104TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 104–62

ATTORNEY ACCOUNTABILITY ACT OF 1995

MARCH 1, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MOORHEAD, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 988]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 988) to reform the Federal civil justice system, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Attorney Accountability Act of 1995".

SEC. 2. AWARD OF COSTS AND ATTORNEY'S FEES IN FEDERAL CIVIL DIVERSITY LITIGATION AFTER AN OFFER OF SETTLEMENT.

Section 1332 of title 28, United States Code, is amended by adding at the end the following:

"(e)(1) In any action over which the court has jurisdiction under this section, any party may, at any time not less than 10 days before trial, serve upon any adverse party a written offer to settle a claim or claims for money or property or to the effect specified in the offer, including a motion to dismiss all claims, and to enter into a stipulation dismissing the claim or claims or allowing judgment to be entered according to the terms of the offer. Any such offer, together with proof of service thereof, shall be filed with the clerk of the court.

99–006

"(2) If the party receiving an offer under paragraph (1) serves written notice on the offeror that the offer is accepted, either party may then file with the clerk of the court the notice of acceptance, together with proof of service thereof.

"(3) The fact that an offer under paragraph (1) is made but not accepted does not preclude a subsequent offer under paragraph (1). Evidence of an offer is not admissible for any purpose except in proceedings to enforce a settlement, or to determine costs and expenses under this subsection.

"(4) At any time before judgment is entered, the court, upon its own motion or upon the motion of any party, may exempt from this subsection any claim that the court finds presents a question of law or fact that is novel and important and that substantially affects nonparties. If a claim is exempted from this subsection, all offers made by any party under paragraph (1) with respect to that claim shall be void and have no effect.

"(5) If all offers made by a party under paragraph (1) with respect to a claim or claims, including any motion to dismiss all claims, are not accepted and the judgment, verdict, or order finally issued (exclusive of costs, expenses, and attorneys' fees incurred after judgment or trial) in the action under this section is not more favorable to the offeree with respect to the claim or claims than the last such offer, the offeror may file with the court, within 10 days after the final judgment, verdict, or order is issued, a petition for payment of costs and expenses, including attorneys' fees, incurred with respect to the claim or claims from the date the last such offer was made.

"(6) If the court finds, pursuant to a petition filed under paragraph (5) with respect to a claim or claims, that the judgment, verdict, or order finally obtained is not more favorable to the offeree with respect to the claim or claims than the last offer, the court shall order the offeree to pay the offeror's costs and expenses, including attorneys' fees, incurred with respect to the claim or claims from the date the last offer was made, unless the court finds that requiring the payment of such costs and expenses would be manifestly unjust.

"(7) Attorney's fees under paragraph (6) shall be a reasonable attorney's fee attributable to the claim or claims involved, calculated on the basis of an hourly rate which may not exceed that which the court considers acceptable in the community in which the attorney practices law, taking into account the attorney's qualifications and experience and the complexity of the case, except that the attorney's fees under paragraph (6) may not exceed—

"(A) the actual cost incurred by the offeree for an attorney's fee payable to an attorney for services in connection with the claim or claims; or

"(B) if no such cost was incurred by the offeree due to a contingency fee agreement, a reasonable cost that would have been incurred by the offeree for an attorney's noncontingent fee payable to an attorney for services in connection with the claim or claims.

"(8) This subsection does not apply to any claim seeking an equitable remedy.".

SEC. 3. HONESTY IN EVIDENCE.

Rule 702 of the Federal Rules of Evidence (28 U.S.C. App.) is amended—

(1) by inserting "(a) In general.—" before "If", and

(2) by adding at the end the following:

"(b) Adequate basis for opinion.—Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion—

"(1) is scientifically valid and reliable;

"(2) has a valid scientific connection to the fact it is offered to prove; and

"(3) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.

"(c) Disqualification.—Testimony by a witness who is qualified as described in subdivision (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.

"(d) Scope.—Subdivision (b) does not apply to criminal proceedings.".

SEC. 4. ATTORNEY ACCOUNTABILITY.

(a) SANCTIONS.—Rule 11(c) of the Federal Rules of Civil Procedure (28 U.S.C. App.) is amended—

(1) in the matter preceding paragraph (1) by striking "may" and inserting "shall";

(2) in paragraph (1)(A)—

(A) in the second sentence by striking ", but shall" and all that follows through "corrected"; and

(B) in the third sentence by striking "may" and inserting "shall"; and

(3) in paragraph (2) by striking "A sanction imposed" and all that follows through "violation." and inserting the following: "A sanction imposed for a violation of this rule 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. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of an order to pay to the other 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.".

(b) APPLICABILITY TO DISCOVERY.—Rule 11 of the Federal Rules of Civil Procedure is amended by striking subdivision (d).

SEC. 5. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Subject to subsection (b), this Act and the amendments made by this Act shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—

(1) The amendment made by section 2 shall apply only with respect to civil actions commenced after the effective date of this Act.

(2) The amendments made by section 3 shall apply only with respect to cases in which a trial begins after the effective date of this Act.

PURPOSE AND SUMMARY

The bill, H.R. 988, as reported, was derived from sections 101, Award of Attorney's Fee to prevailing party; 102, Honesty in Evidence; and 104, Attorney Accountability and Rule 11(c) sanctions against lawyers, of H.R. 10, the "Common Sense Legal Reforms Act of 1995". The purpose of H.R. 988 is to provide concrete steps to restore accountability, efficiency and fairness to our federal civil justice system. Section 2 of H.R. 988 provides for a settlement-oriented "loser pays" attorney's fee amendment to 28 U.S.C. § 1332 wherein a "non-prevailing" party must pay the "prevailing party's" attorney's fees in federal civil diversity litigation where an offer of settlement has been made. Section 3 would limit, in accordance with the Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* the use of expert testimony and Section 4 would reinstate the pre-December 1993 Rule 11(c) provisions of the Federal Rules of Civil Procedure and make mandatory the issuance of sanctions against lawyers who file frivolous lawsuits or engage in abusive litigation tactics.

The bill, as reported, will implement a more complete, fair and effective policy than exists at present to favor compromise rather than dispositive motions or trial and will consequently (1) lessen the incentive to litigate and consequently the caseload burdens faced by the federal judiciary; (2) assure that only meritorious and justiciable cases supported by scientific facts be adjudicated in federal courts, and (3) prevent the filing of frivolous lawsuits by attorneys. Fair and accountable litigation can thereby result, carried out by legitimate claims, accountable counsel and valid testimony.

BACKGROUND AND NEED FOR THE LEGISLATION

It is widely believed that the American legal system no longer serves to expedite justice and ensure fair results. It has become burdened with excessive costs and long delays. For many people, especially middle and lower income litigants, justice is often delayed and as a result is often denied. For instance, in 1985, the

percent of civil cases over three years old in Federal District Courts was 6.6%.[1] Five years later that figure grew to 10.4%.[2]

In addition to excessive costs and long delays, the American legal system has been hurt by an over-reliance on litigation. In 1989, some 18 million civil lawsuits were filed in state and federal courts. That's one lawsuit for every ten adults in America.[3] According to Judge Stanley Marcus, Chairman of the Judicial Conference Committee on Federal-State Jurisdiction, "if present trends continue, the federal courts' civil caseload will double every fourteen years, and in the twenty-eight years between 1992 and 2020 the compounded effect of that doubling and redoubling will raise the annual number of civil cases commenced from roughly 226,000 per year to nearly 840,000 per year."[4] Judge Marcus went on to observe that "under current workload standards this volume of litigation would require an enormous increase in the number of district judges and circuit judges, transforming the existing nature of the federal judicial system virtually beyond recognition."[5] The overuse of litigation imposes tremendous costs upon American taxpayers, businesses and consumers. H.R. 988 will begin the process of restoring accountability, efficiency and fairness to our federal justice system.

SECTION 2. LOSER PAYS

Addressing the above concerns, Section 2 would amend 28 U.S.C. § 1332, the provision granting diversity jurisdiction in U.S. district courts, by applying a loser pays provision that would be triggered by an offer of settlement. The intent of this procedure is to encourage and facilitate the early settlement of lawsuits and reduce protracted litigation. The offer of settlement procedure in Section 2 would allow a party to make by filing with the court in writing and serving on an adverse party, at any time up to 10 days before trial, a formal offer to settle any or all claims in a suit for a specified amount.[6] If the offer of settlement is accepted, the claim or claims are resolved pursuant to the terms of the agreement.[7] If the offer is rejected and the offeree does not obtain a judgment, order, or verdict more favorable than that offered on the applicable claims, the offeree is liable for the costs and attorney's fees of the offeror for those claims from the date the last offer was made by the adverse party.

For example, suppose a plaintiff brings a complaint for $100,000 on January 1. On March 1, the defendant files an offer of settlement for $40,000. The Plaintiff rejects the offer but files its own

---

[1] State-Federal Judicial Observer Number 6, p. 1, July, 1994.

[2] Id.

[3] See A Report from the President's Council on Competitiveness "Agenda for Civil Justice Reform in America" Introduction, August, 1991.

[4] Hearing before the Subcommittee on Intellectual Property and Judicial Administration of the Committee on the Judiciary, House of Representatives, p. 15, May 26, 1994.

[5] Id.

[6] This section does not apply to claims seeking equitable relief. A specified amount may be $0.00, however, for defendants who feel no valid claim has been brought.

