess. 3 (June 14, 2005)) is:

> The Lawsuit Abuse Reduction Act of 2005 . . . will restore the teeth to Federal Rule of Civil Procedure 11 it once had to deter frivolous Federal lawsuits. It would also extend Rule 11's protections to prevent frivolous lawsuits in state courts when state judges determine a case would have national economic consequences that affect interstate commerce. The bill would also prevent forum shopping, the nefarious practice by which personal injury attorneys bring lawsuits in courts that notoriously and consistently hand down astronomical awards even when the case has little or no connection to the court's jurisdiction.

PROBLEMS WITH LARA

Shifting Attorneys' Fees

Although LARA is purportedly directed at "frivolous" suits, it cuts a far broader swathe. Rule 11 applies to any filing during the course of a litigation, not just to initial pleadings. Rule 11(b) requires evidentiary support (or likely evidentiary support after a reasonable opportunity for further investigation) for factual contentions and a basis in existing law or a nonfrivolous argument for modification of existing law for legal contentions. It also requires that a filing not be presented

to cause "unnecessary delay" or a "needless increase" in litigation costs. LARA makes mandatory the consideration of sanctions in every case, because it may be brought up on a motion by a party or by the court on its own. The effects of LARA will not be limited to frivolous suits. It will instead affect many, if not most, lawsuits, resulting in expensive collateral litigation over whether a party interposed a paper for a proper purpose and whether there was evidentiary or legal support for a position espoused during the course of the litigation.

The proponents of LARA claim that it seeks to restore the mandatory sanction regime that existed under Rule 11 from 1983 through 1993. That regime did not work. During hearings before the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee on the 1993 amendments to the Federal Rules of Civil Procedure,[2] John B. Frank, a senior partner of the Phoenix, Arizona law firm Lewis and Roca, a former law school professor who taught civil procedure, and an author of numerous books on court administration and procedure and constitutional and legal historical subjects, testified:

> Rule 11, as adopted in 1983 and enforced today, has been described by Professor Charles Alan Wright as the worst self-inflicted wound in the history of the rules-making process. It has been a blight. Seldom was an effort made with better intentions or higher purposes, but, as has been trenchantly observed by Professor Judith Resnik of the University of Southern California[,] most of the time rules reformers are mopping up after the mistakes of past rules reformers; and Rule 11 is a brilliant example. . . .
>
> In the less than ten years since the adoption of Rule 11, we have had thousands of cases invoking its application. Asking for sanctions because of challenge to the allegedly good faith inquiry into either facts or law has become a major industry. It has become routine that the attorneys now have a double duty, one to try the case and the other to try the opposing counsel.
>
> The rule has become more of a defendant's mechanism than a plaintiff's but the defendants have not liked it either. Approximately 75% of the sanction applications are against plaintiffs. Nonetheless, there are enough against defendants to create a

[2] There were no hearings on LARA in this session of Congress.

> mutual burden. Indeed, the Rule 11 operation is just as obnoxious to the leaders of the defense bar as it is to the plaintiff's bar. The root goal is the desire to sanction frivolous cases. The underlying problem here is that the phrase "frivolous cases" has a happy ring to it as though it were saying something meaningful, when in truth this is false. One judge's frivolous case is another's serious question. In a Federal Judicial Center study, a group of judges who considered the same complaint divided fifty-fifty on whether it was frivolous. . . .
>
> I do not pause with what I think are the substantive misfortunes under Rule 11 because the point that particularly concerns me is what I think the grossly unreasonable and unwholesome burden it has added to judicial administration. The American Judicature Society has done a major study. That study reported that in 7.6% of the cases studied there were Rule 11 sanctions and in 24.3% there was some kind of involvement without sanctions. That meant that there had been some kind of Rule 11 activity of a formal enough sort to be noticed in a third of the cases. This in turn means that a great number of time-consuming and dollar-consuming decision points have been put into the legal system.
>
> When the attention goes from the frequency of Rule 11 in a batch of cases to the frequency of Rule 11 problems for lawyers in general, the American Judicature Society comes up with the astonishing figure that 82% of the bar studied has had some Rule 11 contact. . . .
>
> The worst feature of the 1983 rule . . . is that the rule became a fee-shifting device so that the prevailing lawyer was required to get his fees out of the losing lawyer's side.

