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Lawyers Take Heed! A De Novo Review of Rule 11 in North Carolina - Turner v. Duke Univ.

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NOTES

LAWYERS TAKE HEED! A *DE NOVO* REVIEW OF RULE 11 IN NORTH CAROLINA—*Turner v. Duke Univ.*

INTRODUCTION

Only six years ago few lawyers mentioned Rule 11.[1] Today, federal Rule 11 "has produced over 1000 suits,"[2] as well as a "flurry of academic commentary."[3] Congress amended federal Rule 11 in 1983 to serve the courts as a strengthened tool to fight litigation abuses.[4] In 1987, North Carolina followed the federal lead by enacting a tougher rule to deter abusive practices in the state courts.[5] North Carolina is now beginning to confront some of the problems which the federal courts have dealt with for several years.[6] And the controversy will continue.

In *Turner v. Duke Univ.*, the North Carolina Supreme Court adopted a *de novo* standard of appellate review[7] in evaluating a

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1. *See* Comment, *Critical Analysis of Rule 11 Sanctions In The Seventh Circuit*, 72 MARQ. L. REV. 91, 96 (1988).

2. Untereiner, *A Uniform Approach To Rule 11*, 97 YALE L.J. 901 (1988).

3. *Id. See also* Judge Schwartzer's Progeny: Schwartzer, *Sanctions Under the New Federal Rule 11-A Closer Look* 104 F.R.D. 181 (1985) and Scwartzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988)(articles discussing the reasons for Rule 11 and the rule's evolution in the three year interim.); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988)(complete overview of Rule 11 and its impact on litigation).

4. *See* FED. R. CIV. P. 11 advisory committee's note and Vairo, *supra* note 3, at 193.

5. Turner v. Duke Univ., 325 N.C. 152, 160, 381 S.E.2d 706, 713 (1989) *See infra* note 89 for text of amended Rule 11.

6. *Id.* at 152, 381 S.E.2d at 706.

7. "A common meaning of *de novo* may have the reviewing court in essence retrying the entire case." *De novo* review is also known by such terms as ". . . free, independent, full, plenary, [a review] of no particular deference, or an independent conclusion on the record." 1 CHILDRESS & DAVIS, Standards of Review § 2.14 (1986). *But see* Bose Corp. v. Consumer Union of the United States, 466 U.S. 485 (1984) ("when the court has a full review of a legal issue, it has no license to venture freely into other issues of fact or the case as a whole.") *Id. See gener-*

trial court's decision to impose or deny sanctions under Rule 11.[8] However, the court did not reveal its rationale for the standard it adopted.[9] In contrast, the majority of federal circuits has adopted an abuse of discretion standard.[10] These courts have generally held that a deferential standard best effectuates the purposes of Rule 11.[11]

The standard of review of a Rule 11 decision should effectuate the purposes of the rule, which are to deter abusive practices and to streamline the litigation process.[12] At the same time however, the standard should preserve zealous advocacy.[13] This Note will propose the standard of review which best balances both concerns. First, this Note will summarize the facts of Turner, to introduce the setting of the Rule 11 decision. Second, in the Background section, this Note will explore the history of Rule 11 in the federal courts and in North Carolina, and the various standards of review adopted in the federal courts. Third, this Note will analyze the *Turner* decision and the standard of appellate review adopted by the North Carolina Supreme Court. Fourth, this Note will compare the standards of review and suggest which of the standards furthers or hinders the purposes of Rule 11. Through this Note, the reader should have a sharper understanding of Rule 11, and its treatment in the federal courts and in North Carolina. Finally, this Note urges the reader to consider the impact which a particular standard of review may have on a decision under Rule 11 and on litigation generally.

THE CASE

On July 25, 1985, Jane L. Turner's husband sued Duke University Medical Center alleging the wrongful death of his wife.[14] Mr. Turner also sued the Private Diagnostic Clinic and Dr. Alan H. Friedman, alleging that the defendants' negligence had proximately caused his wife's death.[15] During pretrial discovery, plain-

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ally, infra note 94 for definition of "standard of review."

8. *Turner* 325 N.C. at 165, 381 S.E.2d at 714.

9. *See Id.* at 162-65, 381 S.E.2d at 712-14.

10. *See* cases cited *infra* note 97.

11. *See* FED. R. CIV. P. 11 advisory committee's note and cases cited *infra* note 97.

12. *Id.*

13. Vairo, *supra* note 3 at 226.

14. *Turner*, 325 N.C. at 154, 381 S.E.2d at 708.

15. *Id.* at 157, 381 S.E.2d at 709. (Plaintiff alleged that defendants had failed

tiff's counsel submitted his second set of interrogatories to defendant Duke.[16] Interrogatory number 13 requested Duke to identify any person who had knowledge of Mrs. Turner's treatment while at the hospital and for the substance of that knowledge.[17] Interrogatory number 13 further asked for the address, telephone number and job title of the individual identified.[18] Duke answered the interrogatory by referring the plaintiff to the medical records which had previously been provided to him.[19]

In an effort to have defendant answer the question more specifically, plaintiff moved to compel Duke to answer interrogatory number 13.[20] Plaintiff requested defendant Duke to answer the question directly, rather than answering by reference to the medical records.[21] On August 6, 1986, the trial judge ordered the defendants ". . .to provide the name, address and telephone number as to specific individuals if requested by plaintiff's counsel at a later date."[22] Ten months later in a written request, plaintiff again asked Duke for the names, addresses and telephone numbers of the witnesses who had cared for Mrs. Turner during her hospitalization.[23] Duke did not respond.[24] On June 4, 1987, the trial court instructed all parties to supplement outstanding interrogatories by July 1, 1987.[25] In a letter dated July 1, 1987, Duke responded to plaintiff's counsel, listing several witnesses by name.[26] One of the witnesses listed was Dr. Havard.[27] In this letter, the defendant included no other information about Dr. Havard.[28]

On July 6, 1987, Duke noticed the depositions of two witnesses by hand-delivering a letter to plaintiff's counsel.[29] The first notice scheduled the deposition of Dr. Robert Havard in California on

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to diagnose and treat his wife's perforated colon.)

16. *Id.* at 166, 381 S.E.2d at 714.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Turner v. Duke Univ., 91 N.C. App. 446, 450, 372 S.E.2d 320, 323 (1988), *rev'd and remanded*, 325 N.C. 152, 381 S.E.2d 706 (1989).

23. *Turner*, 325 N.C. at 166, 381 S.E.2d at 714.

24. *Id.*

25. *Id.*

26. *Id.* at 166, 381 S.E.2d at 714-15.