[7] The Act merely requires that a party file an amount of offer with the court in order to determine with certainty the last sequentially made offer by a party. Any terms or conditions of the offer such as confidentiality agreements, stipulations to dismiss, etc., need not be filed with the court and may be written, oral or collateral to any agreement on the amount dictated in the filed offer. Motions to enforce settlement agreements shall be handled in the same manner currently employed by district courts on a case by case basis.

offer of $60,000 on June 1. On October 1, a judgment or verdict is issued for $39,000; the plaintiff, while victorious on the complaint, must pay the defendant's costs and attorney's fees from March 1 to the date of entry of judgment because the plaintiff should have taken the offer of $40,000 made on March 1. On the other hand, if the plaintiff is awarded a judgment or verdict of $61,000, the defendant must pay the plaintiff's costs and attorney's fees from June 1 to the date of entry of judgment since the defendant should have accepted the settlement offer made on June 1. If the verdict, judgment or order is for $50,000, or anywhere in-between the last offer and counter-offer of settlement existing 10 days or more before trial, the traditional American Rule applies and each side bears its own costs and fees for the entire suit.[8] This will effectively maintain the "status quo" for "close call" cases where all negotiating parties acted reasonably in their offers while encouraging close settlements.

The offer of settlement procedure proposed by this Act is an amendment to 28 U.S.C. § 1332, the general diversity statute. Under 28 U.S.C. § 1332, a suit arising under state law may currently be brought in federal court if there is complete diversity of state citizenship between the plaintiff and the defendant, and the amount in controversy exceeds $50,000. Traditionally, such cases involve tort and contract suits. This Section would apply the offer of settlement procedure to all cases brought under a federal court's diversity jurisdiction, including those removed by a defendant to federal court pursuant to 28 U.S.C. § 1441 based on the fact that the court would otherwise have subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

Under Section 2, as reported, a party making an offer may include in such offer a motion to dismiss all claims or to allow judgment to be entered according to the terms of the offer. The Committee intends for this approach to accommodate a defendant who believes that there is no liability in the lawsuit and therefore should not be forced to settle the case.

This section requires that an offer, along with proof of service, be filed with the clerk of the court.[9] This requirement should avoid subsequent disagreements concerning the amount, timeliness and manner of service of the offer. However, evidence of an offer is not admissible except in proceedings to enforce a settlement, or to determine costs and expenses under this provision. This section is designed to encourage the making of offers under the Act by assuring that the offeror will be protected against prejudicial use of an offer. This provision is consistent with Federal Rule of Evidence 408, which provides that offers of compromise are not admissible to prove liability for or invalidity of a claim or its amount.

Under the Act, the fact that an offer is made but not accepted does not preclude subsequent offers. This approach is designed to encourage parties to continue to negotiate a settlement prior to and during trial.

---

[8] This example is simplified to pertain to an entire suit while the amendment is to apply to any claim or claims in a suit and their separate dispositions, leaving parties free to settle out individual claims before dispositive rulings on those claims. The 10 day rule pertains only to trials, however, and not to dispositive motion rulings.

[9] Oral offers to settle, and written offers not filed with the Court, except as collateral terms to an offer properly filed under Section 2, do not, therefore, trigger the loser pays rule.

If all offers made by a party with respect to a claim or claims are rejected and the final judgement, order or verdict issued isn't more favorable to the offeree with respect to the claim or claims than the last offer made by the adverse party, the offeror may file with the court, within 10 days after the final judgment, order or verdict,[10] a petition for payment of costs and expenses, including attorney's fees incurred from the date the last offer was made by the adverse party. If the court finds that the final judgment, verdict or order obtained isn't more favorable to the offeree than the last offer, it is mandatory that the court order the offeree to pay the offeror's costs and expenses, and attorney's fees incurred with respect to the claim or claims from the date the last offer by the adverse party was made.

There are two exceptions to the mandatory requirement that a court award costs and attorney's fees under the terms of Section 2. The first exception would allow the court to exempt certain individual cases based upon express findings that the case presents novel and important questions of law or fact and that it substantially affects nonparties. It is the Committee's intent that this provision limit the discretion granted to the court and require it to carefully scrutinize each individual case or count consistent with the aforementioned criteria and not permit this exception to defeat the Rule.

The second instance where a court would not be required to award costs and attorney's fees or may reduce such costs or fees under this Section would be when it finds that it would be manifestly unjust to do so. It is the intent of the Committee that this standard be interpreted to be an exceptionally high one, extending well beyond the relative wealth of the parties. Rather, on a case by case basis, a judge should only reduce an award as provided under this Section where it would be grossly inequitable to impose it.

Section 2 defines "reasonable attorney's fee" to be one that is "calculated on the basis of an hourly rate which may not exceed that which the court considers acceptable in the community in which the attorney practices law, taking into account the attorney's qualifications and experience and the complexity of the case".[11] This should serve to clarify the fee standard to be used in applying Section 2.

Section 2 would not necessarily require an offeree to pay the entire amount of the offeror's attorney's fees. Rather, it would limit the offeree's liability for the offeror's attorney's fees to an amount not exceeding the amount the offeree paid its own attorney. If the offeree hired its attorney on a contingency basis (an agreement in which a plaintiff does not pay unless it prevails), and, because it lost, paid its attorney nothing, then it would be liable for the offeror's attorney's fees up to the amount "that would have been incurred by the offeree for an attorney's noncontingent fee * * *." It is the intent of the Committee that this encourage accurate reporting and maintenance of hourly work and costs by attorneys hired under a contingency agreement, since a fee petition containing

[10] It is intended that a petition cannot be made until appeals are exhausted and an order, judgment or verdict is final and binding on the parties to the controversy.

[11] This is the "lodestar" calculation used routinely by federal courts and applied in a great number of fee-shifting statutes.

hours worked must be presented to the court within 10 days of entry of a final judgment, order or verdict on a claim in order to collect such costs and attorney's fees.

SECTION 3. HONESTY IN EVIDENCE

Section 3 would amend Rule 702 of the Federal Rules of Evidence, which allows expert witnesses to testify as to their expert opinions with respect to "scientific, technical, or other specialized knowledge." Such evidence may have an enormous impact on a jury's decision because of its nature. Accordingly, assuring that such evidence is valid and reliable is of utmost importance. With that in mind, the amendment would make a scientific opinion inadmissible unless it is:

(1) scientifically valid and reliable;

(2) has a valid scientific connection to the fact it is offered to prove; and

(3) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in [Federal] rule [of Evidence] 403.

The "dangers" specified in Rule 403 are "unfair prejudice, confusion of the issues, or misleading the jury."

Section 3 would further make expert testimony inadmissible if the "witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which such testimony is offered."

The standard for admissibility of scientific expert testimony was most recently addressed by the Supreme Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 113 S.Ct. 2786 (1993), *on remand,* No. 90–55397 (9th Cir., Jan. 4, 1995, Kozinski, J.). In that case, the Supreme Court held that Rule 702 does not require that scientific evidence have "general acceptance" in the relevant scientific community to be admissible.[12] Rather, the Court held that the Rule requires that expert testimony rest on a "reliable foundation" (i.e., the methodology from which the evidence is derived must be based on "scientific knowledge") and be "relevant to the task at hand" (i.e., it must assist the trier of fact and have a logical scientific nexus to the subject matter of the suit or other admitted evidence.) This test has been read to be less stringent than the test originally set forth, before the Federal Rules of Evidence were adopted, in *Frye* v. *United States,* 293 F. 1013 (D.C. Cir. 1923), although not always applied as such. Under *Frye,* scientific evidence was not admissible unless it had been generally accepted in the particular scientific community to which it belonged. Until the Supreme Court's holding in *Daubert,* most circuit courts utilized the *Frye* test and developed differing sets of *Frye* jurisprudence. *Daubert,* enhanced and enforced by Section 3, will serve to evaporate the *Frye* test and create uniformity among the circuits for the admission of scientific evidence in civil cases.

In addition, Section 3 creates a presumption of inadmissibility, rather than admissibility of scientific evidence, which can be rebutted if the criteria of Section 3(2) are met. This standard will thus

[12] Scientific testimony that does not have general acceptance has been called "junk science." Under *Daubert,* general acceptance is one of four non-exhaustive factors a judge should consider in deciding whether to admit scientific evidence.

shift the current standard and force attorneys to prove to the court the validity of scientific evidence under standards established by the Supreme Court in *Daubert* before it can be admitted.

Section 3(2) would serve to codify and is meant to complement the standards established in *Daubert* by the Supreme Court and by the Ninth Circuit on remand. Section 3 uses the words "scientifically valid and reliable" instead of the words "valid scientific reasoning": used in H.R. 10 for two reasons: (1) the word "reasoning", by itself, may be interpreted as requiring a judge to understand completely scientific principles rather than proof of their reliability for evidentiary purposes. While *Daubert* utilizes the word reasoning, it does not stand alone, but is used in the context of methodology, validity and reliability; and (2) the bill seeks to maintain a simple definition that will be interpreted in conjunction with, and not as superseding the *Daubert* case. Section 3 requires that the methodology from which scientific evidence is derived be based on scientific knowledge and that it have a logical, scientific nexus to the subject matter of the suit or other admitted evidence. These goals of *Daubert* would thus be enforced by requiring consideration of their presence, among others, to rebut a presumption of admissibility before allowed. These considerations should include, but are not limited to the "key" questions to be posed by a judge as the "gatekeeper" of admissibility: (1) whether a scientific technique or scientific knowledge has been or can be tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error in the case of a particular technique; and (4) general acceptance of knowledge or a technique in the relevant scientific community.