Amendments to the Fed. Rules of Civil Procedure before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary, 103rd Cong., 1st Sess. 57-59 (1993) (statement of John P. Frank).

In *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Court traced the history of and confirmed the American Rule that, "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." 421 U.S. at 247. Based on the experience under Rule 11 from 1983 through 1993, LARA will significantly undermine and alter this rule, especially since its avowed purpose is to compensate the winner. Attempts to shift fees will become routine, and, because the standard for doing so is not merely that a contention was frivolous, it will be successful in many cases.

For example, it is routine now for complaints to plead claims in the alternative. If one of those claims is dismissed or not proved at trial (and many are in this category), there may well be grounds for fee-shifting under a mandatory Rule 11. It is similarly routine now for answers to assert a defense of failure to state a claim. If a claim is successful, then there may well be grounds for fee-shifting under a mandatory Rule 11. In either event, the "winner" will likely seek its fees, and, even if it does not, the court must consider the possibility. Time-consuming and dollar-consuming hearings to determine the basis for a factual or legal contention and to evaluate the cost incurred by the party opposing the contention will be added to an already burdened federal judicial system.

LARA seeks to reduce the number of frivolous suits by increasing the cost of bringing one. However, by indirectly pursuing those goals through Rule 11, which applies to more than just frivolous suits, LARA will also reduce the number of novel and creative factual and legal arguments that are made. As found in the Federal Judicial Center study described by Mr. Frank, one judge's "frivolous" argument is another judge's "serious" argument.[3] But, because of the uncertainty, risk-averse attorneys in all cases, not just civil rights cases that may be arguably covered by proposed Section 5, will avoid making factual or legal contentions, particularly novel ones, which might be held to violate Rule 11. The law and society will be poorer for the restriction. As reported in the dissenting views in the House Report on LARA:

> A good example of the effect of this rule . . . was cited by the Honorable Robert L. Carter, United States District Court Judge for the Southern District of New York, when he stated: "I have no doubt that the Supreme Court's opportunity to pronounce

[3] Proposed Section 7 also might chill legitimate attempts to reverse a decision by a trial court. Some states, such as California and New York, have three tiers of courts through which a litigant could appeal before seeking review of an adverse decision by the Supreme Court. If a litigant loses in a trial court and then on two appeals through the state court system, an attempt to seek Supreme Court review would be subject to the presumption that it was a violation of Rule 11, since the case would have been lost on the merits in three successive forums.

> separate schools inherently unequal [in *Brown v. Board of Education*] would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start."

H.R. Rep. No. 123, 109th Cong., 1st Sess. 113 (2005) (*quoting* Symposium, The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2193 (June 1989) (brackets in original)).

Imposing on State Courts Rule 11 and Spoliation Sanctions and Venue Limitations for Personal Injury Actions

In cases determined to substantially affect interstate commerce, LARA seeks to impose on litigants in state courts mandatory sanctions under Rule 11 and for intentional spoliation of documents. The condition precedent for a state case to be found to substantially affect interstate commerce is almost no limitation at all. *See, e.g., International Salt Co. v. United States*, 332 U.S. 392, 395, 396 (1947) (sales of $500,000 held not to be an insignificant or insubstantial amount of interstate commerce under the Sherman Act); *Detroit City Dairy, Inc. v. Kowalski Sausage Co.*, 393 F. Supp. 453, 472 (E.D. Mich. 1975) (sales of $86,376.72 held to be a not insubstantial amount of interstate commerce under the Sherman Act). Therefore, mandating that Rule 11 and spoliation sanctions be imposed by state courts in cases found to affect a substantial amount of interstate commerce are likely to encompass many, if not most, of the cases pending in the state courts.