27. *Id.*

28. *Id.*

29. *Id.*

July 21, 1987.[30] Dr. Manard was an oncology fellow who had seen Mrs. Turner at Duke.[31] The second notice scheduled the deposition of Dr. R. P. Scheerer in Florida for July 23, 1987.[32] Dr. Scheerer was an oncologist who had treated Mrs. Turner's cancer in Florida in 1982.[33] These depositions were scheduled within a week of the first day of trial.[34] Dr. Havard's deposition was scheduled 6 days before trial; Dr. Scheerer's, 4 days before trial.[35]

Prior to trial on July 17, 1987, plaintiff filed a motion for sanctions pursuant to N.C. Gen Stat. § 1A-1, Rules 11(a), 26(g) and 37.[36] In essence, plaintiff alleged that Duke had failed to obey the discovery order and that the defendant had noticed the depositions for an improper purpose.[37] The trial court denied plaintiff's motion in its entirety.[38] The court of appeals reviewed the case under a standard of clear error and affirmed.[39]

In *Turner*, the supreme court reversed the lower court and held that a *de novo* review should be implemented in reviewing the denial or granting of sanctions pursuant to Rule 11.[40] The court further held that sanctions should have been imposed on Duke.[41]

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30. *Id.* at 166-67, 381 S.E.2d at 715.

31. Order of Sanctions at 4, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 85 CVS 01927).

32. *Turner*, 325 N.C. at 166-67, 381 S.E.2d at 715.

33. Order of Sanctions at 4, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 85 CVS 01927).

34. *Id.*

35. *Id.*

36. *Id.* at 167, 381 S.E.2d at 715.

37. *Id.*

38. *Id.*

39. *Turner*, 91 N.C. App. at 453, 372 S.E.2d at 325. The plaintiff appealed contending that the court of appeals erred in its review of the Rule 11 decision. He contended that the appellate court incorrectly used an abuse of discretion standard and urged the court to adopt a *de novo* review. The supreme court, however, correctly noted that the court of appeals used a standard of clear error. *Turner*, 325 N.C. at 162, 381 S.E.2d at 712. Research has found no jurisdiction using a clearly erroneous standard of appellate review of decisions under Rule 11.

40. *Turner*, 325 N.C. at 165, 171, 381 S.E.2d at 714, 717-18. The court also held that the court of appeals erred in affirming the directed verdict of Dr. Friedman and the Private Diagnostic Clinic. The supreme court found that the plaintiff presented sufficient evidence to have the alleged negligence of these defendants decided by a jury. *Id.* at 162, 381 S.E.2d at 172. The issue of defendant Duke's liability had been presented to the jury in the trial court. The jury returned a verdict in favor of Duke. *Turner*, 91 N.C. App. at 447, 371 S.E.2d at 321, 322.

41. *Turner*, 325 NC at 171, 381 S.E.2d at 717-18.

The court remanded the case and ordered the trial court to impose Rule 11 sanctions on defendant Duke and/or Duke's counsel.[42]

BACKGROUND

North Carolina's Rule 11 has followed the evolution of the federal Rule 11.[43] Thus, an analysis of the federal cases will serve to enlighten the history of Rule 11 in North Carolina.[44]

A. The Original Rule 11: A Failed Endeavor

Congress enacted the first federal Rule 11[45] in 1938 as a result

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42. On remand, in October of 1984, Judge Hobgood of The Superior Court of Durham County took heed of the supreme court's message. Essentially, he ordered a three-part sanction under Rule 11(a). First, he required Beth A. Fleishman, attorney for Duke, to pay $6,445.00 to Leonard T. Jernigan, Jr., attorney for plaintiff. The amount ordered represented compensation to the attorney. The judge found that plaintiff's counsel had accrued 64.45 hours, at a rate of $100.00 per hour, directly attributable to the motion for sanctions. Second, the judge ordered the depositions of Drs. Havard and Scheerer stricken from evidence at any subsequent trial. Finally, Judge Hobgood held that plaintiff was entitled to a new trial against Duke. The judge stressed the prejudice which plaintiff suffered through the testimony of Dr. Havard. In concluding, the judge stated that the monetary sanctions imposed upon Fleishman would serve to deter and educate her. He also added that no official censure or public reprimand was necessary to accomplish this deterrence and education. Order of Sanctions at 8, 9, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (NO. 85 CVS 01927).

43. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713 (citing Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970) (The federal rules of civil procedure have guided the North Carolina courts in interpreting the state rules of civil procedure.)).

44. *Id.*

45. The original federal Rule 11 provides:

Signing of Pleadings

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or by statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleadings; that to the *best of his knowledge, information and belief* that there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with an intent to defeat the purpose of this rule, *it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For* a *willful*

of judge, lawyer and public concern about the growing "cost, complexity, and burdensomeness of civil litigation."[46] In its original form, lawyers and judges rarely mentioned the rule.[47] Researchers discovered only forty Rule 11 decisions prior to 1983.[48] Though the federal courts expressed concern about civil litigation abuses, judges and lawyers neglected Rule 11.[49] There were two primary reasons for this neglect.[50] First, the courts could sanction only willful violations under the subjective standard of good faith.[51] Second, the court's only express power under the rule was the striking of pleadings.[52] In addressing the neglect of Rule 11, the Advisory Committee stated that the original rule was an ineffective tool to deter litigation abuses because of the confusion it created.[53] The original Rule 11 caused confusion primarily in three areas.[54] First, judges and lawyers were unsure about when to invoke the rule.[55] Second, it was difficult to determine the standard of conduct required by the rule.[56] Third, judges felt constrained in imposing sanctions because of the limited selection of sanctions under the rule.[57]

Similarly, North Carolina courts rarely invoked the state's original Rule 11. North Carolina's original Rule 11(a) allowed the striking of pleadings, but unlike its federal counterpart, did not authorize sanctions.[58] *Estrada v. Burnham*[59] is the only case in

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violation of this rule an attorney may be subjected to *appropriate disciplinary action.* Similar action may be taken if scandalous or indecent matter is inserted. (Emphasis added.)

FED. R. CIV. P. 11. (1938).

46. Schwartzer, *Sanctions Under the New Federal Rule 11-A Closer Look*, 104 F.R.D. 181, 182 (1985).

47. Comment, *The Horizon of Rule 11: Toward A Guided Approach To Sanctions*, 26 HOUS. L. REV. 535 (1989).

48. *Id.* at 535, n.4.

49. *Id.* at 535.

