Published by the Institute of Government, The University of North Carolina at Chapel Hill

No. 90/03
October 1990

Administration of Justice Memorandum

Judges, Prosecutors, Public Defenders, County Attorneys, Police Attorneys, Sheriffs Attorneys

Overview of the 1987 Amendments to Rule 11(a) of the North Carolina Rules of Civil Procedure

Janine M. Crawley

Rule 11(a)[1] of the North Carolina Rules of Civil Procedure requires attorneys to certify that the pleadings and motions they file are neither ungrounded nor improper. The rule also gives courts authority to sanction lawyers who do not comply.[2] Effective January 1, 1987, the North Carolina General Assembly amended Rule 11(a) to conform to Rule 11 of the Federal Rules of Civil Procedure as amended in 1983.[3] The amendments to Rule 11(a) make it easier for a party to succeed on a motion for sanctions, and the new rule has been the subject of much recent litigation as more and more motions for sanctions are filed. This memorandum reviews the changes introduced by the amendments to Rule 11(a), focusing on the new standard of conduct it establishes for attorneys. It then discusses the scope of judicial discretion concerning sanctions and guidelines for choosing sanctions. Finally, a recent United States Supreme Court decision formulating federal law on several contested Rule 11 issues is summarized and compared with current North Carolina law.

History of Rule 11(a)

In 1967 North Carolina adopted the federal practice of checking the validity and propriety of pleadings and motions through attorney certification rather than party verification.[4] The 1967 version of North Carolina Rule 11(a) required attorneys to certify that there was "good ground" to support the allegations made in pleadings, and that pleadings were not "interposed for delay." Under the 1967 rule, courts could, but were not obligated to, strike improperly certified pleadings if an attorney intentionally violated the rule's provisions. The North Carolina rule was identical to the pre-1983 federal rule except that it did not include a provision in the federal rule that allowed for further disciplinary action against attorneys who "willfully" violated the rule or who included "scandalous or indecent matter in their pleadings."

In 1983, federal Rule 11 was amended to its current form in order to increase its effectiveness.[5] The Federal Rules Advisory Committee found that the older version of Rule 11 was rarely used, largely because it was necessary to prove that the filing attorney acted in "bad faith" before a sanction could be imposed, and this was difficult to do. In its comments accompanying the 1983 amendments, the advisory committee also noted that judges and lawyers were confused about both the type of conduct that should trigger sanctions and which sanctions to impose. Because of this confusion, judges, who had wide discretion over whether to issue sanctions, were reluctant to apply the rule.[6]

A similar pattern was occurring in North Carolina. Prior to the 1987 amendments, North Carolina Rule 11(a) was not used.[7] In 1986, North Carolina amended its rule, effective January 1, 1987, to correspond to the federal rule. North Carolina Rule 11(a) now tracks federal Rule 11 almost word for word.[8] The North Carolina Supreme Court has stated that the new North Carolina rule is intended to coincide with the federal rule as amended in 1983, and therefore "decisions under [federal Rule 11] are . . . pertinent for guidance and enlightenment in developing the

philosophy of the North Carolina Rules."[9] Thus both federal and North Carolina opinions, interpreting Rule 11 and Rule 11(a), respectively, are included in the discussion below.

Changes in Rule 11(a)

The 1987 amendments to Rule 11(a) were intended to clarify and toughen the rule. Three major changes were introduced by the amendments: (1) an objective standard of reasonableness replaced the subjective standard of bad faith as the trigger for sanctions, (2) the standard of conduct necessary to avoid sanctions was made more demanding and stated more precisely, and (3) sanctions for violations became mandatory.

Objective Standard

In its comments to the 1983 amendments to the federal rules, the advisory committee stressed that the changes to Rule 11 were intended to substitute a more objective test for the "willful misconduct" or "bad faith" standard that had been incorporated into the older rule. The United States Supreme Court adopted the advisory committee's position in *Christianburg Garment Co. v. E.E.O.C.*[10] The Court stated that under Rule 11 as amended, sanctions should be imposed where pleadings are "frivolous, unreasonable or without foundation even though not brought in subjective bad faith."[11]

Like the 1983 federal amendments, the 1987 North Carolina amendments deleted the clause that limited the availability of sanctions to situations in which Rule 11(a) was violated in bad faith. The North Carolina Supreme Court recognized the new objective standard in *Turner v. Duke University.*[12] The state court wrote, "[a] showing of subjective bad faith is unnecessary under N.C.G.S. Rule 11(a). Rather, the standard under our Rule 11(a) is objective reasonableness under the circumstances."[13]

The switch from the old bad faith to the new objective standard means two things. First, it means that courts can impose sanctions when pleadings lack merit, even if the certifying attorney did not have an improper motive for filing.[14] The second implication of the change is evidentiary. Courts no longer need to inquire into the actual state of mind of the filing attorney in order to determine whether sanctions are justified. They can look to extrinsic evidence to determine whether a reasonable lawyer with like experience and in like circumstances would have filed the pleading in question.[15]

While neither willfulness nor bad faith is needed to trigger Rule 11 sanctions under the amendments, some misconduct must be found. This misconduct can be the result of incompetence or ignorance of the relevant law as well as intent to harass or delay.[16] However, Rule 11 is not simply a fee-shifting mechanism. A widely cited commentary on Rule 11 by a federal district court judge states, "The rule provides for sanctions not fee shifting. It is aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing party. The key to invoking Rule 11 . . . is the nature of the conduct of counsel and the parties, not the outcome."[17] In other words, merely filing a losing motion will not necessarily subject an attorney to sanctions. Sanctions should be imposed only when an attorney behaves unprofessionally by filing a frivolous, unfounded, or improperly motivated pleading.