In Section 4, LARA also limits the venues for personal injury actions in the state courts as well as in the federal courts. It exempts corporations from personal injury actions in states in which they are incorporated, if those states are not the corporations' principal places of business. The proposed statute ignores other types of organizations, such as limited liability corporations, which have become increasingly popular, especially for small businesses, in recent years. Further, the statute is more generous to foreign business entities then domestic corporations by limiting the

choice of venue to where the claimant resides or the injury or circumstances giving rise to the injury allegedly occurred. It also appears that, if there are multiple corporate defendants with different principal places of business, venue will similarly be limited to where the claimant resides or the injury or circumstances giving rise to the injury allegedly occurred. In addition, the proposed statute provides for dismissal of claims if a plaintiff guesses wrong in attempting to determine the undefined "most appropriate forum" where the injury or circumstances giving rise to the claim occurred in more than one county or federal district. Moreover, Section 4 unfairly does not toll the statute of limitations beyond the date of dismissal to allow the plaintiff in a timely fashion to file a reviewed complaint in what may be the "most appropriate forum."

Section 4 is far too restrictive. It limits allowable venues for personal injury actions far more than is necessary to accomplish its stated purpose of preventing the practice of bringing personal injury lawsuits in courts that purportedly hand down astronomical awards when the case has little connection to the court's jurisdiction. It is contrary to the notion that there are national markets for goods and services, which seems to animate the provisions of LARA dictating the application of Rule 11 in state cases involving substantial interstate commerce. Section 4 should be rejected in its current form.

The Supreme Court has commented on the principles of federalism that allow the states "to serve as laboratories for testing solutions to novel legal problems." *Smith v. Robbins*, 528 U.S. 259, 275-76 (2000) (*quoting Arizona v. Evans*, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting)). Imposing uniform flawed mandatory Rule 11 and spoliation sanctions and limiting the venues for personal injury actions undermines this fundamental principle of federalism.

LARA Avoids the Tested Procedures under the Rules Enabling Act

Since the passage of the Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. §§ 2071 – 2077), the Supreme Court has been granted the power to adopt procedural rules for the district courts combining law and equity.[4] In 1935, the Supreme Court appointed an Advisory Committee, 295 U.S. 774, which drafted proposed civil rules, published the drafts for comment, and revised the rules for discussion by the Judicial Conference of the Untied States before they were promulgated by the Supreme Court. 4 Wright & Miller, *Federal Practice & Procedure: Civil 3d* § 1004 at 25-28 (2002). They were then submitted to Congress, which did not block them. *Id.* at 29-31. A similar procedure has been used for amendments to the Federal Rules of Civil Procedure ever since and is now codified in 28 U.S.C. § 2073.

Despite this time-tested procedure involving the bench, bar and legal scholars with public comment and a legislative opportunity for a veto, which resulted in 1993 in the modification of Rule 11 to remove its mandatory aspect, the House of Representatives proposes to sidestep this entire process through the passage of LARA. This will encroach upon the federal judiciary's control of its own procedures and could lead down the slippery slope of repeated jiggering of the Federal Rules of Civil Procedure to the detriment of the federal judicial system. It was just such interference by Congress that led to the Rules Enabling Act, according to Attorney General Homer Cummings, who pushed its passage:

> Legislative bodies have neither the time to inquire objectively into the details of judicial procedure nor the opportunity to determine the necessity for amendment or change. Frequently such legislation has been enacted for the purpose of meeting particular problems or supposed difficulties, but the results have usually been confusing or otherwise unsatisfactory.

[4] The Supreme Court was granted the power to make rules governing equity proceedings in the district courts through the Process Act of 1792, ch. 36, 1 Stat. 275, 276 (1792), and governing actions at law in the district courts through the Conformity Act of 1872, ch. 255, 17 Stat. 197 (1872).