50. Vairo, *supra* note 3, at 191.

51. *Id.*

52. *Id.*

53. FED. R. CIV. P. 11 advisory committee's note.

54. Vairo, *supra* note 3, at 191.

55. *Id.*

56. *Id.*

57. *Id.*

58. North Carolina's original Rule 11 provides:

(a) Signing by attorney. - Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not repre-

which the North Carolina Supreme Court discussed the original Rule 11 in depth. The case illustrates the limitation in the original rule's sanctioning power.[60] In *Estrada*, the plaintiff filed a medical negligence complaint one day before the statute of limitations tolled.[61] The plaintiff then voluntarily dismissed his suit only minutes after filing the complaint.[62] The plaintiff admitted that it was his objective to obtain the one-year extension to refile his case as allowed under Rule 41(a)(1).[63] On appellate review, the supreme court rejected plaintiff's argument, that his pleading was in accord with the spirit and letter of Rule 11(a), and dismissed the complaint as sham.[64] *Estrada* was the exception however, and as in the original federal rule, North Carolina's Rule 11(a) fell largely into neglect.

B. The Amended Federal Rule 11: A Powerful Weapon Against Abuse

The watershed year of 1983 brought forth an integrated package of civil rules designed to combat litigation abuses in the federal courts.[65] Rule 11, as amended,[66] was a large gun in this artillery. It

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sented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by these rules or by statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the *best of his information, knowledge, and belief* there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of the rule, *it may be stricken as sham and false and the action may proceed as though the pleading had not been served.* (Emphasis added.)

N.C. GEN. STAT. § 1A-1, Rule 11(a)(Cum. Supp. 1983)(amended 1987).

59. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

60. *Id.*

61. *Id.* at 319, 341 S.E.2d 538.

62. *Id.*

63. *Id.* at 322, 341 S.E.2d at 542.

64. *Id.* at 325, 341 S.E.2d at 543.

65. Vairo, *supra* note 3, at 193; Rules 7, 11, 16, and 26 of the Federal Rules of Civil Procedure were amended in 1983 to combat the problem of abusive litigation in the federal courts. *Id.*

66. Rule 11 as amended in 1983 provides:

Signing of Pleadings, Motions and other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not repre-

was designed to prevent the delay and increasing costs of modern civil litigation in the federal courts.[67] Additionally, the drafters intended the rule to "discourage dilatory and abusive tactics and to . . .streamline the litigation process."[68]

The amended Rule 11 imposes significant duties on attorneys, parties and *pro se* litigants.[69] First, the rule requires that the attorney or *pro se* litigant sign the pleading, motion or other paper.[70] This signature certifies that the signor is in compliance with Rule 11.[71] Second, the amended rule requires the paper to be: 1) well-grounded in fact; 2) warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law; and 3) not interposed for an improper purpose.[72]

Importantly, the courts also gained additional power to enforce the duties imposed under the amended Rule 11.[73] First, the

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sented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed *after reasonable inquiry* it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, *the court, upon motion or upon its own initiative, shall impose* upon the person who signed it, a represented party, or both *an appropriate sanction*, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (Emphasis added.)

FED. R. CIV. P. 11.

67. Vairo, *supra* note 3, at 190.

68. FED R. CIV. P. 11 advisory committee's note.

69. *See* Scwartzer, *supra* note 46, at 181.

70. *Id.* at 185.

71. *Id.*

72. Comment, *supra* note 1, at 100.

73. Vairo, *supra* note 3, at 193.

court must objectively evaluate an attorney's conduct. [74] It is much easier for the court to evaluate conduct objectively, rather than struggle under the former bad faith or willful test.[75] Second, under the amended rule, the court can raise the Rule 11 violation *sua sponte*.[76] Third, if the court finds a violation of the reasonable standard of conduct, as required by the amended Rule 11, it has a mandatory duty to impose sanctions on the offender.[77] Finally, the amended Rule 11 allows the court discretion in shaping an appropriate sanction in accord with the type of violation committed.[78]

In summary, the amended federal Rule 11 demands two duties to deter litigation abuses and to streamline the civil litigation process.[79] First, judges are required to become more involved in supervising litigation, "with an eye toward earlier pre-trial disposition."[80] Second, lawyers are to take responsibility for their actions in court and are no longer allowed to act as "narrow-minded adversaries."[81]

In retrospect, it is humorous that the Advisory Committee feared that the amended Rule 11 would lie as weak and dormant as its predecessor.[82] The Committee also feared that the rule would be overused.[83] Needless to say, it is the latter fear that has become the focus of much controversy.[84] Rule 11 has spawned excessive satellite litigation.[85] As of 1988, only five years after Rule 11 was

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74. *Id. See supra* note 66, language of amended rule: "formed after reasonable inquiry. . .".

75. Vairo, *supra* note 3, at 193.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 190.

80. *Id.*

81. *Id.*

82. *Id.* at 195 (discussing the remarks of Professor Arthur Miller, Reporter to the Advisory Committee, Federal Bar Council Annual Winter Meeting (February 1987)).

83. *Id.*

84. *See generally* Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV 7 (1987)(discussing the necessity of sanctions in modern litigation); Untereiner, *supra* note 2 (discussing the evolution of Rule 11 and its impact on litigation today); Battey, *Rule 11 Sanctions: Some Current Observations*, 33 S.D.L. REV. 207 (1988)(discussing cases applying various sanctioning methods to control litigation abuses.).

85. *See* Vairo, *supra* note 3, at 232-33. "Indeed, many have said that Rule 11 has replaced civil RICO actions as the cottage industry of the litigation bar." *Id.* at 199.

amended, researchers found over 1000 reported Rule 11 decisions in the federal courts.[86] Critics of the rule focus on this avalanche of litigation and continue to allege that the rule chills zealous advocacy.[87] Others urge the courts to channel enforcement of Rule 11 toward the purposes for which the rule was enacted.[88]

C. *North Carolina's Amended Rule 11*

With the federal rule as its guide, on January 1, 1987, North Carolina adopted the new, improved Rule 11.[89] Rule 11(a) in North Carolina embraces the same three-prong test as the federal rule.[90] Thus, North Carolina courts must sanction conduct which is found to be:(1) without factual basis, (2) without a legal basis, or (3) without a proper purpose.[91] It is reasonable to speculate that, as has occurred with the federal rule, increased satellite litigation may result. As the case law develops, North Carolina courts will

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86. Comment, *supra* note 1, at 93 and Untereiner, *supra* note 2, at 901.
87. Schwartzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988).
88. *Id.*
89. North Carolina's Rule 11, as amended in 1987, provides:
Rule 11. Signing and verification of pleadings.

(a) Signing by attorney - Every pleading, motion or other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief *formed after reasonable inquiry* it is well-grounded in fact and is warranted by existing law or a good faith argument for the modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (Emphasis added.)