Section 3(2) would amend Rule 403 of the Federal Rules of Evidence as it applies to scientific evidence by making evidence inadmissible if its prejudicial value outweighs (rather than substantially outweighs as currently provided in Rule 403) its probative value. Reading this literally, if the dangers of unfair prejudice, confusion of the issues, or misleading the jury even in substantially outweigh the probative value of the scientific evidence, the evidence is inadmissible. Thus, the standard for judging prejudice versus probative value existing in Rule 403 is lowered for cases involving scientific evidence. This change favors the inadmissibility of scientific evidence that is not valid and reliable, since such evidence is more likely to be unfair, confusing or misleading.

Section 3 would also make expert testimony inadmissible if the "witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which such testimony is offered." The reason for this provision is that an expert witness who received a contingency fee is less likely to furnish reliable testimony than one who receives a flat or hourly fee since he or she has a vested interest in the outcome of the litigation. The provision would exclude evidence if the witness receives any contingency fee, even if such fee is not a percentage of the judgment or settlement, but rather is a flat fee or hourly fee the payment of which is contingent upon the legal disposition of the claim.

Section 3 is intended to prevent trial lawyers from taking advantage of the court system. If there is a consensus in the scientific community that a hazard or risk (usually of a product) is real or

substantial, the trial lawyers will implore that consensus to support complaints for compensatory and punitive damages. If the consensus in the scientific community is that a hazard or risk is trivial or imaginary, however, the same lawyers should not be able to brush that fact aside and find "fringe" experts to testify otherwise. Even in cases where real hazards exist, trial lawyers will attempt to stretch claims beyond validity in order to collect punitive damages. By creating a presumption of inadmissibility, rebutted by the standards created by the Supreme Court in *Daubert*, along with a lower standard of prejudice, an amended Rule 702 will be effective in weeding out "junk science" as evidence in our federal courtrooms.

These amendments to Rule 702 would apply only to civil and not criminal cases. They would most frequently be used in product liability cases. This will prevent frustration in the important use of scientific evidence such as blood-type analysis and DNA testing in criminal proceedings.

SECTION 4. SANCTIONS AGAINST ATTORNEYS

Section 4 of the Attorney Accountability Act would amend Rule 11(c) of the Federal Rules of Civil Procedure relating to the sanctions a federal judge may impose against lawyers for (plaintiffs or defendants) who file frivolous lawsuits or engage in abusive litigation tactics. The Committee believes that Rule 11, in its pre-December, 1993 form, was one of the most effective means of curbing lawyer misconduct.

Although federal courts have always had the authority to sanction frivolous pleadings and papers, the early judicial, statutory, and procedural guidelines were very vague, and sanctions were extremely rare. Speaking before the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, then Chief Justice Burger noted with alarm the "widespread feeling that the legal profession and judges are overly tolerant to lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense."

Concerns about frivolous claims and defenses as well as dilatory or abusive tactics led in 1983 to a major revision of Rule 11 of the Federal Rules of Civil Procedure. Key features of the 1983 Rule included a requirement that pleadings be reasonably based on facts and law; mandatory sanctions for frivolous pleadings; and the explicit recognition that a sanction may include an order to reimburse the opposing party for reasonable expenses incurred because of a frivolous pleading.

In 1990, the Judicial Conference's Advisory Committee on Civil Rules undertook a review of the Rule and asked the Federal Judicial Center (FJC) to conduct an empirical study of its operation and impact. The study found that a strong majority of federal judges believe that:

(1) that Rule 11 did not impede development of the law (95%);

(2) the benefits of the rule outweighed any additional requirement of judicial time (71.9%);

(3) the 1983 version of Rule 11 had a positive effect on litigation in the federal courts (80.9%); and

(4) the rule should be retained in its then-current form (80.4%).[13]

The tables below are based on Tables in Section 2A of the FJC's Report and provide further details on the judges' responses to the 1990 Questionnaire on Rule 11—751 judges were surveyed.

TABLE 7

Has Rule 11 impeded development of the law?

	Percentage of judges answering the question
Yes	5.0
No	95.0

TABLE 16

Do the benefits of Rule 11 outweigh the expenditure of judge time?

	Percentage of 452 judges answering the question
Yes	71.9
No	28.1

TABLE 17

What has been the overall effect of Rule 11 on litigation in the Federal courts?

	Percentage of 472 judges answering the question
Rule 11 has had a positive effect	80.9
Rule 11 has had a negative effect	8.7
Rule 11 has had no effect	10.4

TABLE 18

What should be the future of Rule 11?

	Percentage of 526 judges answering the question
Retain in its present form (pre-Dec. 1993)	80.4
Return to its pre-1983 language	7.0
Amend in some other way	12.5

Despite this clear judicial support for a strong Rule 11, in 1991, the Civil Rules Advisory Committee included provisions to weaken the 1993 Rule in a broader package of proposed amendments to the Federal Rules. The proposed changes were then sent to the Supreme Court for approval or modification.

Exercising what it viewed to be a limited oversight role, the Supreme Court approved the proposed changes without substantive comment in April of 1993. In a strongly worded dissent on Rule 11, Justice Scalia correctly anticipated that the proposed revision would eliminate a "significant and necessary deterrent" to frivolous litigation: "[T]he overwhelming approval of the Rule by the federal district judges who daily grapple with the problem of litigation is enough to persuade me that it should not be gutted." After the proposal was forwarded to Congress, there was a seven month period under the Rules Enabling Act in which the Congress had the au-

[13] Federal Judicial Center Final Report on Rule 11 to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, May 1991.

thority to make changes. Despite the introduction of H.R. 2927 by Carlos J. Moorhead, Chairman of the Subcommittee on Courts and Intellectual Property, and a companion bill in the Senate, no formal action was taken, and the revisions went into effect on December 1, 1993.[14]

The Committee believes that the present Rule 11 is much weaker than its predecessor. First, there is no longer a requirement for attorneys to inquire about the facts before filing a pleading. Second, litigants and lawyers are permitted to withdraw challenged pleadings in order to avoid sanctions. Third, the mandatory sanctions that formed an important core of the 1983 rules changes have been replaced with a discretionary sanctioning system, and the prospects for compensating aggrieved opposing parties are greatly reduced. Taken as a whole, these revisions change the dynamics of a lawsuit such that frivolous and abusive conduct is much harder to address and eliminate.

Section 4 makes several important changes to Rule 11. First, it reestablishes a system of mandatory, as opposed to discretionary, sanctions. Second, it mandates the use of attorney's fees as part of the sanction. Third, it puts a bigger emphasis on the Rule's compensatory function by clarifying that sanctions should be sufficient to deter repetition and to compensate the parties that were injured. All of these changes make good, common sense. Mandatory sanctions send a clear message that abusive litigation practices will not be tolerated by our judicial system or the judges who form its core. Appropriate monetary sanctions, including the award of attorney's fees, also help in deterring abuse and provide some recompense for parties that are harmed by sanctionable misconduct.

Fourth, section 4 would eliminate the so-called "safe harbor" provision of the current Rule, which permits a lawyer or litigant to withdraw a challenge pleading, without penalty, prior to the actual award of sanctions. As Justice Scalia noted in his dissent to the Court's transmissions of the new Rule 11 to the Congress, "those who file frivolous suits and pleadings should have no 'safe harbor.' The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing plead-

---

[14] The Judicial Conference of the United States has the responsibility to "carry on a continuous study of the operation and effect of the general rules of practice and procedure". It also recommends changes in the Federal Rules to promote a "simplicity in procedure, fairness in administration, and just determination of litigation and the elimination of unjustifiable expense and delay." 28 U.S.C. § 331. All of this activity is coordinated by its Committee on Rules of Practice and Procedure which is presently chaired by the Honorable Ralph K. Winter. The Standing Committee reviews and coordinates the recommendations of five advisory committees.

The Supreme Court is authorized to "prescribe" the general rules of practice and procedures. In fact it has been the general practice of the Supreme Court to merely act as a conduit for the rule changes and rely on the Judicial Conference to make the basic decisions in this area. Justice White believed that, as a matter of practice, the role of the Supreme Court is to "* * * transmit the Judicial Conference recommendations without change and without careful study as long as there is no suggestion that the committee system has not operated with integrity". Indeed Chief Justice Rehnquist's April 22, 1993 letter conveying the rules to the Speaker states: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the court itself would have proposed these amendments in the form submitted."

However, three of the Supreme Court Justices do not appear to accept this passive role, or at least in this instance they felt so strongly that they dissented in part to the proposed rules. Their observations are outlined in Justice Scalia's dissent in which he objected to changes in Rule 11 joined by Justice Thomas. See Chief Justice Rehnquist's April 22, 1993 letter conveying the rule changes to the Speaker of the House, Justice Scalia with whom Justice Thomas joined and with whom Justice Souter joined in Part II.

ings, secure in the knowledge that they have nothing to lose * * *."

Fifth, it would return to the pre-December 1993 practice of applying Rule 11 to discovery abuses. An empirical study conducted by the American Judicature Society suggested that discovery made up over 19 percent of the motions that were filed under the old Rule 11.[15] It's important to sanction discovery abuses just as it is important to sanction abuses at any stage of the litigation process.

Justice Scalia went on to remind the Supreme Court that the "safe harbor" provision contradicts the Court's decision of five years ago in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990). In that case, the Supreme Court upheld the trial court's jurisdiction to consider Rule 11 sanctions, despite the party's voluntary dismissal, and said:

> Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the arm triggering Rule 11's concerns has already occurred. Therefore, a litigant who has violated Rule 11 merits sanctions even after a dismissal.