Standard of Conduct

Rule 11(a) imposes three separate duties on certifying attorneys. First, attorneys must certify that pleadings and motions are well grounded in fact. Second, the rule requires that pleadings be warranted by existing law or a good faith argument for a change in existing law. Finally, the rule prohibits attorneys from filing pleadings or motions for improper purposes. Each of these duties is discussed more fully below.

Pleadings must be well grounded in fact. To determine that allegations contained in pleadings are well grounded in fact, certifying attorneys must engage in at least some prefiling investigation. A federal district court judge has said, "[Rule 11] specifically aims at preventing the costs attendant upon a 'sue now, inquire later' mentality."[18] The required amount of investigation must be reasonable under the circumstances. Paraphrasing the Federal Rules Advisory Committee's comments, the seventh circuit set forth the following list of relevant factors for determining reasonableness: "whether the signer of the documents had sufficient time for investigation, the extent to which the attorney had to rely on his or her client for the factual foundation underlying the pleading, . . . the complexity of the facts, . . . and whether discovery would have been beneficial."[19]

Several commentators have discussed the minimum amount of prefiling investigation contemplated by federal Rule 11. (Their remarks also should apply in the state context.) In *Sanctions*, Judge Schwarzer advises attorneys to uncover evidence-quality facts before filing; these facts should be admissible or at least should lead to admissible evidence. The uncovered evidence need not be undisputed but should be credible. Suspicion, rumor, hearsay, and the legal conclusions of clients or other attorneys, he emphasizes, are not sufficient.[20] Another commentator recommends (1) interviewing key witnesses as well as the client and (2) reviewing relevant documents, including documents received from out-of-state counsel requiring local signature for filing. Reliance on a client's uncorroborated statements, this commentator maintains, is only warranted when the client has first-hand knowledge to support his or her statements and it is impractical to check the client's facts.[21]

The amount of supporting evidence that lawyers are expected to obtain before filing can be substantial. In a case decided in September, 1990, the fourth circuit held that the plaintiffs' ability to support a *prima facie* case of employment discrimination at the time of their pleading was not sufficient to avoid sanctions. The plaintiffs should have anticipated that the defendant would rebut their *prima facie* case and should have obtained evidence enabling them to answer that rebuttal before pursuing their complaint.[22] In a similar case, also decided in September, 1990, the fourth circuit stressed that attorneys must have adequate supporting evidence for all of their claims *before* they file; lawyers cannot make speculative allegations in the hope that they can uncover the factual basis behind those allegations through discovery.[23]

In two recent North Carolina appellate cases, attorneys were sanctioned for failing to comply with the "well grounded in fact" requirement of Rule 11(a). The complaint in *Central Carolina Nissan Inc. v. Sturgis*,[24] included allegations that the plaintiff, Central Carolina Nissan (CCN), was singled out for prosecution and that the assistant attorney general assigned to the case acted without proper authority. The court found the allegations patently inaccurate and noted that their inaccuracy would have been easy to ascertain. The plaintiff also alleged that a second assistant attorney general conspired with its competitors to drive CCN out of business. The allegations were based on the rumored content of conversations with competitors. The court found that the factual basis of these claims was completely unsubstantiated. Concluding that CCN's complaint was fabricated and improper, the court awarded attorney's fees to the defendant.

In *Shook v. Shook*[25] the plaintiff's petition for alimony contained highly exaggerated income figures for the defendant. (Apparently the defendant's monthly salary was presented as his weekly salary.) The plaintiff's attorney failed to amend the complaint even after it became clear that the figures were grossly incorrect. Moreover, the plaintiff's attorney based his request for fees on the inflated figures. The court found this behavior sufficient to subject the attorney to sanctions.

There is conflicting authority on whether an attorney's duty under Rule 11's "well grounded in fact" clause is a continuing one. That is, it is unclear whether certifying counsel are obliged to amend or withdraw pleadings when new information reveals that their allegations are unfounded. There is no North Carolina authority that speaks directly to this point, although in *Shook* the attorney's failure to correct the mistaken income figures was one factor that led the judge to sanction him.