N.C. GEN STAT. § 1A-1, Rule 11(a)(Cum. Supp. 1989).
90. *Id.*
91. *Id.*

need to define the boundaries and fill in the gaps of Rule 11. As the courts decide the issues of Rule 11, they should primarily remember the goals of the rule: to deter abusive practices and to streamline the litigation process.[92] The North Carolina Supreme Court began to define the boundaries of Rule 11 in *Turner v. Duke Univ.*[93]

D. The Standard of Review of Rule 11[94]

One of the many issues adjudicated under Rule 11 relates to appellate review. Courts have had to determine the appropriate standard of appellate review when the trial court imposed or failed to impose sanctions. The vast majority of states has yet to confront this issue.[95] The federal courts, however, have diverged into three different camps, each purporting to best accomplish the purposes of Rule 11.[96] A survey of the various standards will aid the reader in understanding the standard of review adopted by the *Turner* court and the impact of the standard adopted.

1. Abuse of Discretion-Across the Board

Seven circuits have adopted an abuse of discretion standard of appellate review in analyzing Rule 11 decisions. The First, Third, Fourth, Fifth, Sixth, Seventh and Tenth circuits have adopted this

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92. *See* Scwartzer, *supra* note 87, at 1013.

93. *Turner*, 325 N.C. at 162, 381 S.E.2d at 712.

94. "Standard of review" is defined as "the degree of deference given by the reviewing court to the actions or decisions under review." Standards of review are ". . .those yardstick phrases meant to guide the appellate court in approaching the issue and parties before it and the trial court's earlier procedure or result." Standards of review ". . .actually do affect subsequent courts, trial and appellate procedure in doing their job." Childress & Davis, *supra* note 7, at § 1.1.

95. As of December 1989, only 6 states had adopted a standard of appellate review for the amended Rule 11. *See* Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 152 (1989) (adopted a *de novo* standard of review in Rule 11 decisions); Cooper v. Viking Ventures, 53 Wash. App. 739, 770 P.2d 659 (1989) (adopted an abuse of discretion standard); Wright v. Hills, 161 Ariz. 583, 780 P.2d 416 (1989) (three-tier analysis of appellate review); Clark Equipment Co. v. Bowman, 762 S.W.2d 417 (Ky. App. 1988) (three-tier standard of review); Mears Park Holding Corp. v. Morse/Diesel, Inc., 426 N.W.2d 214 (Minn. App. 1988) (abuse of discretion standard); Searight v. Cimino, 230 Mont. 96, 748 P.2d 948 (1988) (an abuse of discretion standard of appellate review.)

96. *Turner*, 325 N.C. at 164-65, 381 S.E.2d at 713-14.

deferential standard of appellate review.[97] The primary justification expressed for this view is the commitment to the trial judge's unique experience and position.[98] The trial judge has "tasted the flavor of the litigation" and has interacted with the parties.[99] He is therefore, in the best position to make the judgment about whether a lawyer "went too far."[100]

The Seventh Circuit met *en banc* in *Mars Steel Corp. v. Continental Bank*.[101] The court sought to resolve the inner circuit conflict concerning the appropriate standard of appellate review under Rule 11.[102] The court chose an abuse of discretion standard of appellate review, basing its decision on a three-pronged rationale.[103] First, the court analogized an attorney's duty under Rule 11 to tort law, which also employs a deferential standard of appellate review.[104] Second, the Seventh Circuit found the United States Supreme Court's decision in *Pierce v. Underwood* influential.[105] And third, an abuse of discretion standard of appellate review avoids the confusion that can result from a less deferential standard.[106]

First, the court explained that Rule 11 is analogous to tort law, thus establishing a "new form of negligence (legal malpractice)."[107] Rule 11 "creates duties to one's adversary, as well as to the legal system, just as tort law creates duties to one's client."[108] In tort cases, a deferential standard is the usual standard of appellate review.[109] The court held that it only followed that a deferential standard should be employed in the "fact-intensive disputes"

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97. *See*, Mars Steel Corp. v. Continental Bank, 880 F.2d 928, 932-37 (7th Cir. 1989) (en banc); Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1989); Kale v. Combined Ins. Co., 861 F.2d 746, 756-58 (1st Cir. 1988); Teamsters v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir. 1988); Thomas v. Capital Sec. Servs., 836 F.2d 866, 871-73 (5th Cir. 1988)(en banc); Century Products, Inc. v. Sutter, 837 F.2d 247, 250 (6th Cir. 1988); Stevens v. Lawyer's Mut. Liab. Ins. Co., 789 F.2d 1056, 1060 (4th Cir. 1986).

98. *See generally Id.*

99. Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985).

100. Mars Steel Corp., 880 F.2d at 933.

101. *Id.* at 928.

102. *Id.* at 930.

103. *Id.* at 930-37.

104. *Id.* at 932.

105. *Id.* at 934-35.

106. *Id.* at 934-36.

107. *Id.* at 932.

108. *Id.*

109. *Id.* at 933.

under Rule 11.[110]

The court's second reason for adopting an abuse of discretion standard in reviewing decisions under Rule 11 was based upon *Pierce v. Underwood*.[111] In *Pierce*, the United States Supreme Court attempted to flesh out the appropriate standard of review under the Equal Access to Judgment Act.[112] In adopting a deferential standard, the Supreme Court stated that the energy to be invested by an appellate court undertaking a *de novo* review would not clarify the law.[113] Additionally, the Court believed that a *de novo* review of legal questions may "strangely distort the appellate process."[114] The Supreme Court summarized that the appropriate review could be best achieved by the appellate court acting as such, thereby not attempting to act as a trial court.[115]

The Ninth Circuit's third reason for adopting a deferential standard was based upon avoiding confusion in the district courts.[116] The *Mars Steel* court explained that a *de novo* review would fail to clarify the law and would only result in encouraging confusion as to defining the boundaries of appropriate conduct.[117] "Fact-bound resolutions cannot be made uniform through appellate review, *de novo* or otherwise."[118] In its conclusion, the court reaffirmed its commitment to the spirit of Rule 11.[119] The court admonished trial judges to foster the purposes of the rule by "reflecting seriously and considering fully before granting or denying sanctions."[120]

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110. *Id.* at 933.

111. *Id.* at 934. *See generally* Pierce v. Underwood, 487 U.S. 552, (1988) (holding that appellate courts should use an abuse of discretion standard of review when evaluating decisions under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)).

112. *Mars Steel Corp.* at 934-35.

113. *Id.* at 935.

114. *Id.*

115. *Id.*

116. *Id.* at 936.

117. *Id.*

118. *Id.* The court further stated, "We can multiply the occasions for disagreement much more easily than we can bring harmony. Appellate confusion is worse: counsel and district judges must spend time trying to harmonize our opinions. This is one of the reasons why case-specific decisions should be made on a deferential standard. The judgment of three appellate judges is not necessarily better than the judgment of one district judge, but it is assuredly more costly to obtain and interpret." *Id.* at 936.

