

9-1-1989

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D. Lee Decker

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Recommended Citation

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NOTES

Appellate Review of Rule 11 Issues—De Novo or Abuse of Discretion? *Thomas v. Capital Security Services, Inc.*

I. INTRODUCTION

Rule 11 of the Federal Rules of Civil Procedure¹ has emerged as a litigious and controversial issue of federal jurisprudence. This controversy is best illustrated by the inconsistent opinions that emerge from federal courts as they apply and review Rule 11. The en banc Fifth Circuit opinion in *Thomas v. Capital Security Services, Inc.*,² arose in this setting, and among other issues it resolved an intra-circuit split of authority concerning the appropriate appellate standard of review for Rule 11 district court decisions. Specifically, the court determined that an abuse of discretion standard should be applied to all federal district court Rule 11 determinations.³

1. The relevant text of the rule states:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's 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 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.

FED. R. CIV. P. 11.

2. 836 F.2d 866 (5th Cir. 1988) (en banc).

3. *Id.* at 872-73.

The overall objective of this note is to examine the Rule 11 standard of review controversy. Section II will discuss the purposes of amended Rule 11 as well as explain in more detail the federal courts of appeals' split of authority concerning whether abuse of discretion or de novo review is more appropriate to Rule 11 determinations. Section III will discuss the *Thomas* case and present some of the central arguments favoring abuse of discretion review. Section IV will discuss additional reasons both for and against abuse of discretion review. Section IV will also suggest guidelines for application of abuse of discretion appellate review to address legitimate Rule 11 concerns of uniformity, consistency and substantial consequences of sanctions. The note concludes by advocating the application of abuse of discretion review to all federal district court Rule 11 decisions.

II. BACKGROUND

Rule 11 of the Federal Rules of Civil Procedure was amended in 1983. The objective of the revised Rule was to provide a less stringent standard for imposition of sanctions and to allow the trial court, on its own initiative, to impose Rule 11 sanctions.⁴ The overall goal was to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."⁵

The goal of deterring frivolous claims or defenses has arguably been achieved in at least one aspect—the amended Rule has caused lawyers in federal court to carefully investigate the merit of any pleading, motion or argument before filing.⁶ Notwithstanding this success, the revised Rule is not without its problems or critics.⁷ Commentators argue that courts have applied Rule 11 inconsistently causing excessive satellite litigation.⁸ In addition, there has been disagreement concerning many

4. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 193 (1988); FED. R. CIV. P. 11 advisory committee's note to 1983 amendments, reprinted in 97 F.R.D. 165, 198 (1983) [hereinafter *Advisory Notes*].

5. *Advisory Notes*, *supra* note 4, at 198.

6. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1014 (1988).

7. See generally *id.*; Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901 (1988); Bates, *The Rule 11 Debate, 4 Years Later*, NAT'L L.J., Oct. 12, 1987, at 3; Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986).

8. See, e.g., Schwarzer, *supra* note 6, at 1013-18; Vairo, *supra* note 4, at 195-197.

Rule 11 issues⁹ at the federal district and circuit court levels. Most significant, for purposes of this note, is the split of authority among the federal courts of appeals over the appropriate appellate standard of review to be applied to the issue of when sanctions should or should not be imposed.¹⁰

The disagreement hinges upon whether the appropriate standard of review is abuse of discretion or *de novo*. Abuse of discretion has been described as existing "when the [reviewing] court has the definite and firm conviction that the district court made a clear error of judgment in its conclusion upon weighing relevant factors."¹¹ Abuse of discretion, however, entails more

9. Examples of these issues include: (a) whether an attorney has a continuing obligation throughout the proceedings to assure that each pleading or motion comports with Rule 11 requirements; (b) whether district courts have the obligation to make specific findings and conclusions in all Rule 11 determinations; (c) whether the sanction imposed should be the least severe; and (d) at what stage of the litigation should litigants be permitted to raise Rule 11 motions.