Cummings, "The New Criminal Rules – Another Triumph of the Democratic Process," 31 *A.B.A. J.* 236, 237 (1945). Congress should not now resume the bad habit of legislating procedural rules to accomplish apparently meritorious substantive ends, but which will have confusing and unsatisfactory consequences. As described above, LARA could work much unintended mischief in areas unconnected with its stated purpose and set a bad precedent for legislative tinkering with judicial procedural rules.

CONCLUSION

The New York State Bar Association Commercial and Federal Litigation Section strongly opposes LARA and respectfully requests Congress to reject it.

New York State Bar Association
Commercial and Federal Litigation Section

October 20, 2005

EXHIBIT 1

Union Calendar No. 69

109TH CONGRESS
1ST SESSION

H. R. 420

[Report No. 109–123]

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 26, 2005

Mr. SMITH of Texas (for himself, Mr. DELAY, Mr. CHABOT, Mr. PAUL, Mr. GREEN of Wisconsin, Mr. HERGER, Mr. KELLER, Mr. KING of Iowa, Mr. SHAYS, Mr. CANNON, Mr. BRADY of Texas, Mr. NORWOOD, Mr. NEUGEBAUER, Mr. CHOCOLA, Mr. MILLER of Florida, Mr. FEENEY, Mr. FORBES, Mr. GARY G. MILLER of California, Mr. CULBERSON, Mr. GARRETT of New Jersey, Mr. LEACH, Mr. KLINE, Mr. GALLEGLY, Mr. OTTER, Mr. JONES of North Carolina, Mr. KENNEDY of Minnesota, Mrs. MYRICK, Mr. MCCAUL of Texas, Mr. BOOZMAN, Mr. FRANKS of Arizona, Mr. SENSENBRENNER, Mr. GOODLATTE, Mr. FERGUSON, Mr. WILSON of South Carolina, Mr. BRADLEY of New Hampshire, Mr. CALVERT, Mr. FORTUÑO, Mr. KIRK, and Mrs. JO ANN DAVIS of Virginia) introduced the following bill; which was referred to the Committee on the Judiciary

JUNE 14, 2005

Additional sponsors: Mr. SOUDER, Mr. CONAWAY, Mr. ROHRABACHER, Mr. LEWIS of Kentucky, Mr. COX, Mr. SIMPSON, Mr. BARTLETT of Maryland, Mr. GUTKNECHT, Mr. NEY, Mr. MCHENRY, Mrs. CUBIN, Ms. GINNY BROWN-WAITE of Florida, Mr. ROGERS of Michigan, Mr. HENSARLING, Mr. AKIN, Mr. STEARNS, Mr. INGLIS of South Carolina, Mr. BACHUS, and Mr. PUTNAM

JUNE 14, 2005

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on January 26, 2005]

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2005".

SEC. 2. ATTORNEY ACCOUNTABILITY.

Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) by amending the first sentence to read as follows: "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject

of the violation, including a reasonable attorney's fee.";

(2) in paragraph (1)(A)—

(A) by striking "Rule 5" and all that follows through "corrected." and inserting "Rule 5."; and

(B) by striking "the court may award" and inserting "the court shall award"; and

(3) in paragraph (2), by striking "shall be limited to what is sufficient" and all that follows through the end of the paragraph (including subparagraphs (A) and (B)) and inserting "shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.".

SEC. 3. APPLICABILITY OF RULE 11 TO STATE CASES AFFECTING INTERSTATE COMMERCE.

In any civil action in State court, the court, upon motion, shall determine within 30 days after the filing of such motion whether the action substantially affects interstate

commerce. Such court shall make such determination based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted. If the court determines such action substantially affects interstate commerce, the provisions of Rule 11 of the Federal Rules of Civil Procedure shall apply to such action.

SEC. 4. PREVENTION OF FORUM-SHOPPING.