It is important that federal judges maintain the approach exhibited in *Cooter & Gell* because old Rule 11 has proven to be a strong tool for the bench to use and the bar to follow in curbing or avoiding litigation abuse. There should be a coordinated nationwide effort on behalf of the Judiciary to firmly implement Rule 11 as well as a nationwide effort on the part of lawyers to abide by the Rule's terms. Rule 11 sanctions are to be mandatory and like other types of clear penalties in our civil and criminal justice systems, are intended to send an unambiguous message that abusive conduct will not be tolerated. This is important in encouraging compliance with the fact-checking requirement of the Rule. It also gives litigants and the public a sense of fairness in the knowledge that abusive practices will not be tolerated by our justice system. Mandatory sanctions also prevent judges from "going easy" on lawyers who break the rules. As Supreme Court Justice Scalia has written, "[j]udges, like other human beings, do not like imposing punishment when their duty does not require it, especially on their own acquaintances and members of their own profession."

HEARINGS

The Committee's Subcommittee on Courts and Intellectual Property held two days of oversight hearings related to the issues contained in H.R. 988. The hearings were held on February 6 & 10, 1995. Testimony was received from the following eight witnesses on February 6, 1995: the Honorable Jim Ramstad, U.S. Representative, 3rd district, Minnesota; the Honorable Christopher Cox, U.S. Representative, 47th district, California; Professor Thomas D. Rowe, Jr., Duke University Law School; Professor Herbert M. Kritzer, University of Wisconsin Law School; Mr. Walter K. Olson,

[15] "* * * discovery abuse remains a prominent reason for Rule 11 activity and was cited as the reason for 19.2% of formal activity not leading to sanctions and 14.9% of actual sanctions." See Marshall, Kritzer and Zeamans, "The Use and Impact of Rule 11," 86 N.W.U.L. Rev. 943, 951–55 (1992).

Economist, Manhattan Institute; Ms. Debra T. Ballen, Senior Vice President of Policy & Development Research, American Insurance Association; Mr. John P. Frank, Attorney-at-Law, Lewis and Roca; and Mr. John Foster, Engineer and Chairman of Malcolm Pirnie, Inc.

On February 10, 1995, the Subcommittee continued to receive testimony from the following seven witnesses: the Honorable Toby Roth, U.S. Representative, 3rd District, Wisconsin; Dr. Franklin Zweig, President, Einstein Institute for Science, Health and the Courts; Mr. Robert Charrow, Attorney-at-Law, Crowell & Moring; Mr. Anthony Z. Roisman, Attorney-at-Law, Cohen, Milstein, Hausfeld & Toll; Mr. David C. Weiner, Attorney-at-Law, Hahn, Loeser & Parks; Mr. Michael J. Horowitz, Attorney-at-Law, Hudson Institute; and Mr. Bill Fry, Executive Director, HALT, with additional material submitted by Robert D. Evans, Director of Government Affairs, American Bar Association; Mr. L. Ralph Mecham, Director, Administrative Office of the United States Courts; Judge William W. Schwarzer, Director, The Federal Judicial Center; Judge Ralph K. Winter, Jr., Chairman, Committee on Rules of Practice and Procedure, Judicial Conference of the United States; Stuart Z. Grossman, Chairman, Civil Justice Committee, American Board of Trial Advocates, Arthur D. Wolf, Professor of Law, Western New England College School of Law, and Sheila F. Anthony, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice.

COMMITTEE CONSIDERATION

On February 23, 1995 the Committee met to consider H.R. 988. During its consideration, the Committee adopted three amendments. The first amendment was offered by Mr. Goodlatte to strike section 2 and insert new language. That amendment passed on a record of 27 in favor and 7 opposed. The next two amendments passed on voice vote, one offered by Mr. McCollum to strike section 5 "Notice Before Commencement of Lawsuit" and the other by Mr. Barr to strike the "Sense of Congress" provision in section 4.

The Committee then favorably reported H.R. 988 on a record vote of 19 in favor and 12 opposed, a quorum being present. Ms. Lofgren moved to reconsider the vote on the motion to favorably report H.R. 988 to the House. The motion failed on a record vote of 14 in favor and 19 opposed.

The recorded votes occurred as follows:

1. An amendment offered by Mr. Goodlatte to strike section 2 and replace it with language that sets up a mechanism to award costs, expenses and attorney's fees to a prevailing party. The amendment was agreed to by a vote of 27 in favor and 7 opposed.

YEAS	NAYS	PASS
Mr. Hyde	Mr. Conyers	Mrs. Schroeder
Mr. Moorhead	Mr. Boucher	
Mr. McCollum	Mr. Bryant of Texas	
Mr. Gekas	Mr. Serrano	
Mr. Coble	Mr. Sensenbrenner	
Mr. Smith of Texas	Mr. Inglis	

YEAS	NAYS	PASS
Mr. Schiff	Mr. Bono	
Mr. Gallegly		
Mr. Canady		
Mr. Goodlatte		
Mr. Buyer		
Mr. Hoke		
Mr. Heineman		
Mr. Bryant of Tennessee		
Mr. Chabot		
Mr. Flanagan		
Mr. Barr		
Mr. Frank		
Mr. Schumer		
Mr. Berman		
Mr. Reed		
Mr. Nadler		
Mr. Scott		
Mr. Watt		
Mr. Becerra		
Ms. Lofgren		
Ms. Jackson-Lee		

2. Chairman Hyde moved that H.R. 988 as amended be reported favorably to the House. The motion carried, 19 in favor and 12 opposed.

YEAS	NAYS	PASS
Mr. Hyde	Mr. Conyers	Mr. Buyer
Mr. Moorhead	Mr. Frank	
Mr. Sensenbrenner	Mr. Schumer	
Mr. McCollum	Mr. Berman	
Mr. Gekas	Mr. Boucher	
Mr. Coble	Mr. Bryant of Texas	
Mr. Smith of Texas	Mr. Reed	
Mr. Schiff	Mr. Nadler	
Mr. Gallegly	Mr. Scott	
Mr. Canady	Mr. Watt	
Mr. Inglis	Mr. Serrano	
Mr. Goodlatte	Ms. Jackson-Lee	
Mr. Hoke		
Mr. Bono		
Mr. Heineman		
Mr. Bryant of Tennessee		
Mr. Chabot		
Mr. Barr		
Ms. Lofgren		

3. Ms. Lofgren moved to reconsider the vote on the motion to favorable report H.R. 988 to the House. The motion was defeated by a vote of 14 in favor and 19 opposed.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Moorhead
Mr. Schumer	Mr. Sensenbrenner
Mr. Berman	Mr. McCollum
Mr. Boucher	Mr. Coble
Mr. Bryant of Texas	Mr. Smith
Mr. Reed	Mr. Schiff
Mr. Nadler	Mr. Gallegly
Mr. Scott	Mr. Canady
Mr. Watt	Mr. Inglis
Mr. Becerra	Mr. Goodlatte
Mr. Serrano	Mr. Buyer
Ms. Lofgren	Mr. Hoke
Ms. Jackson-Lee	Mr. Bono
	Mr. Heineman
	Mr. Bryant of Tennessee
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HEARINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 988, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 28, 1995.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 988, the Attorney Accountability Act of 1995, as ordered reported by the House Committee on the Judiciary on February 22, 1995. CBO estimates that enacting H.R. 988 would not result in any significant cost to the federal government. Because enactment of H.R. 988 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

H.R. 988 would revise federal rules of procedure in three areas. First, the bill would require the prevailing party in federal civil diversity cases (which are cases that involve two private parties from two different states and damages of at least $50,000) to pay the losing party's attorneys fees if the losing party made an offer of settlement prior to trial that was rejected and later proved to be larger than the damages actually awarded in the subsequent trial. Second, H.R. 988 would establish the circumstances under which testimony based on scientific opinion could be admissible in court. Third, the bill would require federal judges, upon determining that an attorney has filed a frivolous lawsuit or has engaged in abusive tactics, to impose sanctions against the attorney. These mandatory sanctions could include the payment of the opposing party's attorney's fees or other expenses to compensate the parties injured by such conduct.

Under current law, sanctions against attorneys are imposed at the discretion of federal judges and can include the payment of penalties to the courts. Based on information from the Administrative Office of the United States Courts (AOUSC), civil penalties collected (which are recorded in the budget as miscellaneous receipts to the Treasury) total less than $500,000 per year. Thus, eliminating the ability of federal judges to impose civil penalties payable to federal courts would not cause a significant loss of receipts to the Treasury. Also, according to the AOUSC, the number of hearings held to consider sanctions against attorneys would most likely increase under this bill. Any additional costs to the federal courts, however, would be insignificant.

In addition, to the extent that these reforms to civil procedure would deter the filing of civil cases or encourage settlements prior to trial, the federal court system could realize some savings. The amount of such savings cannot be estimated until these new procedures have been implemented for a period of several years.

H.R. 988 would not affect state courts, and thus would have no budgetary impact on state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 988 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1. This section provides a short title for the bill, the "Attorney Accountability Act of 1995".

Section 2. This section amends the diversity jurisdiction statute (28 U.S.C. § 1332) and provides a mechanism for the award of costs, expenses and attorney fees to a "prevailing" litigant. The emphasis is on pretrial settlements and it takes effect only when a settlement offer is made by a party to an adverse party within 10 days of trial. If the settlement offer is rejected and the judgment is less than that offer, even though the party may have prevailed, the party must pay the costs, expenses and attorney fees to the adverse party offeror from the date of last offer made by the adverse party offeror.