10. Rule 11 is often analyzed in light of the three types of conduct that are sanctionable under the Rule. These include (a) legal insufficiency, (b) factual insufficiency, and (c) motivation by an improper purpose. The analysis of *when* conduct is sanctionable, however, is not the sole concern of Rule 11. Rather, as is clearly expressed in Untereiner, *supra* note 7, at 905, the Rule poses three interrelated issues: (a) When has a violation of the Rule occurred?, (b) Who should be sanctioned for the violation?, and (c) What sanction should be imposed? This note focuses on the issue of *when* sanctions should be imposed since the courts of appeal are in virtual agreement that the appellate standard of review concerning the "who" and "what" issues should be abuse of discretion. *See, e.g., Adamson v. Bowen*, 855 F.2d 668, 672 n.5 (10th Cir. 1988); *Aetna Life Ins. Co. v. Alla Medical Servs. Inc.*, 855 F.2d 1470, 1474 (9th Cir. 1988); *Snow Machs., Inc. v. Hedco, Inc.*, 838 F.2d 718, 725 (3rd Cir. 1988); *Brown v. Federation of State Medical Bds. of the United States*, 830 F.2d 1429, 1434 (7th Cir. 1987); *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987) (en banc); *INVST Fin. Group v. Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 401 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 291 (1987); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1175 (D.C. Cir. 1985).

11. *Secretary of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985). *See also United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987) (abuse of discretion is defined as an arbitrary, capricious, whimsical or manifestly unreasonable judgment). *Kern v. TXO Prod. Corp.*, 738 F.2d 968 (8th Cir. 1984), also provides a helpful definition of trial court discretion and abuse of that discretion:

[W]hen we say that a decision is discretionary, or that a district court has discretion to grant or deny a motion, we do not mean that the district court may do whatever pleases it. The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law. An abuse of discretion, on the other hand, can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment. And in every case we as an appellate court must be mindful that the district courts are closer to the facts and the parties, and that not everything that is important

than a narrowly defined scope of review. As pointed out by Judge Friendly, "[t]here are half a dozen different definitions of 'abuse of discretion,' ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes."¹² And, the Third Circuit has reasoned that

[i]n our judicial system, a wide variety of decisions covering a broad range of subject matters, both procedural and substantive, is left to the discretion of the trial court. The justifications for committing decisions to the discretion of the court are not uniform, and may vary with the specific type of decisions. Although the standard of review in such instances is generally framed as "abuse of discretion," in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.¹³

Thus, the scope of abuse of discretion review is normally dependent upon the reasons for granting deference in the first place. This demonstrates that abuse of discretion spans a broad spectrum of review standards. De novo review, on the other hand, entails a complete and independent review of the record while according no deference to the lower court's determination.¹⁴

The federal courts of appeals have pursued at least three different approaches to the Rule 11 standard of review issue.¹⁵ Some circuits have adopted an abuse of discretion standard for all Rule 11 issues.¹⁶ Other circuits apply the de novo standard,

about a lawsuit comes through on the printed page.

Id. at 970.

12. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982).

13. *United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981) (footnote omitted).

14. *See, e.g., United States v. Raddatz*, 447 U.S. 667, 690 (1980) (Stewart, J., dissenting) (de novo determination "means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy").

15. The Second Circuit's approach, however, is unique and will not be included in the three approaches mentioned below. The Second Circuit applies de novo review to the question of whether a pleading was groundless; yet, it has not established a standard of review for motions and pleadings that are groundless as a matter of law or are imposed for an improper purpose. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987). *See also Adamson v. Bowen*, 855 F.2d 668, 673 n.6 (10th Cir. 1988).

16. *Adamson v. Bowen*, 855 F.2d at 673; *Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 758 (1st Cir. 1988); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 872-73 (5th Cir. 1988) (en banc); *Stevens v.*

and there are two basic variations of this approach. Variation one will be referred to as the "three-tiered" approach and variation two as the "legal sufficiency" approach.