119. *Id.*

120. *Id.*

2. The Three-Tier Standard of Review

The Ninth Circuit alone has adopted the three-tier standard of appellate review for decisions under Rule 11.[121] Under the three-tier analysis, the court (1) reviews the factual determinations of the lower court under a clearly erroneous standard; (2) reviews the legal conclusions under a *de novo* standard; and (3) reviews the choice of sanction under an abuse of discretion standard.[122] As a minority of one, the Ninth Circuit's approach has suffered two basic criticisms.[123] First, the standard is difficult to apply to Rule 11 decisions which are a complex mix of fact and law.[124] Second, the three tier-standard has been described as "intrusive" by the Fifth Circuit.[125] Many courts share the sentiment of the Fifth Circuit and state that the trial judge should have the "lion's share" of the responsibility for imposing Rule 11 sanctions.[126]

3. The Combination Standard of Review

Three of the circuit courts apply a third standard of appellate review in analyzing Rule 11 decisions.[127] The Second, Eleventh and D.C. Circuits employ a combination of *de novo* and abuse of discretion standards to evaluate the trial court's decision to impose or deny sanctions under Rule 11.[128] First, these circuits review the factual findings and the particular sanction chosen by the lower court under an abuse of discretion standard.[129] Second, the courts apply a *de novo* review to assess the legal sufficiency of a pleading

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121. Zalvidar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986). The *Turner* court reported the Seventh Circuit as also subscribing to the three-tier approach. *Turner*, 325 N.C. at 165, 381 S.E.2d at 713 (citing Brown v. Federation of State Medical Bds. of United States, 830 F.2d 1429 (7th Cir. 1987) as authority for the proposition that the Seventh Circuit subscribed to the three-tier approach). However, Brown was reversed by the Seventh Circuit *en banc* in *Mars Steel Corp.* 880 F.2d at 930. Both *Mars Steel Corp.* and *Turner* were decided in July, 1989.

122. *Zalvidar*, 780 F.2d at 828.

123. *See generally Kale*, 861 F.2d at 758.

124. *Id.*

125. Vairo, *supra* note 3, at 225-26 (quoting Schivangi v. Dean Witter Reynolds Inc., 825 F.2d 885 (5th Cir. 1987)).

126. *See supra*, note 97.

127. *See generally* Eastway Constr. Corp., v. City of New York, 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 484 U.S. 918, (1987); Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1985); Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985).

128. *Id.*

129. *Turner*, 325 N.C. at 165, 381 S.E.2d at 713-14.

or motion and the trial court's decision to impose sanctions.[130]

The early Rule 11 decisions inferred this *de novo* authority from the language of the rule itself.[131] Rule 11 states, ". . . the court . . . shall impose . . . an appropriate sanction. . ."[132] Some courts have interpreted the "shall" language, combined with the objective standard of conduct as required by the rule, to mean that the appellate court is in as good a position as the trial court to determine a Rule 11 violation.[133]

More recent cases, however have rejected this theory.[134] These courts state that the mandatory language does not prescribe the relationship between the appellate and the trial judges.[135] The courts also criticize the *de novo* portion of this review as involving appellate courts in trial court matters.[136] Additionally, the courts express concern that a *de novo* review will provide opportunity for judicial disagreement at the appellate level.[137] Since one of the primary goals in the amendment of Rule 11 was to streamline litigation, it seems incongruous to encourage appeals through an opportunity for a *de novo* review.[138]

Critics continue to urge appellate courts to adopt definitive and uniform standards of appellate review in assessing decisions under Rule 11.[139] In adopting a standard of review, an appellate court should look to the purposes of Rule 11 for guidance in its decision.[140] An appellate court has several interests to balance in its decision to adopt a particular standard of review. First, the court must consider the purposes of Rule 11: to deter abusive conduct and to streamline the litigation process.[141] The court must also consider the autonomy of the trial judge, who is in a unique position to reflect upon the "nuances" of the particular case in as-

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130. *Id.*

131. *Kale*, 861 F.2d at 757-58.

132. *See supra*, note 66 for text of FED. R. CIV. P. 11.

133. *See Kale*, 861 F.2d at 757 (discussing *Eastway Constr. Corp.*, 762 F.2d at 254 n. 7 (subscribing to the proposition that the appellate court is in as good a position as the trial court because of the objective standard of conduct required by Rule 11)).

134. *Kale*, 861 F.2d at 757-58.

135. *See Id.*

136. *Mars Steel Corp.*, 880 F.2d at 936.

137. *Id.*

138. *Id.* at 935.

139. Vairo, *supra* note 3, at 226.

140. *Id.*

141. FED. R. CIV. P. 11 advisory committee's note.

sessing attorney conduct.[142]

ANALYSIS

In 1989, the North Carolina Supreme Court confronted the amended Rule 11 for the first time in *Turner v. Duke Univ.*[143] The trial court had denied plaintiff's motion for sanctions under Rule 11.[144] The court of appeals affirmed this decision.[145] The plaintiff appealed to the supreme court alleging that the court of appeals erred in using an abuse of discretion standard of review.[146] He urged the supreme court to adopt a *de novo* standard.[147] In contrast, the defendant urged the court to adopt a standard which would allow deference to the trial court's decision.[148] First, the supreme court in *Turner* noted that the court of appeals had used neither an abuse of discretion standard, nor a *de novo* standard.[149] The court of appeals had used a standard of "clearly erroneous."[150] Second, the *Turner* court adopted a *de novo* standard of review, allowing the trial court deference only in the particular sanction chosen.[151] The *Turner* court explained:

> A trial court's decision to impose or not to impose mandatory sanctions under Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law support its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny sanctions under N.C. GEN. STAT. §1A-1, Rule 11(a).[152]

As stated, the supreme court found that a deferential standard was appropriate in deciding upon the particular sanction to be im-

142. *In Re* Ronco, Inc., 838 F.2d 212, 217-18 (7th Cir. 1988).
143. *Turner*, 325 N.C. at 162, 381 S.E. 2d 712.
144. *Id.* at 157, 381 S.E.2d at 715.
145. *Id.*
146. *Id.* at 162, 381 S.E.2d at 712.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 165, 381 S.E.2d at 714.
152. *Id.*

posed.[153] A trial court would be reversed in its choice of sanction only upon the appellate court finding an abuse of discretion.[154] In the opinion, the court stated, " After careful analysis of the federal decisions, we adopt. . .", but chose not to reveal its rationale in deciding upon the *de novo* standard of appellate review.[155] The court did reveal, however, its reliance upon the imperative "shall impose" language of Rule 11.[156] The *Turner* court emphasized that the rule's mandatory language implies that the trial court's discretion should be "on the selection of an appropriate sanction, rather than on a decision to impose sanctions."[157]