At any time before judgment, the court may exempt any claim from this section if the court finds that the claim presents a question of law or fact that is novel and important and that substantially affects nonparties. This is intended to be a high standard and all three elements (novel, important and substantially affects nonparties) must be present before an exception applies.

Attorney's fees awarded under this section shall be reasonable and calculated on the basis of an hourly rate which may not exceed that which the court considers acceptable in the community in which the attorney practices law, taking into account the attorney's qualifications and experience and the complexity of the case, and attorneys may not exceed the actual cost paid by the offeree to its own attorney. If no such cost exists because of a contingency fee agreement, then the offeree must pay the reasonable costs and fees that would have been incurred if no contingency agreement existed. This section does not apply to any claim seeking an equitable remedy.

Section 3. This section amends Rule 702 of the Federal Rules of Evidence. Section 3 narrows the opportunity for distorted scientific evidence to be introduced into federal trial of civil litigation. It focuses the nature and scope of expert witness testimony permitted during trial of a civil lawsuit by amending Section 702 and 403 of the Federal Rules of Evidence (FRE) to create a presumption of inadmissibility and a lower standard of prejudice. It reduces the opportunity for "junk" or unfounded scientific opinion pronounced by heavily credentialed but biased witnesses from reaching juries. It is intended to raise the accountability of expert witnesses in federal civil litigation. It requires U.S. district judges to manage cases proactively with respect to "fringe" claims invoking the mantle of scientific research. By its several provisions, Section 3 codifies and further applies rule 702 FRE as enunciated in 1993 by the U.S. Supreme Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.* 113 S.Ct. 2786 (1993).

Section 3 accomplishes these objectives by:

(1) inserting into the FRE the presumption that expert witness opinion based upon scientific evidence of all varieties is inadmissible, and requiring the proponents of such evidence to rebut the presumption;

(2) providing that a trial judge in pre-trail proceedings screen the argument made in rebuttal of the presumption of admissibility through a finding of the proferred evidence's scientific validity and reliability, structuring the court's review in accordance with the standards in *Daubert* v. *Merrell Dow Pharmaeuticals, Inc.,* 113 S.Ct. 2786;

(3) requiring a further finding that the proponents of scientific evidence have linked in proposed testimony an opinion on the ultimate fact in issue to a credible scientific foundation;

(4) requiring a judge to make a finding that weighs the preferred expert opinion's probative value against its propensity to prejudice, confuse or mislead a jury; and

(5) by requiring a judicial inquiry into the fee basis for expert witness testimony, and a ruling of inadmissibility by operation of law in any instance in which the court finds that an expert witness's fee is contingent upon the outcome of a case.

Section 4. This section would amend Rule 11(c) of the Federal Rules of Civil Procedure. This section makes several changes to Rule 11(c). First, it reestablishes a system of mandatory, as opposed to discretionary, sanctions. Second, it mandates the use of attorney's fees as part of the sanction. Third, it puts a bigger emphasis on the Rule's compensatory function by clarifying that sanctions should be sufficient to deter repetition and to compensate the parties that were injured. Fourth, it eliminates the "safe harbor" provision of the current Rule 11(c), which permits a lawyer or litigant to withdraw a challenged pleading, without penalty, prior to the award of sanctions. Fifth, it would return to the pre-December 1993 practice of having Rule 11 apply to Discovery.

Section 5. This section would set an effective date for the Act at 180 days after enactment.

AGENCY VIEWS

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES,
Washington, DC, February 7, 1995.

Hon. CARLOS J. MOORHEAD,
Chairman, Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, House of Representatives, Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I write to request your assistance to prevent amendment of Rule 702 of the Federal Rules of Evidence (Testimony by Experts) outside the Rules Enabling Act process in your consideration of H.R. 10, the Common Sense Legal Reform Act.

The Chief Justice established and appointed members to the Judicial Conference Advisory Committee on Evidence Rules in early 1993. As part of a comprehensive review of all the evidence rules, the committee discussed at length the rules on expert testimony at separate public meetings on May 9–10, 1994, and October 17–18, 1994.

The committee unanimously concluded that amendment of Rule 702 would be counterproductive at this time in light of the recent decision of the Supreme Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.* (1993). It is yet too early to determine whether *Daubert* curbs abuses in the use of expert testimony. A valid assessment of its effects can only be made after courts acquire more experience with it. The committee will continue to study the operation and effect of the rule as construed under *Daubert* by the courts.

At its January 9–10, 1995 meeting, the committee discussed the proposed amendment of Evidence Rule 702 contained in H.R. 10. Section 102 of the bill would add a new subdivision (b) to Rule 702 purportedly codifying the *Daubert* decision. *Daubert* is now the law of the land. Restating the Court's opinion, even if drafted accurately, is unnecessary. But Rule 702(b) as proposed in H.R. 10 does not accurately codify *Daubert*. And if enacted would cause mischief.

Rule 702(b) distinguishes between "validity" and "reliability" of scientific evidence, a distinction expressly rejected in *Daubert*. Under the proposed amendment, a judge must determine that "validity" of scientific evidence as a preliminary matter. This new requirement imposes an ill-defined burden on the courts. Indeed, it is difficult to see how scientific evidence can be "reliable" and yet not be "valid." The uncertainties created by the requirements could cause significant problems, particularly for prosecutors who often rely heavily on "scientific evidence" in establishing the guilt of defendants.

Rule 702(b) limits its scope to "scientific knowledge." It does not extend to "technical or other specialized knowledge," items explicitly contained in Rule 702. By implication, the proposed amendment would bar extension of *Daubert* to these other types of evidence—something *Daubert* leaves open.

The proposed Rule 702(b) would also reverse the present Evidence Rule 403 balancing test, which *Daubert* expressly applies to Rule 702 testimony. Rule 702(b) would require that the proffered opinion be "sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in Rule 403"; instead of the existing test which permits the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

The reverse balancing test used in Rule 702(b) raises serious problems, because it applies only to "scientific knowledge." The Rule 403 balancing test would continue to apply to opinion testimony that is "technical or other specialized knowledge." There is no apparent reason to apply different balancing tests to different types of opinions. The distinctions will generate unnecessary and wasteful litigation as resourceful lawyers attempt to discern differences in individual cases.

Section 102 would also add a new Evidence Rule 702(c), which excludes testimony from an expert who is entitled to receive "compensation contingent on the legal disposition of any claim with respect to which such testimony is offered." The need for the provision is unclear. Contingent fee expert testimony is prohibited in most districts under disciplinary rules regulating professional conduct.

Unlike disciplinary rules, the proposed Rule 702(c) would regulate and penalize contingent fee expert testimony by excluding the proffered evidence. Neither the provision's advantages nor adverse effects are fully understood. Moreover, the relationship between the new rule and the numerous statutory fee-shifting provisions is unclear. Expert testimony given in *pro bono* cases where payment of fees for experts is shifted to the losing party may be subject inadvertently to exclusion under Rule 702(c).

Although less likely, disputes may arise concerning large corporations' in-house experts whose livelihoods depend on their past records in testifying before the courts or experts testifying in cases litigated on a contingency attorney-fee basis. The entire question of what "entitled to receive compensation" means in Rule 702(c) is a matter that needs careful attention and study.

Revision of evidence rules governing the admission of expert testimony in civil and criminal cases involves particularly complex issues that vary tremendously depending on the case. Under the Rules Enabling Act rulemaking process, every proposed amendment is subject to public comment and widespread examination by individuals who work daily with the rules and meticulous care in drafting by acknowledged experts in the area. Proposed amendment of Evidence Rule 702 is precisely the type of work best handled by the Act's rulemaking process.

The committee urges you to withdraw the proposed amendments to Evidence Rule 702 in section 102 from H.R. 10.

Sincerely yours,

RALPH K. WINTER,
Judge, United States Court of Appeals.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, February 24, 1995.

Hon. PATRICIA SCHROEDER,
House of Representatives,
Washington, DC.

DEAR CONGRESSWOMAN SCHROEDER: Thank you for the opportunity to comment on Section 102 of H.R. 10, the "Common Sense Legal Reform Act." The provision would amend Federal Rule of Evidence 702 in an attempt to curtail the use of so-called "junk science" in the courtroom.

It is the Justice Department's view that Section 102 neither codifies present caselaw interpreting Rule 702 nor reinstates earlier common law. Considerable effort has been and is being expended in developing materials to assist federal judges in assessing complex scientific matters under present Rule 702. The proposal to amend Rule 702 uses undefined terms and alters long-standing evidentiary presumptions. As a result, it could spawn extensive litigation and force the courts to start over in evaluating the use of scientific evidence in both criminal and civil proceedings.

The current Rule 702 is broadly phrased, applying to both civil and criminal proceedings:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The proposed amendment would provide that "testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible unless the court determines that such opinion is (1) based on scientifically valid reasoning; and (2) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in Rule 403." (emphasis added). Section 102 of the proposed bill would also add a new Evidence Rule 702(c) barring testimony from expert witnesses entitled to receive any compensation contingent on the outcome of any claims with respect to which their testimony is offered.