The Ninth Circuit developed the "three-tiered" approach in *Zaldivar v. City of Los Angeles*.¹⁷ This approach breaks down Rule 11 issues into three levels of analysis: (1) the district court's factual findings to establish violations of Rule 11 are reviewed for clear error; (2) the district court's legal conclusion as to whether or not a Rule 11 violation has occurred is reviewed de novo; and (3) if a Rule 11 violation is found, the district court's choice of an appropriate sanction is reviewed under the abuse of discretion standard.¹⁸

The D.C. Circuit established the second variation or "legal sufficiency" approach in *Westmoreland v. CBS, Inc.*¹⁹ This approach distinguishes between the situations when violations of Rule 11 can occur. For instance, when factual, bad faith or dilatory reasons form the basis for the district court's imposition of Rule 11 sanctions, the standard of review is abuse of discretion. De novo review is appropriate when the basis for imposing sanctions is the legal insufficiency of the motion or pleading.²⁰

The approaches outlined above have not been cleanly adopted or followed.²¹ Intra-circuit disagreement and inconsistency is quite common. The Fifth Circuit is especially illustrative of this phenomenon. In *Davis v. Veslan Enterprises*,²² the Fifth Circuit appeared to adopt an abuse of discretion standard to the issue of whether the district court erred in imposing Rule

Lawyers Mut. Liab. Ins. Co. of N.C., 789 F.2d 1056, 1060 (4th Cir. 1986). After this note was written and during the publication process, the Seventh Circuit, en banc, resolved its own intra-circuit conflict regarding the appellate standard of review for district court Rule 11 determinations. See *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (en banc). In *Mars Steel Corp.*, the Seventh Circuit held that deferential or abuse of discretion review should be used consistently across the board. *Id.* at 930. Many of the Seventh Circuit's reasons and conclusions supporting abuse of discretion review are parallel to and reflect those contained within this note. The author of this note applauds the Seventh Circuit's decision and appropriate references will therefore be made to the opinion throughout this note.

17. 780 F.2d 823, 828 (9th Cir. 1986).

18. *Zaldivar*, 780 F.2d at 828.

19. 770 F.2d 1168, 1174-75 (D.C. Cir. 1985).

20. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); *Westmoreland*, 770 F.2d at 1174-75.

21. See *supra* note 7.

22. 765 F.2d 494, 498 (5th Cir. 1985). The court stated that "[i]n determining whether the district court erred in imposing such sanctions, this Court's review is limited to determining whether the district court abused its discretion." *Id.*

11 sanctions. Subsequently, however, in *Robinson v. National Cash Register Co.*,²³ a different Fifth Circuit panel distinguished the holding in *Davis v. Veslan Enterprises* and instituted *Zaldivar's* "three-tiered" approach.²⁴ The Fifth Circuit noted this split of opinion in both *Shivangi v. Dean Witter Reynolds, Inc.*,²⁵ and in *Thomas v. Capital Security Services, Inc.*²⁶ In both instances the Fifth Circuit adhered to the "more intrusive" de novo standard of review. The Fifth Circuit finally resolved this conflict in its en banc decision in *Thomas*.²⁷

III. ANALYSIS OF *Thomas*

A. Facts

Plaintiffs²⁸ brought an employment discrimination action²⁹ in federal district court against their former employer, Capital Security Services, Inc. The district court granted partial summary judgment in Capital's favor.³⁰ After trial on the remaining issues, the district court found against the plaintiffs on all grounds.³¹ The plaintiffs filed an appeal, but the court of appeals affirmed without a published opinion.³² Capital, however, filed a motion for attorneys' fees based on alleged violations of Rule 11.³³

Although the district court denied the motion for attorneys' fees, it noted that the circumstances of the case presented a close question as to whether or not Rule 11 had been violated. The court observed that the "shotgun" approach evidenced by

23. 808 F.2d 1119, 1129 (5th Cir. 1987).

24. See *supra* notes 17-18 and accompanying text.

25. 825 F.2d 885, 891 (5th Cir. 1987).

26. 812 F.2d 984, 989 (5th Cir. 1987).

27. *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc).

28. The plaintiffs were black females who had been working for Capital as security officers when they were released in October of 1983. *Thomas*, 812 F.2d at 986.

29. *Id.* The plaintiffs' complaint contained broad allegations of discriminatory practices against the defendant, Capital. In addition, the complaint alleged a class action on behalf of all similarly situated black female employees of Capital, both past and future. The plaintiffs' causes of actions were based on alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17, 42 U.S.C. § 1981, and the thirteenth amendment. *Thomas*, 812 F.2d at 986.

30. The district court dismissed the thirteenth amendment claims and limited the other allegations to mistreatment while on the job.

31. 812 F.2d at 986.

