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OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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November 6, 2013

Honorable John Conyers, Jr.  
Ranking Member  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Representative Conyers:

We write to offer the initial views of the Judicial Conference Rules Committees on one aspect of H.R. 3309, the Innovation Act.

We are the current chairs of the Judicial Conference's Committee on the Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure. In those capacities, we have reviewed the legislation and have shared it with the chairs of other committees of the Judicial Conference that may have an interest in the legislation. The Judicial Conference may wish to comment on the Innovation Act in the future, and we may have a few additional comments about the draft legislation in the future. For now, however, we wish to offer a comment about Section 6 of H.R. 3309, which it may be useful to hear sooner rather than later.

In its current form, Section 6 requires the Judicial Conference to develop rules to implement the requirements described in the Act that are intended to address asymmetries in discovery burdens and costs in patent litigation. In doing so, Section 6 sets forth the content of the civil rules that the Judicial Conference is expected to develop through the Rules Committees.

We greatly appreciate, and share, the desire to improve the civil justice system in our federal courts, including by reducing abusive procedural tactics in patent litigation. But legislation that mandates the contents of the federal rules contravenes the longstanding Judicial Conference policy opposing direct amendment of the federal rules by legislation instead of

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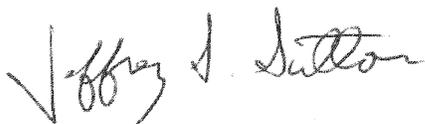
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through the deliberative process Congress established in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. Congress passed the Rules Enabling Act to create a thorough and inclusive process for addressing procedural problems in the federal courts. Under that process, the Rules Committees collect information that is essential to promulgating effective rules by commissioning empirical studies, analyzing relevant case law, and consulting with experts and others with direct experience in the area. Proposals for change are published for public comment and thoroughly analyzed by the Civil Rules Committee, the Standing Rules Committee, the Judicial Conference, the Supreme Court, and Congress. This multi-layered process ensures a thorough evaluation of proposals while reducing the ever-present risk of unintended consequences.

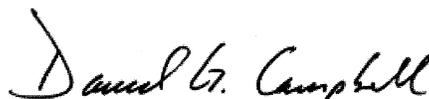
By dictating the outcome of the Rules Enabling Act process with respect to potential rules, Section 6 of H.R. 3309 runs counter to that process. We worry that this kind of approach more often will undermine, rather than further, the development of sound rules and practices. Instead of mandating the outcome of the Rules Enabling Act process, Congress may wish to urge the Judicial Conference's Rules Committees to study whether certain rules should be amended to address abusive patent litigation tactics and/or to implement the provisions of the Innovation Act. That approach would allow Congress to express its interest in addressing these problems *and* would respect the long-established virtues of the deliberative processes created by the Rules Enabling Act.

The Rules Committees and the other relevant Judicial Conference committees will continue to study the bill. If additional concerns are identified, they will be communicated to you as soon as possible. For now, however, we want to let you know immediately about our specific concerns with Section 6. The Rules Enabling Act process has worked well for the last 80 years or so, and we hope to see this collaborative partnership continue to work well long into the future. Thank you for considering our concerns. If you or your staff have any questions, please do not hesitate to contact us or Benjamin Robinson, Deputy Rules Officer and Counsel, at 202-502-1820.

Sincerely,



Jeffrey S. Sutton  
United States Circuit Judge  
Sixth Circuit  
Chair, Committee on Rules  
of Practice and Procedure



David G. Campbell  
United States District Judge  
District of Arizona  
Chair, Advisory Committee  
on Civil Rules

cc: Democratic Members of the House Committee on the Judiciary

Identical letter sent to: Honorable Bob Goodlatte