The interest of the Justice Department regarding the admissibility and use of scientific evidence was clearly stated in the introduction to the government's amicus curiae brief filed with the U.S. Supreme Court in the landmark cases *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*:

> The United States is vitally interested in the issue of the admissibility of expert testimony concerning scientific theories in federal court. The federal government is a party to a far greater number of civil cases 'on a nationwide basis than even the most litigious private entity.' (Citation). In addition the government is solely responsible for the enforcement of federal criminal laws. Because of the great diversity of its civil and criminal litigation, the federal government finds itself supporting the admission of scientific theories in some cases while opposing their admission in others. The federal government is therefore interested in a principled approach to resolution of the question presented in this case.

The consequences of proposed Section 102 cannot be fully understood without explanation of the U.S. Supreme Court's recent ruling in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The issue in *Daubert* was whether the 1975 enactment of the Federal Rules of Evidence precluded federal trial courts from relying solely on the seventy-year old common-law test enunciated in *Frye* v. *United States,* 293 F. 1013 (D.C. Cir. 1923) to determine whether expert scientific testimony should be received by the court or heard by the jury. Under *Frye,* expert scientific opinion was admissible only if it were based on techniques that were "generally accepted" by the relevant scientific community and found to be reliable. A split among the circuit courts regarding the effect of the Federal Rules and increasing controversy over the use of expert scientific testimony in litigation led the Court to accept certiorari in *Daubert.*

The *Daubert* case involved an attempt to introduce into evidence certain epidemiological and statistical studies to prove that ingestion of the prescription drug Bendectin by the plaintiffs' mothers during pregnancy had caused serious birth defects. The trial court had granted the defendant's summary judgment motion on the

grounds that the expert testimony proposed by the plaintiffs did not meet the "general acceptance" standard for the admission of such evidence under *Frye*, and the Ninth Circuit upheld that determination. The *Daubert* court remanded the case, holding that the common law rule of *Frye* was superseded by the adoption of Rule 702 as the federal standard for the admissibility of expert scientific testimony. Since the sparse language of the rule itself offered little direction, the Supreme Court sought to provide guidance as to how such evidence should be evaluated by courts under the more flexible and permissive Rule 702.

The *Daubert* decision is complex and cannot be easily distilled into a word or two of "black letter law." Rather, the nine to nothing decision defines a general construct or scheme for the judicial evaluation of scientific evidence. According to the *Daubert* majority, the first step in comprehending the standard for admissibility of scientific testimony is to appreciate the meaning of the term "scientific knowledge" in Rule 702. Knowledge connotes more than subjective belief or unsupported speculation. The phrase was interpreted to establish a standard of "evidentiary reliability," further explained to mean "trustworthiness" or "scientific validity." 113 S. Ct. 2786, 2795. In order to qualify as "scientific knowledge," an inference or assertion "must be derived by the scientific method" and proposed testimony must be supported by "appropriate validation—i.e. 'good grounds'." In addition, the Court found that Rule 702 included a requirement of "relevance" or "helpfulness," mandating a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." The majority opinion also offered four guidelines to judges to assist in the inquiry, suggesting that (1) the theory or technique should be able to be or have been tested; (2) the theory or technique should be subjected to peer review and publication; (3) the court should attempt to determine the known or potential rate of error; and (4) the court should inquire as to the degree of acceptance within the relevant scientific community. *Id.* at 2796–2797.

Finally, the Court underscored the connection between Rule 702 and Rule 403, to the effect that scientific testimony may be excluded, even if probative and reliable, if it will tend to mislead, prejudice or confuse the jury. Id. at 2798. The Court repudiated the notion that abandonment of the "general acceptance" standard would result in a "free-for-all in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions," instead relying on the common sense and wisdom of the judicial "gatekeepers" to ensure that expert testimony "both rests on a reliable foundation and is relevant to the task at hand." Id.

Several components of the Justice Department were involved in developing the Department's amicus brief, including the Criminal Division, the FBI, the Torts and Appellate branches of the Civil Division, and the Environment and Natural Resources Division. Seeking to accommodate the sometimes competing interests of the various components with respect to the use of scientific evidence, the Department lent its support to those courts that favored a more generalized inquiry into the reliability of scientific evidence in light of the purpose for which it is offered. The very formulation adopted by the Supreme Court in *Daubert* regarding the definition of sci-

entific "knowledge" is suggested in the Justice Department's brief to the Court, as well as the guidelines for determining reliability.

In light of the *Daubert* ruling, the proposed amendment to Rule 702 would seem to have the following effects:

1. The proposed rule requires opinion testimony to be based on "scientifically valid reasoning," an undefined term that differs significantly from the text and context of the *Daubert* holding and the "general acceptance" test of *Frye*. This will necessitate protracted litigation to determine the scope and intent of the new formulation. We anticipate the possibility of revalidating many areas of expert testimony which have already received the imprimatur of the federal courts in the context of such litigation.

2. The proposed rule incorporates a presumption that all scientific evidence is inadmissible, unless it meets the uncertain two-pronged test of the amended rule. This is contrary to the holding by the *Daubert* court that Rule 702 was intended to be permissive and flexible with respect to the admissibility of expert testimony. Moreover, even for well established forensic sciences, such as frequent analysis, firearms examinations, serology, etc., we foresee unnecessary admissibility battles in criminal cases, coupled with undue expense and delay. Such a reformulated rule might prevent the admissibility of cutting edge technologies (as DNA identification once was) which could prove to be powerful tools both for convicting the guilty and exonerating the innocent. Unless their testimony was specifically held to be admissible, every expert witness in every case, criminal and civil, would be barred from testifying. In criminal and civil cases, needless satellite litigation over the admissibility of evidence would inevitably result with serious detrimental effects on the prosecution of crimes and the expeditious resolution of civil cases.

3. Proposed Rule 702(b) is expressly limited in scope to scientific evidence, while existing Rule 702 also applies to "technical, or other specialized knowledge," raising confusion about the extension of *Daubert* to other types of expert opinion testimony.

4. The proposed amendment reverses the burden of Rule 403, which *Daubert* expressly ties to Rule 702 testimony. Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury" (dangers must outweigh probative value). Proposed Rule 702(b) requires that the opinion be "sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403" (probative value must outweigh dangers). There is also an issue as to whether this reversal of the Rule 403 balance applies to other kinds of expert opinion testimony.

5. The proposed amendment could strategically disadvantage the United States in cases involving significant issues of science, technology, forensics, public health, the environment, and economic analysis.

It is the view of the Department that proposed Section 102 neither codifies the *Daubert* decision or reinstates the *Fyre* rule and that the measure would force the courts to begin all over again in the evaluating the use of scientific evidence in both criminal and civil proceedings. The provision could well jeopardize the progress

that had been made with the *Daubert* decision and the cases following, cutting short the opportunity for the circuit courts to further refine the meaning of the decision. See, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 1995 WL 1736 (9th Cir. 1995) sustaining the inadmissibility of plaintiffs evidence under the Supreme Court's new formulation. Of particular concern is the presumption againt admissibility of scientific evidence stated by the amendment, and confusion as to whether the *Daubert* ruling was incorporated in the amended rule or overruled.

Since the *Daubert* decision in 1993, numerous activities have been undertaken to enhance the ability of federal judges to assess and manage complex scientific issues. The Department endorses these efforts. The Federal Judicial Center (FJC) has just published an extensive manual which examines procedures for the management of expert testimony, including the use of procedures such as court appointed experts and special masters, in cases presenting the most difficult issues. Justice Department attorneys participated in the preparation of that publication. The FJC also is expanding opportunities for judicial education concerning scientific evidence, and will undertake research and evaluation related to the use and management of scientific and technical testimony. Similarly, the Einstein Program for Law and Judicial Policy Studies at George Washington University, in conjunction with the State Justice Institute, the National Institute of Justice, and the FBI, is developing seven science-related benchbooks for judges. Within the judicial community, the new "gatekeeper" role assigned to judges by the *Daubert* decision appears to have been taken very seriously. We thus urge that *Daubert* and the mechanisms which have flowed from the opinion be permitted to be tested over a period of several years. If *Daubert* proves to be unwieldy for the judiciary and litigants, it can certainly be revisited. However, it appears prudent to allow the opinion and the judiciary's role as gatekeeper a reasonable chance to succeed.

The Advisory Committee on Evidence Rules also has examined Rule 702 in light of the *Daubert* ruling. A senior official of the Justice Department is a member of that committee. As indicated in a letter to the Ranking Member of the House Judiciary Committee, dated February 7, 1995, the Chair of the Advisory Committee, Judge Ralph Winter, urged the withdrawal of the proposed amendment to Rule 702, allowing the Advisory Committee to assess needed changes. We share the view that the Rules Enabling Act process is the most effective means of considering this complex subject.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

SHEILA F. ANTHONY,
Assistant Attorney General.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted

is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 1332 OF TITLE 28, UNITED STATES CODE

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) * * *

* * * * * * *

(e)(1) In any action over which the court has jurisdiction under this section, any party may, at any time not less than 10 days before trial, serve upon any adverse party a written offer to settle a claim or claims for money or property or to the effect specified in the offer, including a motion to dismiss all claims, and to enter into a stipulation dismissing the claim or claims or allowing judgment to be entered according to the terms of the offer. Any such offer, together with proof of service thereof, shall be filed with the clerk of the court.

(2) If the party receiving an offer under paragraph (1) serves written notice on the offeror that the offer is accepted, either party may then file with the clerk of the court the notice of acceptance, together with proof of service thereof.

(3) The fact that an offer under paragraph (1) is made but not accepted does not preclude a subsequent offer under paragraph (1). Evidence of an offer is not admissible for any purpose except in proceedings to enforce a settlement, or to determine costs and expenses under this subsection.