32. *Thomas v. Capital Sec. Servs., Inc.*, 802 F.2d 453 (5th Cir. 1986).

33. Capital also based the motion upon 28 U.S.C. § 1927 and 42 U.S.C. § 2000e-5(k). *Thomas v. Capital Sec. Servs., Inc.*, 110 F.R.D. 402 (S.D. Miss. 1986).

plaintiffs' complaint tended to demonstrate a lack of inquiry on the part of plaintiffs' attorneys both as to the relevant facts and applicable law. The court, however, declined to impose sanctions due to the unsettled nature of the law in the particular area.³⁴

On appeal, a panel from the Fifth Circuit Court of Appeals applied a *de novo* standard of review to the district court's determination not to impose Rule 11 sanctions.³⁵ The panel vacated the district court's Rule 11 decision on the ground that the district court may have believed a Rule 11 violation had occurred but chose not to impose sanctions, and, since Rule 11 makes sanctions mandatory if a violation occurs, the case was remanded with instructions to make findings and conclusions.³⁶

The Fifth Circuit subsequently decided on its own motion to rehear the case *en banc*.³⁷ The court reasoned that because of Rule 11's importance to judges, attorneys and litigants, there was therefore a critical need to resolve the circuit-wide difference of opinion concerning the procedures and standards for imposition of Rule 11 sanctions.³⁸

B. Holding and Rationale

Although the *en banc* panel in *Thomas* made several significant holdings concerning the application of Rule 11,³⁹ for purposes of this note, only the holding and rationale as to the standard of appellate review will be emphasized. The court first

34. *Thomas*, 110 F.R.D. at 403.

35. *Thomas v. Capital Sec. Servs., Inc.*, 812 F.2d 984, 989 (5th Cir. 1987). The district court had also denied attorneys' fees under both 28 U.S.C. § 1927 and 42 U.S.C. § 2000e-5(k). *Thomas*, 110 F.R.D. at 404. The Fifth Circuit panel affirmed this action without extensive discussion. The panel noted that the decision to award attorneys' fees under the above mentioned statutes is committed to the trial court's discretion and will only be reversed for an abuse of discretion. The panel found no abuse of discretion. *Thomas*, 812 F.2d at 990.

36. *Thomas*, 812 F.2d at 989-90.

37. *Thomas v. Capital Sec. Servs., Inc.*, 822 F.2d 511 (5th Cir. 1987).

38. *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 868 (5th Cir. 1988) (*en banc*).

39. Some of the other *Thomas* court holdings include: (1) An attorney's or litigant's conduct should be evaluated at the time a pleading, motion or other paper is signed and there is no requirement of a continuing obligation under Rule 11 (*id.* at 874-75); (2) Where a district court finds a Rule 11 violation, sanctions are mandatory (*id.* at 876); (3) The sanction imposed should be the least severe sanction adequate to the purposes and objectives of Rule 11 (*id.* at 877-78); and (4) District courts do not have the obligation to make specific findings and conclusions in all Rule 11 cases; however, when the basis and justification for a Rule 11 decision is not readily discernible on the record, an adequate explanation by the trial court for the decision will be necessary. In its absence, a prompt remand for such an explanation will be made. *Id.* at 883.

looked to the language of Rule 11 and noted the lack of a clearly distinguishable standard of review for Rule 11 decisions. The court did, however, interpret the Rule 11 Advisory Committee Notes as advocating an abuse of discretion standard based on the language that the district court should retain "the necessary flexibility to deal appropriately with violations of the rule."⁴⁰ The court acknowledged the imperative nature of Rule 11's "shall impose" language, but refused to use this as grounds to broaden the scope of Rule 11 appellate review. Instead, the court chose to leave discretion in the district court thereby enabling it to regulate and control its courtroom.⁴¹

Another factor advanced by the court was that since Rule 11 inquiries are fact-intensive, the trial court is in the best position to consider the facts and make appropriate judgments. In addition, the trial judge is much more familiar with the action and its underlying aspects. Finally, the trial judge is more intimately involved with the litigants and attorneys.⁴²