(a) IN GENERAL.—Subject to subsection (b), a personal injury claim filed in State or Federal court may be filed only in the State and, within that State, in the county (or Federal district) in which—

(1) the person bringing the claim, including an estate in the case of a decedent and a parent or guardian in the case of a minor or incompetent—

(A) resides at the time of filing; or

(B) resided at the time of the alleged injury;

(2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred;

(3) the defendant's principal place of business is located, if the defendant is a corporation; or

(4) the defendant resides, if the defendant is an individual.

(b) DETERMINATION OF MOST APPROPRIATE FORUM.—If a person alleges that the injury or circumstances giving rise to the personal injury claim oc-

curred in more than one county (or Federal district), the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim. Any otherwise applicable statute of limitations shall be tolled beginning on the date the claim was filed and ending on the date the claim is dismissed under this subsection.

(c) DEFINITIONS.—In this section:

(1) The term "personal injury claim"—

(A) means a civil action brought under State law by any person to recover for a person's personal injury, illness, disease, death, mental or emotional injury, risk of disease, or other injury, or the costs of medical monitoring or surveillance (to the extent such claims are recognized under State law), including any derivative action brought on behalf of any person on whose injury or risk of injury the action is based by any representative party, including a spouse, parent, child, or other relative of such person, a guardian, or an estate; and

(B) does not include a claim brought as a class action.

(2) The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, but not any governmental entity.

(3) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and any other territory or possession of the United States.

(d) APPLICABILITY.—This section applies to any personal injury claim filed in Federal or State court on or after the date of the enactment of this Act.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in section 3 or in the amendments made by section 2 shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law.

SEC. 6. THREE-STRIKES RULE FOR SUSPENDING ATTORNEYS WHO COMMIT MULTIPLE RULE 11 VIOLATIONS.

(a) MANDATORY SUSPENSION.—Whenever a Federal district court determines that an attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall determine the number of times that the attorney has violated that rule in that Federal district court during that

attorney's career. If the court determines that the number is 3 or more, the Federal district court—

(1) shall suspend that attorney from the practice of law in that Federal district court for 1 year; and

(2) may suspend that attorney from the practice of law in that Federal district court for any additional period that the court considers appropriate.

(b) APPEAL; STAY.—An attorney has the right to appeal a suspension under subsection (a). While such an appeal is pending, the suspension shall be stayed.

(c) REINSTATEMENT.—To be reinstated to the practice of law in a Federal district court after completion of a suspension under subsection (a), the attorney must first petition the court for reinstatement under such procedures and conditions as the court may prescribe.

SEC. 7. PRESUMPTION OF RULE 11 VIOLATION FOR REPEATEDLY RELITIGATING SAME ISSUE.

Whenever a party attempts to litigate, in any forum, an issue that the party has already litigated and lost on the merits on 3 consecutive prior occasions, there shall be a rebuttable presumption that the attempt is in violation of Rule 11 of the Federal Rules of Civil Procedure.

SEC. 8. ENHANCED SANCTIONS FOR DOCUMENT DESTRUCTION.

(a) IN GENERAL.—Whoever influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, a pending court proceeding through the intentional destruction of documents sought in, and highly relevant to, that proceeding—

(1) shall be punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under Rule 11 of the Federal Rules of Civil Procedure, in addition to any other civil sanctions that otherwise apply; and

(2) shall be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for disciplinary proceedings.

(b) APPLICABILITY.—This section applies to any court proceeding in any Federal or State court that substantially affects interstate commerce.

Union Calendar No. 69

109TH CONGRESS
1ST SESSION

H. R. 420

[Report No. 109–123]

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

JUNE 14, 2005

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

EXHIBIT 2

RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions, and Other Paper; Representations to Court; Sanctions

(a) * * *

(c) SANCTIONS. [If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.] *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.*

(1) HOW INITIATED.

(A) BY MOTION. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5[, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected]. If warranted, the court [may] *shall* award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) ON COURT'S INITIATIVE. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show

cause why it has not violated subdivision (b) with respect thereto.

(2) NATURE OF SANCTIONS; LIMITATIONS. A sanction imposed for violation of this rule [shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

[(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

[(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.] *shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.*