The federal circuits are split on this issue.[26] There seems to be a growing consensus in favor of the position recently adopted by the fifth circuit. The fifth circuit decided on a "snapshot" approach to Rule 11. It held that a pleading's propriety should be judged as of the time it is filed; later events are irrelevant. Attorneys have no duty to amend, withdraw, or refrain from objecting to opponents' motions for summary judgment if evidence unfavorable to their position emerges.[27] In reaching this conclusion, the fifth circuit relied on an advisory committee comment that states that in determining whether to impose sanctions, judges should avoid using hindsight. Instead, they should consider whether the signer's conduct was reasonable at the time the pleading was filed. However, one of the latest cases from the fourth circuit reaches the opposite conclusion. In *Blue v. Harris*, the fourth circuit stated explicitly that, "sanctions are appropriate for pursuing a claim after it becomes clear that the case is without merit."[28]

Pleading must be warranted by law. The second duty imposed by Rule 11(a) requires attorneys to file pleadings and motions "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Courts are more lenient in allowing lawyers to pursue novel legal arguments than in allowing them to file pleadings based solely on unsubstantiated facts.[29] As the federal advisory committee noted, "[Rule 11] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."

In *Harris v. Harris*,[30] the North Carolina Court of Appeals equated the standard for legal argument in Rule 11(a) with the standard set forth in G.S. 6-21.5. This section provides that a reasonable attorney's fee may be awarded in a civil case if the court finds that "there was a complete absence of a justiciable issue of either law or fact in any pleading." The "complete absence of a justiciable issue" is a fairly permissive standard. The leading case interpreting the statute characterizes a nonjusticiable issue as one that is "imagined or fanciful" and states that "complete absence of a justiciable issue suggests that it must conclusively appear that such issues are absent even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss."[31] In *First American Bank of Virginia v. Carley Capital Group*,[32] the North Carolina Court of Appeals overturned an order imposing sanctions where the defendant made a cogent but weak legal argument, relying on distant precedents. The court reasoned that the defendant's pleading demonstrated that its attorneys had researched the relevant law and had found some support for their position. This was sufficient to avoid sanctions.

As with the obligation to file pleadings well grounded in fact, the key to avoiding Rule 11(a) sanctions under the "warranted by law" clause is prefiling investigation. Certifying attorneys must make some effort at researching the relevant law and ascertaining the claim's legal viability. A

number of courts have imposed sanctions when attorneys have either overlooked or ignored bars to filing—bars such as lack of jurisdiction, *res judicata*, and the immunity of defendants. For example, in *Chu by Chu v. Griffith*,[33] sanctions were imposed against an attorney who charged a state court judge with violating his client's constitutional rights when it was clear that the judge had absolute immunity. In *H. McBride Realty Inc. v. Myers*,[34] the court assessed attorney's fees against a party who filed a motion virtually identical to a previously denied motion. One commentator suggests that filing a motion for summary judgment when it is clear that there are disputed issues of fact would similarly constitute a legally frivolous motion and should subject the filing attorney to sanctions.[35]

As well as the procedural abuses listed above, gross substantive legal inaccuracies can lead to sanctions. In *In re Kunstler*, the plaintiffs' lawyers were sanctioned for misstating the law on double jeopardy, standing, and their clients' fifth amendment rights.[36] The plaintiff's attorney in *Shook v. Shook* was penalized partly because he omitted a core element of a claim in his complaint; he filed for alimony without alleging that his client was a dependent spouse. If a certifying attorney's legal argument poses a serious challenge to established precedent, the attorney should acknowledge the novelty of his or her position, discuss the opposing precedent, and make a coherent and reasoned argument for modification of that precedent. Unsupported claims for modification or extension of the law, without any reasonable argument, may lead to Rule 11 sanctions.[37] For example, in *Cabell v. Petty*[38] the fourth circuit allowed sanctions when the argument presented by the filing attorney conflicted with established United States Supreme Court precedents and these precedents were neither acknowledged nor discussed.

Pleading may not be filed for improper purposes. Finally, Rule 11 and Rule 11(a) prohibit filing pleadings or motions for improper purposes. The most common improper purpose is intent to cause delay. In *Turner v. Duke University*, the North Carolina Supreme Court upheld the trial court's decision to sanction Duke University's attorney for scheduling depositions just days before trial in an attempt to force a continuance. Intent to increase the costs of litigation or to harass opponents also may lead to sanctions. For instance, in *Central Carolina Nissan Inc. v. Sturgis* the North Carolina Court of Appeals affirmed an award of attorney's fees against Central Carolina Nissan for filing suit against an assistant attorney general in his individual capacity in an attempt to eliminate his eligibility to prosecute a previously filed antitrust suit. Similarly, the court in *Blue v. Harris* upheld sanctions against plaintiffs and their attorneys because the plaintiffs had given "evasive and patently perjurious" testimony intended to "harass and embarrass" the army.[39]

The "improper purpose" clauses of federal Rule 11 and North Carolina Rule 11(a) are theoretically independent of the duties to file motions well grounded in fact and law. That is, legally and factually supportable claims may still be improper,[40] and frivolous claims are not always wrongly motivated.[41] In practice, however, lack of merit is treated as evidence of an improper purpose, and courts often find that motions are ungrounded when they are filed only for delay or harassment.[42]