The fact that Rule 11 sanctions are fact-intensive was also relied upon to refute the often asserted argument that de novo review is more likely to promote uniformity. The rationale behind the uniformity assertion is that de novo review allegedly allows the reviewing court more room in which to set general guidelines as well as provide consistency among the numerous trial court decisions. Notwithstanding these general assertions, the *Thomas* court stated that "the goal of uniformity may be no better served by the de novo standard because many sanctions cases are fact-intensive, close calls."⁴³

The court summed up its rationale by stressing that allowing de novo rather than abuse of discretion review "would transform an appellate court into a trial court where attorneys' and litigants' conduct would be reviewed as if those individuals were litigating their case initially on the appellate level."⁴⁴ The court also noted that appellate courts are not replacements for

40. Advisory Notes, *supra* note 4, at 200. See *Thomas*, 836 F.2d at 871.

41. *Thomas*, 836 F.2d at 872.

42. *Id.* at 873.

43. *Id.* (quoting C. SHAFFER & P. SANDLER, *SANCTIONS: RULE 11 AND OTHER POWERS* 15 (2d ed. 1988)). See also, *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

44. *Thomas*, 836 F.2d at 873. The court further reasoned that "[t]his [could not] be the result contemplated by the rulemakers when they amended Rule 11 in 1983." *Id.*

district courts and refused to adopt a Rule 11 standard of review that would in effect usurp the discretion of district courts.⁴⁵

Based on the above reasons, the Fifth Circuit, en banc, concluded that the better approach was to apply the abuse of discretion standard across-the-board to all Rule 11 issues.⁴⁶

IV. REASONS FOR AND AGAINST ABUSE OF DISCRETION REVIEW IN THE RULE 11 CONTEXT

A. *District Court's Familiarity with the Circumstances of the Case and the Rule 11 Reasonable Inquiry Analysis*

Courts usually cite the trial judge's close contact with the circumstances surrounding the imposition of Rule 11 sanctions as the reason for using the abuse of discretion standard.⁴⁷ The imposition or denial of sanctions is often a fact-intensive decision. Consequently, the trial judge has an advantageous and singular position. This position stems from the judge's close and intimate involvement with the facts, issues and litigants of the case on a daily basis.⁴⁸ Because of this familiarity, the trial court's judgment and discretion should be the "clearest guidepost to appellate courts."⁴⁹

Although the trial court's familiarity with the facts and circumstances of the underlying case suggests that abuse of discretion should be the proper standard of review for Rule 11 determinations, there is at least one scenario where this argument may appear weak. Under Rule 11, sanctions may be imposed if (1) the attorney has not conducted a reasonable inquiry into the facts that support the document; (2) the attorney has not conducted a reasonable inquiry into the legal basis of the document to assure it is either "warranted by existing law" or submitted under "a good faith argument for the extension, modification, or reversal of existing law;" or (3) the document is interposed for an improper purpose such as bad faith, delay, or to harass the

45. *Id.*

46. *Id.* at 872.

47. *See, e.g.,* *Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 758 (1st Cir. 1988); *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1238 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

48. *Thomas*, 836 F.2d at 872-73. *See also* *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 934 (7th Cir. 1989) (en banc) ("The district judge has a comprehensive vision that [the appellate court] lack[s].").

49. *Kale*, 861 F.2d at 758; *Thomas*, 836 F.2d at 873.

opposition.⁵⁰ Situations (1) and (3) are clear instances where the ability of the district court to judge and analyze counsel's actions first hand renders it in an advantageous position to achieve fairer and more factually consistent decisions under Rule 11. Yet, under situation (2), the trial court seems to be in no better position than the appellate court to ascertain the legal sufficiency of the motion or pleading.⁵¹ Accordingly, such determinations should be reviewed *de novo* based on the general rule that questions of law should be independently reviewed by the appellate court.⁵²

The use of *de novo* rather than abuse of discretion appellate review to examine the district court's determination of legal sufficiency is mooted by the following argument. The language of Rule 11 calls for a "reasonable inquiry" into both the factual and legal sufficiency⁵³ of a motion or pleading. The Advisory Committee stated that

what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.⁵⁴

Thus, under both factual and legal sufficiency, the court should consider extraneous factors such as those included in the Advisory Committee Notes. This suggests that even the determination of legal sufficiency is based upon factors with which the district court is much more familiar.⁵⁵ The appellate court, on the

50. FED. R. CIV. P. 11.

51. See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987).

52. See, e.g., *Pierce v. Underwood*, 108 S. Ct. 2541, 2546 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')").

53. The legal sufficiency of a motion or pleading includes the requirement that the document be either "warranted by existing law" or submitted in good faith "for the extension, modification, or reversal of existing law." FED. R. CIV. P. 11.