Using a *de novo* review, the court then analyzed the conduct of Duke.[158] The court focused its attention on the trial court's "conclusion of law" that Duke's conduct was not sanctionable under Rule 11(a).[159] The plaintiff outlined four reasons that defendant Duke's conduct warranted sanctions under Rule 11(a): (1) that Duke failed to disclose Dr. Scheerer as an expert witness; (2) that Duke failed to identify Dr. Havard in response to discovery requests; (3) that the depositions were interposed to increase litigation cost and to delay trial; and (4) that the depositions were purposely interposed to disrupt plaintiff's counsel's preparation for trial.[160]

The *Turner* court began its *de novo* review by analyzing plaintiff's first argument.[161] The plaintiff argued that Dr. Scheerer was an expert and that counsel for the defense had failed to reveal him as such.[162] Thus, plaintiff contended that Duke had failed to obey an order of discovery requiring all expert witnesses to be identified and deposed by July 1, 1987.[163] The *Turner* court, however, found the trial court to be correct on this issue.[164] The supreme court stated that Dr. Scheerer was acting as an ordinary witness, not in his capacity as an expert.[165] The *Turner* court agreed with the trial

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 166-71, 381 S.E.2d at 714-18.
159. *Id.* at 166, 381 S.E.2d 770 F.2d at 714 (quoting *Westmoreland*, at 1174).
160. *Turner*, 325 N.C. at 167, 381 S.E.2d at 715.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 167-68, 381 S.E.2d at 715-16.
165. *Id.*

court's decision that Dr. Scheerer had "personally treated the plaintiff's wife", and that his deposition was scheduled to question him about this treatment.[166] Therefore, although physicians are experts in the field of medicine, here Dr. Scheerer acted as an ordinary witness.[167]

In reviewing plaintiff's three remaining arguments, the *Turner* court embraced its *de novo* review and rejected any deference to the trial judge.[168] In his second argument, plaintiff asserted that Duke had failed to identify Dr. Havard in response to interrogatory number 13.[169] During pretrial discovery, plaintiff requested Duke to identify persons who had treated the plaintiff's wife during her stay at Duke Hospital.[170] Duke's attorney answered interrogatory number 13 by referring plaintiff to the medical records already provided.[171] Plaintiff then filed a motion to compel Duke to answer the question more specifically.[172] In the order, the trial judge sustained defendant's objection as to the broadness of the question in interrogatory number 13.[173] Nevertheless, he granted plaintiff's motion in the following language: "[A]s to interrogatory No. 13, defendants are ordered to provide the name, address and telephone number as to specific individuals if requested by plaintiff's counsel at a later date."[174]

Defendant argued and the trial court agreed that the language of the order was ambiguous.[175] Therefore, when plaintiff made a second general request asking for information about all of defendant's witnesses, defendant did not answer the request.[176] Duke's attorney contended that his duty, according to the language of the order, was to answer questions as to specific individuals if requested by the plaintiff.[177]

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166. *Id.* at 168, 381 S.E.2d at 716.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 169, 381 S.E.2d at 714.
174. *Turner*, 91 N.C. App. at 450, 372 S.E.2d at 323.
175. *Turner*, 325 N.C. at 169, 381 S.E.2d at 716.
176. *Id.*
177. *Id.* One must question the wisdom in defense counsel's failure to answer to plaintiff's request for information as to the witness' address, telephone number, etc. Why is it that Duke did not object to plaintiff's discovery request, attach a copy of the trial judge's order and explain to the plaintiff its interpretation of the

The court of appeals agreed that the language of the order was ambiguous.[178] The lower court also thought it significant that plaintiff "had only to ask specifically about the identity of each signator and defendant would have been obliged to supply it."[179] Though defendant's counsel did identify Dr. Havard in a letter dated July 1, 1987, the *Turner* court held that defendant's answer to plaintiff's second general request violated the reasonable conduct standard of Rule 11(a).[180]

Despite acknowledging that the trial judge's order was ambiguous, the supreme court concluded that the defendant improperly failed to comply with that order.[181] The court believed that plaintiff's interpretation of the order was "more logical" than the defendant's interpretation.[182] The *Turner* court interpreted the order to mean that defendant should have answered the second request specifically, even if asked about the witnesses in a general manner.[183] The supreme court stated that the order was more logically interpreted as meaning "that Duke was directed to provide information as to specific individuals whom Duke intended to present as witnesses if requested to do so at a later date by plaintiff's counsel."[184]

An appellate court should not use the advantage of hindsight in reviewing an attorney's conduct.[185] The Advisory Committee warned,. . . "The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading was submitted."[186] The trial court, appellate court and the defense counsel thought the language of the order ambiguous.[187] The supreme court disagreed.[188] Thus, given such a difference of opinion, reasonable men could differ in their choice of action based on that opinion. The standard of an attorney's conduct under Rule 11 is one of

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order?

178. *Turner*, 91 N.C. App. at 450, 372 S.E.2d at 323.
179. *Id.*
180. *Turner*, 325 N.C. at 169, 381 S.E.2d at 716.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. FED. R. CIV. P. 11 advisory committee's note.
186. *Id.*
187. *Turner*, 91 N.C. App. at 450, 372 S.E.2d at 323.
188. *Turner*, 325 N.C. at 168, 381 S,E.2d at 716.

reasonableness under the circumstances.[189] It is not, however, a standard of "more logical" action.[190] Given the harsh impact of sanctions upon an attorney's reputation, a court should impose sanctions only for improper, unreasonable conduct.[191] In this case, the supreme court seems to have effectuated a punishment for choosing a less logical option, rather than deterrence of unreasonable conduct.

The *Turner* court then turned to plaintiff's third argument, that defense counsel's conduct "threatened a needless increase in litigation costs and unnecessary delay."[192] The *Turner* court agreed with plaintiff's argument.[193] The court held that Dr. Scheerer's testimony was duplicative of defendant's other expert witness, Dr. Ozer.[194] Thus, the court concluded that Dr. Scheerer's testimony needlessly threatened to increase plaintiff's litigation cost.[195] In contrast, the lower court emphasized the fact that Dr. Scheerer had personally treated the patient.[196] The appellate court stated that although the testimony of Dr. Scheerer and Dr. Ozer may have overlapped in certain areas, "Dr. Scheerer's personal perspective and impressions were relevant and his testimony was not needlessly duplicative."[197]

The testimony of witnesses is an incident of trial which is uniquely intimate to a trial judge.[198] Thus, the trial court's opinion that a witness' testimony is not duplicative should not be second guessed by an appellate court.[199] This lack of deference to the trial court's holding seems to be one of the specific instances in which the *Turner* court failed to fulfill its role as an appellate court. The trial judge has a "familiarity with the case, parties, and counsel

189. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713.

190. *Id.* at 163-69, 381 S.E.2d at 713-16.

191. *See generally* Untereiner, *supra* note 2, at 918-19.

192. *Turner*, 325 N.C. at 169-71, 381 S.E.2d at 716-18.