Like the tests for lack of merit, the test for whether a motion or pleading has been filed for an improper purpose is *objective*.[43] As the fourth circuit acknowledged in *In re Kunstler*, an objective standard for something as subjective as motive or intent sounds paradoxical. The fourth circuit resolved the apparent paradox by interpreting the term "objective" to mean the following: (1) a finding of improper purpose cannot be based solely on the injured party's subjective impression that he or she has been delayed or harassed, and (2) an attorney's or party's testimony as to their own state of mind is not the only evidence a judge can consider in determining motive; circumstantial facts surrounding the filing can be used to infer the signer's purpose. In *Sanctions*, Judge Schwarzer writes, "the record in the case and all the surrounding circumstances should afford an adequate basis for determining whether particular papers or proceedings [are improper]."[44]

Judges' Discretion over Choice of Sanction

The Federal Rules Advisory Committee in its comments accompanying the 1983 amendments to Rule 11 and a number of opinions have emphasized that a sanction is mandatory when a violation of Rule 11 is found.[45] However, courts retain much discretion over what type of sanctions to impose. In its review of Rule 11 litigation in the federal courts, the Federal Judicial Center concluded, "[t]he options available to a district court judge in tailoring a sanction for a given case seem limited only by the judge's imagination and the possibility of appellate review under an abuse of discretion standard."[46]

The following sanctions have been applied by a court. Judges have

- issued oral and written reprimands;
- ordered remedial legal education;
- ordered attorneys to circulate a written reprimand around their firm;
- ordered attorneys to pay opponents' court costs, often including opponents' attorney's fees;[47]
- ordered the payment of interest on a delayed judgment; and
- stricken improper or frivolous pleadings.[48]

The American Law Institute's *Manual for Complex Litigation Second* suggests some additional alternatives, including

- precluding tainted evidence;
- referring a copy of the case file and opinion to the state bar grievance committee;
- removing counsel from the case;
- holding counsel, party, or both in contempt;
- issuing an adverse ruling against the offending party; or
- enjoining future litigation on the matter at issue.[49]

An award of attorney's fees is by far the most common sanction. Factors that courts have considered in choosing a sanction include the willfulness of the wrongdoing,[50] the conduct of the opposing party,[51] the experience of the attorneys involved,[52] and the parties' ability to pay.[53]

In his commentary on Rule 11, Judge Schwarzer advises courts to apply the least severe sanction adequate to serve Rule 11's purpose of deterring unethical conduct. According to Schwarzer, judicial reprimand is often effective, and criticism from the bench can have a greater effect on lawyers' self-esteem and reputation in the community than judges often realize.[54] Another commentator, concerned that the possibility of recovering attorney's fees encourages the frivolous overuse of Rule 11, reiterates Schwarzer's position. She writes, "[i]mposing attorney's fees as a routine matter will not necessarily foster the overall purposes of Rule 11. Rather, the district court should consider whether a less severe sanction, such as a reprimand, mandatory legal education, or requiring an attorney to circulate a reprimand within the firm would be more appropriate."[55] The principle of imposing the minimum sanction appropriate under the circumstances has been adopted by numerous federal courts.[56]

An award of attorney's fees raises the questions of how much to assess and who to charge. According to the language in both federal Rule 11 and North Carolina Rule 11(a), the amount awarded should be the "reasonable" expenses incurred as a result of the wrongful pleading or motion. This represents a compromise between a mere fine and actual expenses. In North Carolina, the record must contain findings of fact to support the reasonableness of the fees the judge awards.[57] Factors used to determine whether an attorney's fee is reasonable include the time and labor expended, the skill required to perform the legal services rendered, the customary fee for like work, and the attorney's experience and ability.[58] Attorneys receiving fee awards are obligated to mitigate costs.[59]

In analyzing the problem of whether to sanction the attorney, the party, or both, commentators on Rule 11 often distinguish between legal errors and factual inaccuracies based on incorrect information from the client. In the former situation, they contend, only the attorney should be disciplined, while in the latter, both the client and the attorney should be sanctioned.[60] When pleadings are filed for improper purposes, clients should be sanctioned when they were integrally involved in formulating the strategy of the litigation.[61]

The recent trend is to impose sanctions only against the attorney. This creates a potential conflict of interest between attorneys and their clients because attorneys have an incentive to divulge confidential client communications to defend themselves against claims that the allegations they filed were unfounded or unreasonable. This conflict of interest could be reduced by imposing joint and several liability upon the party and his or her attorney, when both are at fault, and encouraging the two to negotiate either a defense strategy for a hearing on the sanction motion or an appropriate division of the sanction between them. Joint and several liability will give clients a say in deciding what information is worth protecting as well as an incentive to participate more fully in litigation.