(4) At any time before judgment is entered, the court, upon its own motion or upon the motion of any party, may exempt from this subsection any claim that the court finds presents a question of law or fact that is novel and important and that substantially affects nonparties. If a claim is exempted from this subsection, all offers made by any party under paragraph (1) with respect to that claim shall be void and have no effect.

(5) If all offers made by a party under paragraph (1) with respect to a claim or claims, including any motion to dismiss all claims, are not accepted and the judgment, verdict, or order finally issued (exclusive of costs, expenses, and attorneys' fees incurred after judgment or trial) in the action under this section is not more favorable to the offeree with respect to the claim or claims than the last such offer, the offeror may file with the court, within 10 days after the final judgment, verdict, or order is issued, a petition for payment of costs and expenses, including attorneys' fees, incurred with respect to the claim or claims from the date the last such offer was made.

(6) If the court finds, pursuant to a petition filed under paragraph (5) with respect to a claim or claims, that the judgment, verdict, or order finally obtained is not more favorable to the offeree with respect to the claim or claims than the last offer, the court shall order the offeree to pay the offeror's costs and expenses, including attorneys' fees, incurred with respect to the claim or claims from the date the last offer was made, unless the court finds that requiring the payment of such costs and expenses would be manifestly unjust.

(7) Attorney's fees under paragraph (6) shall be a reasonable attorney's fee attributable to the claim or claims involved, calculated

on the basis of an hourly rate which may not exceed that which the court considers acceptable in the community in which the attorney practices law, taking into account the attorney's qualifications and experience and the complexity of the case, except that the attorney's fees under paragraph (6) may not exceed—

(A) the actual cost incurred by the offeree for an attorney's fee payable to an attorney for services in connection with the claim or claims; or

(B) if no such cost was incurred by the offeree due to a contingency fee agreement, a reasonable cost that would have been incurred by the offeree for an attorney's noncontingent fee payable to an attorney for services in connection with the claim or claims.

(8) This subsection does not apply to any claim seeking an equitable remedy.

RULE 702 OF THE FEDERAL RULES OF EVIDENCE

Rule 702. Testimony by Experts

(a) In general.—If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Adequate basis for opinion.—Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion—

(1) is scientifically valid and reliable;

(2) has a valid scientific connection to the fact it is offered to prove; and

(3) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.

(c) Disqualification.—Testimony by a witness who is qualified as described in subdivision (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.

(d) Scope.—Subdivision (b) does not apply to criminal proceedings.

RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions, and Other Papers; 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] *shall*, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or par-

ties that have violated subdivision (b) or are responsible for the violation.

(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 Sanction; 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 sanction imposed for a violation of this rule 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. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of an order to pay to the other 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.*

(A) * * *

* * * * * * *

[(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.]

* * * * * * *

DISSENTING VIEWS

We strongly dissent from the ill-conceived provisions of H.R. 988. We discuss below our objections to its component parts.

I. ATTORNEY'S FEES

"Loser pays" is a phrase that appeals to everyone who has heard an anecdote about a court case that produced what appears to be an absurd or abusive outcome. Government by anecdote, however, can produce disastrous policy, and this provision in particular deserves close scrutiny, and rejection, because it will impinge on the right of the people to have access to the courts to resolve their disputes.

Although the Contract with America claims that its "loser pays" provision is intended to penalize frivolous lawsuits, discourage the filing of weak cases and encourage the pursuit of strong cases,[1] it is almost certain to have consequences well beyond those salutary ones. We have no problem with a provision narrowly tailored to penalize frivolous lawsuits; and indeed, Rule 11 sanctions and causes of action for abuse of process or malicious prosecution are examples of tried and tested judicial mechanisms for penalizing frivolous lawsuits.

We have a serious problem, however, with provisions that deter middle-income persons from pursuing reasonable claims or defenses, and place them at an unfair disadvantage in disputes with risk-neutral parties—such as large corporations for whom the risk of fee-shifting will become just a cost of doing business. In a sense, the legislation creates a destructive dynamic where all but the rich will apply a test, in their minds, of whether their claim will "beyond all reasonable doubt" succeed at trial, before pursuing a civil action that our civil justice system provides should be decided by a trier of fact on a "preponderance of the evidence" standard. This makes absolutely no sense if you believe in a fair and accessible civil justice system. It makes good sense if your only goal is to deter litigation, whatever the consequences.

It is notable that the Republican majority is eager to embrace the so-called "English rule" just as prominent voices in England are calling for the abandonment of that rule in England. In a January 14 editorial, the conservative British magazine, The Economist, called for the abandonment of the rule, because "only the very wealthy can afford the costs and risks of most litigation" under the English rule. "This offends one of the most basic principles of a free society: equality before the law," it noted.

The "loser pays" provision in H.R. 988, as amended in committee by the Goodlatte amendment, may well have the intended, and salutary, effect of discouraging frivolous claims. It may well serve to

[1] Newt Gingrich & Dick Armey, "Contract with America," 143, 146 (Times Books 1994).

encourage a reasonable settlement in those cases in which the defendant is clearly liable. Its fatal flaw, however, is that it does not distinguish between frivolous cases and the much larger class of cases in which liability is a close call. We may slam the courthouse door with impunity on the former, but it would devastate the right of access of the judicial system to close the door on the latter.

Yet, it is clear that the "loser pays" provision in H.R. 988 fails to distinguish between frivolous cases and reasonable cases in which liability is closely contested, and thus, will deter many, particularly middle-income citizens and small businesses, from pursuing reasonable claims or defenses. As one scholar has noted:

> [F]or a middle-income litigant facing some possibility of an adverse fee shift, * * * defeat may wipe him out financially. * * * [T]he threat of having to pay the other side's fee can loom so large in the mind of a person without considerable disposable assets that it deters the pursuit of even a fairly promising and substantial claim or defense.[2]

Middle-income parties and small businesses may have to place their very solvency on the line in order to pursue a meritorious claim. The burden of proof in a civil case is "preponderance of the evidence," often described as that amount of evidence that shifts the scales, even if only slightly, from the point of balance. A middle-income plaintiff confronted with a written offer to settle under Section 2 of H.R. 988 must to settle at that point, unless he or she is willing to assume the risk of payment of the other side's attorney's fees. For middle-income plaintiffs who would be financially ruined by such an award, the calculus becomes, in effect, whether it is beyond a reasonable doubt that they will prevail. A rational middle-income plaintiff confronted with a settlement offer of $1.00 will drop even meritorious claims at that point, if the defendant's liability is a close question.

Particularly when their dispute is with a risk-neutral defendant, such as a large corporation for whom the risk of paying the other side's legal fees is merely a cost of doing business, middle-income people will be placed at a serious strategic disadvantage in the federal courts, even when their claims are not frivolous.

If the purpose is to discourage frivolous lawsuits, H.R. 988 doesn't even do that very well. Because the fee-shifting provision of H.R. 988 applies only in diversity cases, the effect of the rule will be to shift cases to the state courts, rather than to deter them altogether.

It is notable that the states, often referred to as the laboratories of democracy, have not, in any significant numbers, perceived the English rule to be an appropriate measure for their court systems. The Florida experience, in which doctors first demanded the English rule, and then demanded that it be abolished, should be a reminder to us that unintended consequences often overtake the intended ones, particularly when we act hastily and without thoughtful deliberation.

"Loser pays" is gimmick phraseology masking great harm to our civil justice system and the middle class which looks to it to uphold

---

[2] Thomas D. Rowe, Jr., "Predicting the Effects of Attorney Fee Shifting," 47 Law & Contemp. Probs. 148, 153 (1984).

their economic rights. As such, it fits in very nicely with the "Contract with America," but very poorly with the fundamental precepts that have guided the American justice system. This legislation should be rejected by the full House.

II. SCIENTIFIC EVIDENCE

The Committee's approach to amending Federal Rule of Evidence 702, relating to the admissibility of scientific evidence, exemplifies the bumpersticker method of governance reflected in the House Republicans' "Contract with America." This bill, we are told, "curbs the use of 'junk science' and requires so-called experts to be real experts."[3] While "No Junk Science!" and "Honesty in Evidence!" are exciting slogans, the underlying issues are too nuanced to permit sound policy to be articulated in the space of a car bumper.

To the extent that "junk science" is a problem in our courts, the Supreme Court provided an adequate cure in the *Daubert* case.[4] The federal judges, who will be required to live with the results of our hasty, poorly-drafted rules amendment, tell us that amendment of Rule 702 "would be counterproductive at this time in light of * * * *Daubert*," and "would cause mischief" because it imposes ill-defined burdens and uncertainties on the courts.[5] By rushing this rules change through the Committee and the House without going through the rulemaking process that Congress itself established under the Rules Enabling Act, 28 U.S.C. §§ 2071–2074, we trample upon the courts and the public alike in our stampede to the 100 Day finish line.

A. The Supreme Court has carefully crafted a remedy for this problem

In an opinion issued in 1993, the Supreme Court carefully crafted a framework for the judicial evaluation of scientific evidence, designed to curb abuses in the use of expert testimony. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). *Daubert* provides detailed guidance to judges, who serve as "gatekeepers" to ensure that expert testimony "both rests on a reliable foundation and is relevant to the task at hand." Id. at 2798.