193. *Id.*

194. *Id.* at 170, 381 S.E.2d at 717.

195. *Id.*

196. *Turner*, 91 N.C. App. at 452-53, 372 S.E.2d at 324-25. The lower court explained, "The record is devoid of any evidence that these depositions either increased plaintiff's costs or were purposely scheduled to distract plaintiff from preparing for trial. . . . Dr. Scheerer was the surgeon who operated on and treated her cancer. We believe that his personal perspective and impression were relevant and his deposition and testimony were not needlessly duplicative." *Id.*

197. *Id.*

198. *Kale*, 861 F.2d at 758.

199. *Id.*

that an appellate court cannot have." [200] Particularly in evaluating the appropriateness of witness testimony, a trial judge seems to uniquely have "the view from the trenches."[201] Therefore, it should be the trial judge's "exercise of judgement and discretion that is the clearest guidepost to appellate courts."[202]

The supreme court further rejected Duke's argument and the trial court's suggestion to conduct telephone depositions of the doctors in California and Florida.[203] The lower court suggested this alternative to decrease plaintiff's cost in traveling to the distant states.[204] Arguably, if the plaintiff had agreed to telephone depositions, he would have had to invest little time or expense. The plaintiff also specifically refused to move for a continuance.[205] The *Turner* court concluded that the plaintiff's refusals of telephone depositions and a continuance were reasonable because of two facts.[206] First, the court stated that the violation of Rule 11 "had already taken place."[207] Second, the trial had already been twice continued.[208] The *Turner* court chose to ignore the fact that the trial judge had specifically asked the plaintiff if he would object to the doctors' testimony at trial.[209] Plaintiff responded, "[I]f they want to fly them in, I suppose I would have no objection to them. . ."[210] Again, the supreme court rejected the proximity of the trial judge and his experience with the practicalities of litigation.

The *Turner* court surmised that the plaintiff's second and third grounds were enough to constitute sanctionable conduct under Rule 11(a).[211] The court stated that "Duke's noticing and taking of the depositions of Dr. Havard and Dr. Scheerer so close to trial, subsequent to the failure to reveal the existence of Dr. Havard, as well as the duplicative nature of Dr. Scheerer's testimony threatened to increase plaintiff's litigation costs and cause

200. *Id.* (quoting O'Connell v. Champion, 812 F.2d 393, 395 (8th Cir. 1987)).
201. *Kale*, 861 F.2d at 758.
202. *Id.*
203. *Turner*, 325 N.C. at 170, 381 S.E.2d at 717.
204. *Id.*
205. *Id.*
206. *Id.* at 170-71, 381 S.E.2d at 717.
207. *Id.*
208. *Id.*
209. *See Id.*
210. *Turner*, 91 N.C. App. at 453, 372 S.E.2d at 325.
211. *Turner*, 325 N.C. at 170, 381 S.E.2d at 717.

an unnecessary delay of the trial in violation of Rule 11(a)."[212] The court continued, however, to address plaintiff's fourth argument.[213] He argued that the depositions were noticed to purposely disrupt his preparation for trial.[214] In agreement, the court acknowledged that the plaintiff would have been unable to adequately prepare for trial if required to travel to California and Florida for depositions.[215] The supreme court then inferred that the depositions were scheduled to harass the plaintiff's preparation for trial.[216] The court, however, did not discuss any increased litigation costs, delay or any other general or specific prejudice to the plaintiff.[217]

The North Carolina Supreme Court in *Turner* concluded by reversing the court of appeals and remanding the case for the imposition of mandatory sanctions pursuant to Rule 11(a).[218]

A. The Goals of Rule 11— To Deter Abusive Litigation Practices

According to the Advisory Committee's Note, Rule 11 was primarily designed to deter abusive practices in modern civil litigation.[219] Thus, appellate courts should model their standards of appellate review to promote the primary goal of deterrence.[220] The Ninth Circuit held in *Matter of Yagman* that to deter improper conduct, the trial judge should "monitor attorneys closely and tell them at the time the offending conduct occurs."[221] Finding a Rule

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212. *Id.*

213. *Id.* at 170-71, 381 S.E.2d at 717.

214. *Id.*

215. *Id.*

216. *Id.*

217. *See generally, Id.* Further, Judge Scwartzer discussed the elements to explore to assess whether a document has been "interposed for an improper purpose": "The record in the case and all the circumstances should afford an adequate basis for determining whether the particular papers or proceedings *caused* delay that was unnecessary, whether they *caused increase* in the cost of litigation that was needless, or whether they lacked *any apparent purpose.*" (Emphasis added.) Scwartzer, *supra* note 46, at 195.

218. *Turner*, 325 N.C. at 171, 381 S.E.2d at 717-18. *See supra* note 42 (sanction imposed on attorney for Duke).

219. FED. R. CIV. P. 11 advisory committee's note.

220. *See generally* Untereiner, *supra* note 2, at 907-09 (discusses deterrence as primary overriding goal of sanctioning under Rule 11.)

221. Matter of Yagman, 796 F.2d 1165, 1183-84 (9th Cir. 1986), *amended*, 803 F.2d 1085 (9th Cir. 1986), *cert, denied*, 484 U.S. 963 (1987). There are those who state that the primary goals of Rule 11 should be either compensation or punishment. *See generally* Untereiner, *supra* note 2, at 907. *See Eastway*, 821 F.2d at 124-26 (Pratt, J. dissenting) and *In Rr* TCI Ltd., 769 F.2d 441. 446 (7th

11 violation at the end of litigation fails to effectively achieve specific deterrence.[222] In effect, a *de novo* review by an appellate court, with the imposition of sanctions after an attorney's conduct has been condoned by a trial court, effects a punishment rather than deterrence.[223]

In *Turner*, the supreme court found Duke's conduct to be sanctionable, after the conduct was found to be reasonable at the trial and appellate levels.[224] Thus, a *de novo* review of Rule 11 seems to punish improper conduct rather than to foster deterrence, as recommended by the Advisory Committee's Note.[225]

A *de novo* appellate review of Rule 11 cases also raises the issue of the distinct roles of the trial judge and the appellate judge.[226] To deter abusive conduct, one must be familiar with it.[227] The trial judge is the judicial actor closest to the alleged misconduct; therefore, the responsibility for imposing Rule 11 sanctions is vested in him.[228] The trial judge understands the practicalities of everyday litigation.[229] He alone "sees the shots fired by one party against the other, and he alone has the full knowledge of the circumstances prompting the crossfire."[230] Similarly, in *Turner*, the defense counsel's notices of depositions were only two papers in a "blizzard"[231] of documents in a complicated medical malpractice trial. Only the trial judge could have possessed the practical experience to know the reasons or motives for defendant's conduct in this discovery setting.[232] The majority of circuits has concluded that an abuse of discretion standard is the more appropriate appellate review.[233] These courts have left the thoughtful determination of reasonable conduct to the trial judge because "his familiarity with the case, parties, and counsel is one an appellate court cannot

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Cir. 1985) (compensation as a goal under Rule 11). *But see* Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 329 (1986)(punitive goal under Rule 11).