Deciding which attorneys to sanction also can be an issue. Federal case law makes clear that signing attorneys are all individually responsible for the representations made in the pleadings they file. It is no defense to a Rule 11 action to claim that you relied on another attorney's research.[62] Moreover, only lawyers and not law firms can be sanctioned under the rule.[63]

An adverse ruling on the merits or an injunction against further litigation is viewed by most judges and commentators as extreme and is rarely used.[64] However, there are North Carolina cases in which default judgments have been issued for persistent discovery abuses under Rule 37.[65]

Current Developments

In *Cooter & Gell v. Hartmax Corp.*[66] the United States Supreme Court clarified the federal position on several frequently litigated issues involving Rule 11. These are (1) the standard for appellate review of sanctions imposed by trial courts, (2) whether an attorney can escape sanctions by filing a voluntary dismissal under Rule 41(a)(1), and (3) whether the costs of appealing a Rule 11 sanction may be included in an award of attorney's fees. On the first issue North Carolina law now differs from the United States Supreme Court's interpretation of federal Rule 11. On the second and third questions, North Carolina law is unclear and will likely be the subject of future litigation.

Standard of Review

Before *Cooter & Gell*, several federal circuits had instituted a "tiered" method of reviewing Rule 11 sanctions; different components of the sanction decision were reviewed under different standards. In *Cooter & Gell*, the

United States Supreme Court rejected the "tiered" approach. The Court ruled that appellate courts should apply an abuse of discretion standard in reviewing all aspects of a district court's Rule 11 determination. In contrast to this position, the North Carolina Supreme Court has adopted a two-part approach to appellate review of state Rule 11(a) cases. In *Turner v. Duke University*, the court held that the decision whether or not to impose sanctions should be reviewed *de novo* as a legal issue. The court stated that, "[i]n 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 are supported by its findings of fact; and (3) whether the findings of fact are supported by a sufficiency of the evidence."[67]

On the other hand, the *Turner* court held that the trial court's *choice* of sanction should be reviewed under an abuse of discretion standard.[68] Abuse of discretion, as applied to the issue of choice of sanctions, is a highly permissive standard.[69] However, the court of appeals did find an abuse of discretion in *Central Carolina Nissan Inc. v. Sturgis*. The trial court in that case had reduced the fees assessed against an attorney because of the "competent and candid" representation he secured for himself at the Rule 11 hearing. The appellate court reinstated the original sanction, holding that the conduct of the offending attorney's counsel was not relevant in considering the amount of the sanction.[70]

Rule 41(a)(1) Dismissal

Cooter & Gell also addressed the issue of the relationship between Rule 41(a)(1) and Rule 11. Federal Rule 41(a)(1), like its North Carolina counterpart, allows plaintiffs to take a voluntary dismissal without prejudice by giving timely notice or by obtaining the opposing party's consent. The United States Supreme Court held that Rule 41(a)(1) and Rule 11 are independent. The Court stated that Rule 11 is violated the moment an improvident pleading is filed. Thus a Rule 41(a)(1) dismissal will not necessarily save an attorney from sanctions. Conversely, the imposition of Rule 11 sanctions on a pleading does not in itself prevent refiling. The Court explained, "[b]oth Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system, and thus their policies, like their languages are completely compatible. . . . Rule 41(a)(1) does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers."[71] *In re Kunstler* extended the *Cooter & Gell* holding to dismissals under federal Rule 41(a)(2), which governs voluntary dismissals by order of the court. However, *Kunstler* also suggests that parties should be able to raise equitable defenses such as laches and estoppel to motions for sanctions filed after their case is dismissed.[72] There is no North Carolina case law directly on this issue, and it is unclear how the appellate courts will rule.[73]

Sanctions for Costs of Appeal

Finally, *Cooter & Gell* held that appellees are not entitled to attorney's fees under Rule 11 for the costs of defending Rule 11 sanction awards on appeal. The opinion stated that Rule 38 of the Federal Rules of Appellate Procedure governs the imposition of sanctions for improper or frivolous appeals.[74] Federal Rule 38 is more restrictive than federal Rule 11,[75] and under Rule 38 only the court can raise the issue of sanctions. The overall impact of *Cooter & Gell* will be to limit the availability of attorney's fees for the costs of appeal in the federal courts.

North Carolina appellate courts have not decided whether parties may be awarded attorney's fees under Rule 11(a) for costs incurred in defending a Rule 11(a) sanction on appeal. The North Carolina rule that parallels federal Rule 38 is Rule 34 of the North Carolina Rules of Appellate Procedure. Rule 34 is more expansive than its federal counterpart.[76] It closely tracks the language of Rule 11. That is, the same standards of frivolity and impropriety apply to motions for Rule 34 sanctions as apply to motions for Rule 11(a) sanctions. Rule 34 was recently adopted and there is no case law interpreting it. However, the rule's thoroughness and specificity indicate that it likely will be viewed as the exclusive mechanism for obtaining attorney's fees for the costs of appeal.

It is unclear what substantive difference there will be in making a motion for sanctions for the costs of appeal under North Carolina Rule 11(a) or under Rule 34 of the North Carolina Rules of Appellate Procedure, because the substantive standards are so similar, and North Carolina appellate courts have *de novo* review of trial courts' decisions to impose Rule 11(a) sanctions. In other words, substituting Rule 34 for Rule 11(a) in the North Carolina courts may not have the effect of limiting the availability of attorney's fees for appeals. Moreover, Rule 34 gives the appellate courts the explicit authority to remand the issue of the amount of a monetary sanction to the trial court for factual findings.[77] Thus even the finder of fact will often be the same under Rule 11(a) and Rule 34. Use of Rule 34 does make the process for obtaining an award of attorney's fees for the costs of an appeal slightly more cumbersome as appellate costs cannot simply be tacked on to an existing award. Instead, a separate motion must be filed.