54. Advisory Notes, *supra* note 4, at 199.

55. "The Rule speaks of 'reasonable' pre-filing inquiry, the language of tort law. And although the definition of a frivolous legal position is itself a question of law, there will often be factual questions concerning the actual position the litigant took—questions on which the court of first instance has the leading role." *In re Central Ice Cream Co.*, 836 F.2d 1068, 1072 (7th Cir. 1987). See also *Pierce v. Underwood*, 108 S. Ct. 2541, 2547

other hand, is at a disadvantage in determining, even de novo, the reasonableness of the required Rule 11 inquiry due to its fact sensitive nature.

B. Consistency with the Purposes of Rule 11

One of the central purposes of amended Rule 11 is to avoid delay and unnecessary expense in litigation.⁵⁶ Abuse of discretion review is more consistent with this objective in light of the argument that de novo review provides added incentive to appeal an adverse determination. The argument is that de novo review may be perceived by litigants as having more potential to yield a favorable result and in effect allows litigants a fresh opportunity to have their claims reviewed.

Abuse of discretion, on the other hand, may discourage appeal of adverse Rule 11 determinations since the appellant carries the heavier burden of showing that the lower court committed a clear error of judgment after weighing the relevant factors.⁵⁷ Consequently, abuse of discretion as opposed to de novo review will avoid the expense and delay stemming from excessive appeals.

Litigants may appeal adverse Rule 11 decisions regardless of whether abuse of discretion or de novo review is used. This, however, should only be true regarding those litigants who actually receive imposition of Rule 11 sanctions. Given the adverse consequences of such sanctions,⁵⁸ it is highly probable that an appeal in these circumstances will be more actively pursued. Yet, when sanctions are denied, the losing party will be deterred by the applicable standard of review. Any appeal should be carefully and practically examined due to the expense and time involved. The presence of abuse of discretion review will, as a practical matter, weigh against numerous appeals.

(1988) ("Not infrequently, the question [to be reviewed by the appellate court] will turn upon not merely what was the law, but what was the evidence regarding the facts.").

56. See, e.g., Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 364 (1983) (proposed amendments were "designed to deal with precisely the problems of delay and expense"); Note, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751, 773 (1985) ("The primary concerns behind these amendments are unnecessary delay and expense in litigation.").

57. See *supra* note 11 and accompanying text.

58. See *infra* text accompanying note 90.

C. *Administrative Convenience and Efficiency*

An additional reason that favors using abuse of discretion review is administrative convenience and efficiency. The across-the-board abuse of discretion review is easily applied⁵⁹ and does not waste judicial resources by requiring duplication of the district court's Rule 11 determinations.⁶⁰

The United States Supreme Court, in *Pierce v. Underwood*,⁶¹ listed administrative convenience and efficiency to support its holding that abuse of discretion should be used when reviewing a district court's determination of whether the government's litigation position was substantially justified for purposes of assessing attorneys' fees against the government under the Equal Access to Justice Act (EAJA). The Court reasoned that even when it is possible for the reviewing court to acquire the district court's factual knowledge of the underlying case, this acquisition is achieved through considerable expense and duplication of judicial resources.⁶²

In contrast, the "legal sufficiency" and "three-tiered" approaches are complex and can create additional work for both federal district, and appellate courts. Under these approaches, courts are required to undergo, anew in each case, the difficult task of determining which issues are to be reviewed by what standard. These approaches also have the anomalous effect of splintering review of district court Rule 11 decisions into several categories for standard of review purposes. This splintering effectively creates complexity and raises additional questions for appeal since litigants and courts disagree concerning the appropriate standard for certain issues. Finally, the *de novo* approaches can be criticized for duplication of judicial resources.

D. *Mandatory Nature of Rule 11 Language*

Rule 11 requires that if a pleading or motion "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 repre-

59. See *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 758 (1st Cir. 1988).

60. See *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir. 1989) (en banc) ("There is little to gain, and much to lose, in duplicating the efforts of district judges.").