222. *Yagman*, 796 F.2d at 1183-84.

223. *See generally supra* note 221.

224. *See Turner*, 325 N.C. at 162-71, 381 S.E.2d at 712-18.

225. *See generally* FED. R. CIV. P 11 advisory committee's note.

226. *See Kale*, 861 F.2d at 758; *Mars Steel*, 880 F.2d at 934.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Kale*, 861 F.2d at 758.

231. *Id.*

232. *See Id.*

233. *See supra* note 97.

have."[234] If the goal of Rule 11 is primarily deterrence, appellate courts should admonish the trial judges to use their familiarity with litigation to deter abusive practices as they occur.[235]

B. *The Goals of Rule 11 : To Streamline the Litigation Process*

The Advisory Committee's Note encourages courts to "streamline the litigation process by lessening frivolous claims or defenses" through the use of Rule 11.[236] Thus, courts must remember that as they increase the amount or frequency of awards under Rule 11, the number of motions for Rule 11 sanctions will increase.[237] If Rule 11 develops into a fee-shifting device, it will defeat itself by becoming the object of litigation abuses.[238] Judge Weiss, who participated as a member of the Advisory Committee, succinctly stated, "Rule 11 has become the subject of abuse. . ." and he "caution[ed] that Rule 11 is not to be used routinely."[239]

Therefore, an appellate court should implement two policies to foster the second purpose of Rule 11, to streamline the litigation process.[240] First, appellate courts should employ a standard of review which will deter abusive litigation.[241] Second, trial courts should mold a sanction according to the conduct in question.[242]

An appellate court must carefully review a Rule 11 decision to discourage abusive litigation practices.[243] A court however, should not embrace a review which will encourage "satellite litigation" for the shot at a *de novo* review.[244] The *Turner* court, in adopting a *de novo* standard of appellate review, may well be sending an invitation to all parties to appeal a Rule 11 decision.[245] The opportunity to "get a *de novo* call on every close question" may be tempting if

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234. *O'Connell*, 812 F.2d at 395. *See generally supra* note 97 (for cases which emphasize the trial judge's advantage as more proximate to the conduct in question.)

235. *Id.*

236. FED. R. CIV. P. 11 advisory committee's note.

237. Vairo, *supra* note 3, at 231.

238. *Id.*

239. *Id.* at 204.

240. *See generally Mars Steel Corp.*, 880 F.2d at 935, Vairo, *supra* note 3, at 230.

241. *Mars Steel Corp.*, 880 F.2d at 935.

242. Vairo, *supra* note 3, at 231.

243. *Mars Steel Corp.*, 880 F.2d at 935.

244. *Id.*

245. *Id.*

there is an opportunity to recover attorney's fees.[246] In contrast, an abuse of discretion standard will ensure reasonable conduct as required by Rule 11, but will decrease a temptation to appeal a denial of sanctions by the trial court.[247] The *Turner* standard may perpetuate excessive litigation in North Carolina courts. Thus, a *de novo* standard of appellate review may cause the "streamlined litigation" enhanced by Rule 11 to be "offset by the cost of satellite litigation."[248]

The second measure a court should utilize to streamline litigation is the choice of an appropriate sanction.[249] The trial court has wide discretion in this area, but has a responsibility to effectuate the purposes of Rule 11.[250] Sanctions should be molded in accord with the particular facts and circumstances of each case.[251] Judges have stated that there is "natural tendency" to award attorney's fees because this sanction is specifically provided for in Rule 11.[252] However, if Rule 11 becomes a tool for fee-shifting, an avalanche of satellite litigation will result, as the winners in litigation attempt to recover their expenses.[253] A trial court may consider imposing alternative sanctions[254] to accomplish purposes of the rule. A reprimand, mandatory legal education or fees paid to the court, rather than attorney's fees, could serve as deterrents to misconduct.[255] Furthermore, an alternative sanction may discourage routine filings of Rule 11 for the opportunity to recover legal fees.[256] An appellate court may insure that the trial court did not abuse its discretion in awarding sanctions.[257] The reviewing court should encourage the trial court, by a thorough deferential review, to thoughtfully explain the choice of sanction and how it was appro-

246. *Id.*

247. *See Id.*

248. *See* Fed. R. Civ. P. 11 advisory committee's note.

249. Vairo, *supra* note 3, at 231.

250. *Id.*

251. Comment, *supra* note 47, at 564.

252. Vairo, *supra* note 3, at 230.

253. *Id.* at 231.

254. Comment, *supra* note 1, at 109. In one case, Judge Scwartzer, who is a proponent of alternative sanctions, ordered an attorney to show cause to the court why he should not be suspended from the practice of law for a Rule 11 violation. Kendrick v. Zanides, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985).

255. Comment, *supra* note 1, at 109.

256. *Id.*

257. *See Mars Steel Corp.*, 880 F.2d at 936.

priate under the facts before it.[258]

CONCLUSION

Rule 11 is a necessity in modern litigation and therefore should not be repealed.[259] However, courts must define the boundaries of the rule to foster its purposes.[260] Excessive satellite litigation, stimulated by a *de novo* review and the award of attorney's fees, may serve to offset the positive effects of the rule.[261] Courts, acting through Rule 11, have encouraged attorneys to "stop and think" before acting unreasonably.[262] However, courts must insist that attorneys not misuse the very rule intended to curb litigation abuse.[263]

North Carolina courts have the power to deal with litigation abuse through N.C. Gen. Stat. § 1A-1, Rule 11(a).[264] Because Rule 11 has succeeded at raising the consciousness of attorneys, the rule should not be allowed to become "a new toy for lawyers."[265] North Carolina's adoption of a *de novo* appellate review of Rule 11 decisions in *Turner* may well lead to Professor Miller's nightmare.[266] The nightmare occurs as "the vindicated party leaps up and exclaims, 'I hereby move to sanction the sanction motion' "[267]

T. June Hobby

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258. Untereiner, *supra* note 2, at 921.

259. Scwartzer, *supra* note 87, at 1018.

260. Comment, *supra* note 1, at 574

261. *See Mars Steel Corp.*, 880 F.2d at 935.

262. Schwartzer, *supra* note 87, at 1021.

263. *Id.* at 1013.

264. *See supra* note 89 (text of N.C. GEN STAT. § 1A-1, Rule 11(a)(Cum. Supp. 1989).

265. Comment, *supra* note 1, at 119.

266. *Id.*

267. *Id.*