Conclusion

Litigation under Rule 11 in the federal courts and Rule 11(a) in North Carolina is burgeoning. These rules have their weaknesses. Commentators are increasingly critical of

the amount of satellite litigation Rule 11 and its state counterparts are producing. Judges interviewed in the Federal Judicial Center study were worried about the possible chilling effect Rule 11 may have on innovative litigation and its disparate impact on less privileged clients who cannot afford the risk of being sanctioned. Many also expressed concern about the degree of intrusiveness into the attorney-client relationship that Rule 11 often requires. Lawyers have complained of the inconsistent application of the rules and inappropriate judicial use of the threat of sanctions to coerce settlements.[78] On the other hand, these rules remain one of the few ways courts have of controlling attorneys' actions and ensuring that they respect the court and the judicial process. The challenge for courts interpreting these rules is to strike some balance between checking unprofessional behavior and preventing the abuse of the rules through arbitrary application or frivolous overuse.

Notes

1. N.C. GEN. STAT. § 1A-1 (Supp. 1989) [hereinafter the General Statutes will be cited as G.S.].

2. Rule 11(a) is not the only sanctioning provision in the North Carolina Rules of Civil Procedure. Rule 26(g) and Rule 37 allow courts to sanction attorneys for abusing the discovery process. Rule 34 of the North Carolina Rules of Appellate Procedure governs sanctions for frivolous and improper appeals. The standards of conduct set forth in all of these rules are similar. At the trial level, violation of one of the applicable rules often will imply violations of others. *See e.g.*, Turner v. Duke University, 325 N.C. 152, 381 S.E.2d 706 (1989) (discovery abuse led to Rule 11(a) sanctions). *See also* Blue v. Harris (1990 U.S. App. LEXIS 16450), at 56 n.3 (all sanctioning theories applied by trial court essentially similar).

3. North Carolina Rule 11(a) is now virtually identical to federal Rule 11. North Carolina Rule 11 includes subsections (b), (c), and (d), which set forth guidelines for the verification of pleadings by parties or their agents when this is required. These provisions have no counterparts in the federal rule.

4. The relevant portions of the 1967 North Carolina Rule 11(a) read as follows:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record. . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information 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 this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. G.S. 1A-1 (1967).

North Carolina has retained some statutory exceptions to the general rule that pleadings and motions should be certified rather than verified. For example, complaints in divorce actions and shareholders' derivative suits must be verified. North Carolina Rule 11, subsections (b), (c), and (d), establish procedures for verification when required.

5. Minor technical amendments were made to federal Rule 11 in 1987. No substantive changes have been made since 1983. *See infra* note 8 for the text of North Carolina Rule 11(a). The federal rule is virtually identical.

6. A study by the Federal Judicial Center found that there were only nineteen reported cases involving Rule 11 in the federal courts before 1983, compared with almost 700 Rule 11 cases between 1983 and 1987. FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS, 67–68 (1988).

7. There is no official documentation on the number of Rule 11(a) cases filed in North Carolina before and after 1987. Unofficially, this author could find only one recorded case, Estrada v. Burnham, 316 N.C. 318 (1988), in which a pleading was "stricken as a sham" under the older version of the rule. Since 1987 Rule 11(a) cases have become routine.

8. North Carolina Rule 11(a) currently reads:

> 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 represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except where 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 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 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. G.S. 1A-1 (Supp. 1989).

Federal Rule 11 is identical except that it substitutes gender neutral terms for the male pronouns in the text and includes a statement explicitly revoking a rule in equity, which required that averments in an answer be overcome by testimony of two witnesses and corroborating evidence.

9. Turner v. Duke University, 325 N.C. 152, 164 (1989).

10. 434 U.S. 412 (1978).

11. *Id.* at 421. Bad faith or willful misconduct can also trigger sanctions. *See* Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987). In other words, the new standard is broader or more inclusive than the older one.

12. 325 N.C. 152, 381 S.E.2d 706 (1989).

13. 325 N.C. at 164.

14. *See e.g.*, *Cabell*, 810 F.2d 463 (4th Cir. 1987) (sanctions appropriate against inexperienced attorney who did not act in bad faith but whose pleading overlooked contrary and controlling Supreme Court precedent). *See infra* the section on "Standard of Conduct" for more discussion of meritless or improper pleadings.

15. *See In re* Kunstler, ___ F.2d ___ (4th Cir. 1990).

16. *See e.g.*, *Cabell*, 810 F.2d at 466 (inexperienced attorney could be sanctioned for filing motion that displayed gross ignorance of applicable precedents).

17. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 185 (1985) [hereinafter *Sanctions*].