Writing on behalf of the Evidence Rules Advisory Committee of the Judicial Conference of the United States, Judge Winter urges that we not amend Rule 702 at this time. He notes that the Evidence Rules Advisory Committee "unanimously concluded that amendment of Rule 702 would be counterproductive at this time in light of [*Daubert*]." The rational approach would be to assess the operation of *Daubert* to determine whether it is effective in curbing abuses in the use of scientific testimony; if it isn't, the experience of the courts under *Daubert* will be instructive in perfecting the remedy.

The newly-instituted Republican majority of the Judiciary Committee, however, appears to be constrained from recognizing that a

---

[3] Newt Gingrich & Dick Armey, "Contract With America" 143 (Times Books 1994).

[4] *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

[5] Letter from The Hon. Ralph K. Winter, Judge, United States Court of Appeals and Chair, Evidence Rules Advisory Committee of the Judicial Conference of the United States, to The Hon. Carlos Moorhead, Chairman, Subcommittee on Courts and Intellectual Property (February 7, 1995).

solution to the problem has already been set into motion—perhaps because such a recognition would foreclose the opportunity to check off a box on the "Contract With America" checklist in front of the television cameras. Instead, it is the imperative of the Contract that we trump the Supreme Court's careful analysis and guidance with a rules amendment that will cause confusion and turmoil throughout the federal judiciary.

B. The amendment is confusing and disruptive

Although some proponents of Section 3 of H.R. 988 claim that it will simply codify *Daubert*, they are plainly wrong. By omitting many of the guidelines spelled out in *Daubert*, by using undefined terms that differ from the language of *Daubert*, and by reversing the presumption with respect to admissibility, H.R. 998 effectively reverses *Daubert* in favor of a less-nuance, untested, and unclear standard. The U.S. Department of Justice notes:

It is the Justice Department's view that Section 102[6]

> neither codifies present case law interpreting Rule 702 nor reinstates earlier common law * * * The proposal to amend Rule 702 uses undefined terms and alters long-standing evidentiary presumptions. As a result, it could spawn extensive litigation and force the courts to start over in evaluating the use of scientific evidence. * * *[7]

Of the three witnesses who testified about scientific evidence at the February 10 hearing of the Subcommittee on Courts and Intellectual Property, only one asserted that the proposal codifies *Daubert*, and he recommended the insertion of language "that would make clear that the amendment * * * is not intended to undermine or otherwise relax the four guidelines in *Daubert*."[8] No such language has been added. The other two witnesses asserted that the proposal radically departs from *Daubert*. Dr. Franklin M. Zweig, testifying at the invitation of the majority, noted that "a dispassionate assessment must observe that it goes way beyond [*Daubert*]," calling it "an entirely different species of evidence law than the one currently applied by the federal judiciary [under Evidence Rule 702]."[9]

Dr. Zweig warned that this amendment could have significant unanticipated effects: thousand of hearings annually, with accompanying interlocutory appeals, perhaps spawning satellite litigation; the diversion of federal judicial resources to conduct the prescribed inquires; a bench trial on the substance prior to the jury trial that would follow; a hobbling of federal intellectual property adjudication, generally regarded as "junk-free," with a possible

---

[6] Section 102 of H.R. 10 is the predecessor of Section 3 of H.R. 988. It varied slightly from the present version, requiring that the court determine "that such opinion is—(1) based on scientifically valid reasoning; and (2) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403."

[7] Letter from Sheila F. Anthony, Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to The Hon. Patricia Schroeder, Ranking Democrat, Subcommittee on Courts and Intellectual Property (February 24, 1995).

[8] Testimony of Robert P. Charrow at 9.

[9] Testimony of Franklin M. Zweig at 11.

similar impact on international trade litigation; and an increase in form shopping for civil cases.[10]

Judge Winter and his committee warn us that enactment of this provision would cause mischief. We should pay heed.

Perhaps most troubling is the reversal of the long-standing presumption of admissibility of evidence; H.R. 998 incorporates a presumption that all scientific evidence is inadmissible unless it meets the three-pronged test of subsection (b). A presumption of inadmissibility places tremendous pressure on the courts to conduct extensive, burdensome pre-trial hearings, and removes a significant amount of decisionmaking authority from the juries.

We emphatically disagree with the notion that jurors lack the common sense and reasoning ability to evaluate scientific evidence. As Chief Justice Rehnquist has observed, "The founders of our nation considered the right of trial by jury in civil cases * * * a safeguard too precious to be left to the whim of the sovereign. * * *" *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, _____ (1979) (dissent). John Dickenson, one of the leading Federalists, wrote: "Trial by jury is our birthright; * * * who in opposition to the genius of United America, shall dare to attempt its subversion."[11] This bill subverts the jury by reversing the long-standing presumption of admissibility of evidence, and empowering federal judges, unelected officials appointed for life, to conduct much of the evaluation now left to jurors.

C. The amendment wrongly sidesteps the rulemaking process

Finally, we object to the consideration of an amendment to the Federal Rules of Evidence in a manner that sidesteps the rulemaking process Congress established under the Rules Enabling Act. As Judge Winter noted:

> Revision of evidence rules governing the admission of expert testimony * * * involves particularly complex issues that vary tremendously depending on the case. Under the Rules Enabling Act rulemaking process, every proposed amendment is subject to public comment and widespread examination by individuals who work daily with the rules and meticulous care in drafting by acknowledged experts in the area. Proposed amendment of Evidence Rule 702 is precisely the type of work best handled by the Act's rulemaking process.

Letter of the Hon. Ralph K. Winter to the Hon. Carlos Moorhead at 3.

We are embarking on a process that will dramatically affect every federal court in the land. It will fundamentally reshape and curtail the role of juries in cases involving scientific evidence, and will create vast areas of uncertainty in the trial of civil cases in federal court. The rulemaking process established by the Rules Enabling Act is designed to ensure that we take such steps only after full consultation with the courts, the public, experts, and those who work regularly with the rules. To sidestep that process is to in-

---

[10] Summary of Testimony of Franklin M. Zweig.

[11] Quoted in Testimony of Anthony Z. Roisman, February 10, 1995, Subcommittee on Courts and Intellectual Property.

dulge in a form of arrogance that does not bode well for our relationship with the judiciary, nor for our system of justice.

III. RULE 11 AMENDMENT

Rule 11 of the Federal Rules of Civil Procedure provides for the imposition of sanctions to deter abuses in the signing of pleadings, motions, and other court papers. Amended in 1983 to expand the power of the court to award attorney's fees to a litigant whose opponent acts in bad faith in instituting or conducting litigation,[12] Rule 11 instead "become a font of rancor."[13] It contributed significantly to the rising incivility of the bar as lawyers "had a double duty, one to try the case and the other to try the opposing counsel."[14]

The burden placed on the courts by the 1983 version of Rule 11 was considerable: an American Judicature study found that in 24.3 percent of the cases there was some Rule 11 involvement without sanctions, and in 7.6 percent of the cases there were Rule 11 sanctions.[15] That is, one-third of all cases involved satellite litigation based on Rule 11; one-fourth of all cases were burdened with Rule 11 activity, even though sanctions did not ultimately obtain.

To remedy these problems, Rule 11 was revised in 1993, using the process set out in the Rules Enabling Act, with hearings and consideration by the Supreme Court and the Congress. The revised rule:

> continues to require litigants to 'stop-and-think' before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

Fed. R. Civ. P. 11, advisory committee note.

Because it is of such recent vintage, the Federal Judicial Center has not had time to study how the revised Rule 11 is working. There are preliminary indications, however, that the revision has reduced satellite litigation, caused more lawsuits to be withdrawn because of the safe-harbor provisions of the rule, and improved the civility of the bar.[16]

As with the "junk science" provision of H.R. 988, we are rushing to fix a problem before taking the time to see if a previously-established remedy is sufficient; and we are doing so in a way that bypasses the Rules Enabling Act and the processes that would ensure adequate consultation with the federal courts about rules changes.

CONCLUSION

H.R. 988 is a composite of so-called federal court reforms that decimate the established rules of our civil justice system. These re-

---

[12] Fed. R. Civ. P. advisory committee's note.

[13] "Rule 11 Snags Lawyers," ABA Journal (Jan. 1991).

[14] Testimony of John P. Frank before the Subcommittee on Courts and Intellectual Property (February 6, 1995).

[15] Id., citing American Judicature Study, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank, ed., 1989).

[16] Frank Testimony at 8–9; "Sanctions Litigation Declining," ABA Journal (March 1995).

forms are not based on empirical evidence of malfunctions in the courts or widespread abuse by persons seeking to vindicate their rights. They are based on a desire to systematically begin closing the door of justice to all but the most affluent.

For most Americans, the arcane legal language of the bill will never be scrutinized, instead subsumed by catchy labels like "loser pays." But the American legal system, which is without peer in the world, was not developed in a hundred days, nor launched in the wake of pleasing semantic phrases. It was developed by a careful—even conservative—approach of Congress working with the judicial branch in developing fair and workable rules of federal civil procedure and evidence. Obviously, the proponents of H.R. 988, in their zeal to achieve a result for an ideological point of view, care nothing at all for a system that works well for all parties.

History has shown that such cavalier disregard for things that work well in government do not stand the test of time. When put to the test, it will be evident that H.R. 988 does not live up to the high ideals that are the underpinnings of the American system of civil justice.

CHARLES E. SCHUMER.
HOWARD L. BERMAN.
JOSÉ E. SERRANO.
JOHN CONYERS.
PAT SCHROEDER.
JERROLD NADLER.
BARNEY FRANK.
BOBBY SCOTT.
JOHN BRYANT.
MELVIN L. WATT.

○