

Memorandum in Opposition

NYSBA Federal Memorandum #1

February 7, 2017

H.R. 720
S. 237

By: Rep. L. Smith
By: Senator Grassley

A BILL to amend Rule 11 of the Federal Rules of Civil Procedure.

THE NEW YORK STATE BAR ASSOCIATION OPPOSES THIS LEGISLATION

This bill would amend Rule 11 of the Federal Rules of Civil Procedure (“FRCP”) -- via a process that is inconsistent with the Rules Enabling Act, 28 USC sections 2072-74 -- to reinstate a mandatory sanctions provision that was deleted from the FRCP in 1993.

If enacted, this bill would significantly multiply satellite litigation, substantially degrade the efficiency of the courts, and greatly increase the cost of litigation. Changing Rule 11, as this bill proposes, would poison the relationships between parties and their attorneys, making cases more difficult to settle.

Moreover, enactment of this legislation constitutes bad public-policy, in that, it would restore a rule used from 1983 to 1993, which was thoroughly discredited because it did not allow for ameliorative action by the courts. The bill also would require the imposition of monetary sanctions, including attorneys’ fees, for violation of Rule 11. Such “fee-shifting” is contrary to the American Rule. Also, it would have a dampening effect on access to the justice system. Further, the bill would eliminate a provision adopted in 1993 that allows parties and their attorneys to avoid sanctions by withdrawing particular claims, and thereby resolving issues before the matter goes before the court.

Finally, the Rules Enabling Act provides that procedural rules should be drafted by the Judicial Conference of the United States, submitted to the U. S. Supreme Court for consideration and promulgation, and then transmitted by the Court to the Congress for its consideration before the rules take effect. That process respects the power of the judicial branch and recognizes the expertise and perspective of judges regarding the FRCP. Circumventing the rule-making process of courts, under the Rules Enabling Act, as this bill would, is poor precedent.

Based on the foregoing, the New York State Bar Association **OPPOSES** this legislation.