18. Foster v. Michelin Tire Corp., 108 F.R.D. 412, 415 (C.D. Ill. 1985).

19. Brown v. Federation of State Medical Bds. of U.S., 830 F.2d 1429, 1435 (7th Cir. 1987); *see also* Thomas v. Capital Sec. Serv., 836 F.2d 866, 875 (5th Cir. 1988).

20. Schwarzer, *Sanctions*, at 187.

21. Yeomans, *How to Avoid Rule 11 Sanctions*, 34(2) PRAC. LAW. 61, 65 (1988) [hereinafter, *Avoiding Rule 11 Sanctions*].

22. Blue v. Harris (1990 U.S. App. LEXIS 16450), at 22 (4th Cir.). *Blue* was brought under Title VII, and litigation under Title VII has produced a unique and complicated scheme for balancing the burden of proof between plaintiffs and defendants. Thus the holding in *Blue*—that the establishment of a factually supportable *prima facie* case is not sufficient to avoid sanctions—may not be applicable outside the Title VII context.

23. *In re* Kunstler, ___ F.2d ____ (4th Cir. 1990). *Cf.* Kraemer v. Grant County, 892 F.2d 686, 690 (7th Cir. 1990) ("if discovery is necessary to establish a claim, then it is not unreasonable to file a complaint so as to obtain the right to conduct discovery").

24. 98 N.C. App. 253, 390 S.E.2d 730 (1990), *rev. denied* (1990 N.C. LEXIS 696).

25. 95 N.C. App. 578, 383 S.E.2d 405, *rev. denied*, 326 N.C. 50, 389 S.E.2d 94 (1989).

26. *Compare* Hilton Hotels v. Banou, 899 F.2d 40, 44 n.6 (D.C. Cir. 1990); Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied sub nom*, County of Suffolk v. Graseck, 480 U.S. 918 (1987); Hamer v. County of Lake, 819 F.2d 1362, 1370 n.15 (7th Cir. 1987), *cert. denied sub nom*, Patner v. County of Lake, 110 S. Ct. 146 (1989) (no continuing duty under Rule 11 to amend complaint when new facts emerge); *with* Herron v. Jupiter Transp. Co., 858 F.2d 332, 336 (6th Cir. 1988); Meadow Ltd. Partnership v. Heritage Sav. & Loan Assoc., 118 F.R.D. 432, 434 (E.D. Va. 1987), *aff'd sub nom*, Fahrens v. Meadow Farm Partnership, 850 F.2d 207 (4th Cir. 1988) (counsel's duty under Rule 11 to inquire into the facts is a continuing one).

27. Thomas v. Capital Sec. Serv., 836 F.2d 866, 874 (5th Cir. 1988).

28. (1990 U.S. App. LEXIS 16450), at 23. Note, too, that attorneys have a continuing duty under rules 26 and 37 to comply with legitimate discovery requests.

29. *See* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 214–15 (1988) [hereinafter *A Critical Analysis*]; Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*. 484 U.S. 918 (1987) ("in framing [our Rule 11 standard] we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.").

30. 93 N.C. App. 67, 376 S.E.2d 502 (1989).

31. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 326, 344 S.E.2d 555, *rev. denied*, 318 N.C. 284, 348 S.E.2d 344 (1986).

32. 394 S.E.2d 237 (N.C. App. 1990).

33. 771 F.2d 79 (4th Cir. 1985).

34. 94 N.C. App. 511, 380 S.E.2d 586 (1989); *see also* Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 618, 381 S.E.2d 330 (1989) (dicta stating that filing motions identical to denied motions may lead to sanctions).

35. Yeomans, *Avoiding Rule 11 Sanctions*, at 65.

36. ___ F.2d ___ (4th Cir. 1990).

37. Yeomans, *Avoiding Rule 11 Sanctions*, at 66.

38. 810 F.2d 463 (4th Cir. 1987).

39. (1990 U.S. App. LEXIS 16450), at 35.

40. *See e.g.*, Cohen v. Virginia Elec. & Power Co., 788 F.2d 247 (4th Cir. 1986) (filing motion for purely tactical reason of testing opponents' reaction, with intent to withdraw motion if opponents objected to it, was sanctionable behavior even though motion was nonfrivolous).

41. *See e.g.*, *Cabell*, 810 F.2d 463 (4th Cir. 1987) (baseless claims can lead to sanctions even when there is no finding that attorney acted in bad faith).

42. *See Kunstler*, ___ F.2d ___ (4th Cir. 1990) (whether or not pleading has foundation in fact or is well grounded in law will often influence the determination of signer's purpose); *Blue* (1990 U.S. App. LEXIS 16450), at 36 (synergistic effect of plaintiffs' conduct in combination with number of frivolous claims alleged and maintained supports finding of bad faith).

43. *See e.g.* Zalvidar v. City of Los Angeles, 780 F.2d 823, 831 n.9 (9th Cir. 1986).

44. Schwarzer, *Sanctions*, at 195.

45. *See e.g.*, Thomas v. Capital Sec. Serv. Inc., 836 F.2d 866, 876 (5th Cir. 1988). For North Carolina state cases holding that sanctions are mandatory for violations of North Carolina Rule 11(a), *see Turner*, 325 N.C. 152, 164 (1989); *Shook*, 95 N.C. App. 578, 584 (1989).

46. FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS, 127 (1988).

47. In *Blue v. Harris*, the trial judge ordered plaintiffs not only to pay their opponent's costs and attorney's fees but to pay into court the administrative costs of the trial including the judge's salary. The fourth circuit held that the latter sanction was an abuse of discretion that could threaten the impartiality and propriety of the court and reversed the trial court on this issue.

48. For a discussion of the variety of court-imposed sanctions, see Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 877–78 (5th Cir. 1988). *See also* FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS, 129 (1988).

49. MANUAL FOR COMPLEX LITIGATION SECOND § 42.25-.3 (1985). *See also* FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS, 127 (1988).

50. The Federal Rules Advisory Committee directs courts to take the sanctioned attorney's intent into account in choosing a sanction. The American Bar Association also recommends considering this factor. *See* FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS, 130 n.331 (1988).

51. *See* Brown v. Capital Air Inc., 797 F.2d 106 (2d Cir. 1986).

52. *See* Huetigg & Schromm Inc. v. Landscape Contractors Council of N. Cal., 790 F.2d 1421 (9th Cir. 1986); *Blue* (1990 U.S. App. LEXIS 16450), at 54–56.

53. *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied sub nom*, County of Suffolk v. Graseck, 480 U.S. 918 (1987).

54. Schwarzer, *Sanctions*, at 201.

55. Vairo, *A Critical Analysis*, at 231.

56. *See* Thomas v. Capital Sec. Serv., 836 F.2d 866, 878 (5th Cir. 1988) (listing cases that have followed Judge Schwarzer's recommendation). *See also Blue* (1990 U.S. App. LEXIS 16450), at 18 (chastising trial court for expressing frustration with protracted litigation by imposing excessive sanctions).

57. *See* Morris v. Bailey, 86 N.C. App. 378, 387, 358 S.E.2d 120 (1987).

58. *Morris*, 86 N.C. App. at 387.

59. *See* Thomas v. Capital Sec. Serv., 836 F.2d 866, 879 (5th Cir. 1988); Schwarzer, *Sanctions* at 198–200.

60. *See* Schwarzer, *Sanctions*, at 203; Vairo, *A Critical Analysis*, at 227.

61. *See* Schwarzer, *Sanctions*, at 203.

62. *Kunstler*, ___ F.2d ___ (4th Cir. 1990) ("total reliance on other counsel is itself a violation of Rule 11").

63. *See* Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989) (Rule 11 does not authorize sanctions against law firm).

64. *See* Schwarzer, *Sanctions*, at 204; *see also* Thomas v. Capital Sec. Serv., 836 F.2d 866, 878 (5th Cir. 1988).

65. *See e.g.*, Roane-Barker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

66. 110 S. Ct. 2447 (1990).

67. 325 N.C. 152, 165 (1989). *See also* Lowry v. Lowry, 99 N.C. App. 246, 255 (denial of attorney's fees also requires findings sufficient to allow *de novo* appellate review).

68. 325 N.C. at 165.

69. *See* Worthington v. Bynum, 305 N.C. 478, 482, 290 S.E.2d, 599, 603 (1982) (trial judge's discretion is "practically unlimited").

70. 98 N.C. App. 253, 264 (1990).

71. 110 S. Ct. 2447, 2457 (1990); *see also Blue* (1990 U.S. App. LEXIS 16450) (sanctions imposed against plaintiffs who withdrew complaints during course of litigation).

72. ___ F.2d ___ (4th Cir. 1990).

73. *Cf.* Estrada v. Burnham, 316 N.C. 318 (1988) (attorney sanctioned under Rule 11 for filing complaint then immediately taking a voluntary dismissal in order to extend statute of limitations).

74. Rule 38 of the Federal Rules of Appellate Procedure states:

> If a Court of Appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

75. Under federal Rule 38, an appeal is considered frivolous where the result is obvious or the appellant's arguments of error are wholly without merit. Taylor v. Sentry Life Ins. Co., 729 F.2d 652 (9th Cir. 1984).

76. The relevant parts of Rule 34 of the North Carolina Rules of Appellate Procedure read as follows:

> (a) A court of appeals may, on its own initiative or on motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:
>
> (1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.
>
> (2) the appeal was taken or continued for an improper purpose . . . ,
>
> (b) A court of the appellate division may impose one or more of the following sanctions:
>
> (1) dismissal;
>
> (2) monetary damages including but not limited to . . . attorney's fees;
>
> (3) any other sanction deemed just and proper.
>
> (c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under b(2) or b(3) of this rule.

Effective July 1, 1989.

77. *See* Rule 34(c) of the North Carolina Rules of Appellate Procedure.

78. *See* FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS, 171–74 (1988). In response to these criticisms the Federal Rules Advisory Committee has announced that it will conduct a study of Rule 11 and consider amending it in 1991.

A total of 1,050 copies of this public document were printed by the Institute of Government, The University of North Carolina at Chapel Hill, at a cost of $336.74 , or $0.32 per copy. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs.

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.