61. 108 S. Ct. 2541 (1988). For a more in depth discussion of additional reasons why the Supreme Court's decision in *Pierce v. Underwood* is relevant to the Rule 11 standard of review issue, see *Mars Steel Corp.*, 880 F.2d at 934-35.

62. *Pierce*, 108 S. Ct. at 2547.

sented party, or both, an appropriate sanction.”⁶³ The use of “shall impose” in the Rule is often cited as support for the use of the de novo standard of appellate review in the Rule 11 context.⁶⁴

In *Westmoreland v. CBS, Inc.*, the D.C. Circuit interpreted the “shall impose” language of Rule 11 as concentrating “the district court’s discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions.”⁶⁵ Additionally, other circuits have held that the mandatory nature of Rule 11 logically carries with it a broadened scope of review by the court of appeals.⁶⁶ Indeed, the imperative nature of the Rule’s language is a strong rationale for the use of the de novo standard of review.

The Advisory Committee Notes to Rule 11, while not specifically resolving the appellate standard of review issue, are still helpful in determining the specific focus and intention of the “shall impose” language. The Advisory Committee stated that “[t]he new language of the rule is intended to reduce the reluctance of courts to impose sanctions.”⁶⁷ The Advisory Committee additionally noted that

the words “shall impose” in the last sentence focus the court’s attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.⁶⁸

The “shall impose” language, therefore, is specifically intended to focus the court’s attention on the need to impose sanctions and to eliminate the court’s reluctance to sanction when violations of the Rule occur.⁶⁹ Consequently, emphasizing “shall im-

63. FED. R. CIV. P. 11 (emphasis added).

64. See, e.g., *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 757 (1st Cir. 1988); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1126 n.12 (5th Cir. 1987); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985), cert. denied, 108 S. Ct. 269 (1987); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985).

65. 770 F.2d at 1174 (emphasis in original) (citation omitted). See also *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 157 (3d Cir. 1986).

66. *Eastway Constr. Corp.*, 762 F.2d at 254 n.7.

67. Advisory Notes, *supra* note 4, at 198.

68. *Id.*

69. “The mandatory word ‘shall’ is intended to remove the exercise of discretion by the court in imposing Rule 11 sanctions *once* it has found a violation.” *Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988) (emphasis added).

pose" makes sanctions mandatory when violations occur, but determining whether a violation occurs should be left to the discretion and flexibility of the district court.⁷⁰

Another argument against implying de novo review from Rule 11's mandatory language is "the fact that at [Rule 11's] core imposition of sanctions is 'a judgment call.'"⁷¹ This rationale bears strong weight especially given the numerous and diverse circumstances under which Rule 11 issues may arise. Consequently, the judgment call of when to impose sanctions is best left to the trial judge whose unique position renders her most able and qualified to make such determinations.

E. Uniformity

Judge Friendly has stated that "broad judicial review is necessary [and desirable] to preserve the most basic principle of jurisprudence that 'we must act alike in all cases of like nature.'"⁷² Indeed, uniformity and consistency are often cited as compelling reasons for adopting a more intrusive standard of appellate review.⁷³

The assertion that de novo review is more likely to breed consistency and uniformity is premised on the fact that de novo review allows the reviewing court to analyze the record anew and without deference to the lower court's decision. This approach enables the reviewing court to make consistent and independent determinations. Additionally, such review gives the appellate court more leeway and opportunity for setting general guidelines to be followed by district courts in subsequent cases.

Not surprisingly, Rule 11 has not been the paradigm of uniformity or consistency. Since the revised Rule's inception in 1983, the Rule has engendered extensive disagreement and con-

70. *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987).

71. *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 758 (1st Cir. 1988) (citations omitted). See also *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir. 1989) (en banc) ("Whether the lawyer 'went too far' (or 'didn't do enough') is inevitably a judgment call.").

72. Friendly, *supra* note 12, at 758 (citation omitted).

73. See, e.g., *Pierce v. Underwood*, 108 S. Ct. 2541, 2560 (1988) (White, J., concurring in part and dissenting in part) ("De novo appellate review of whether the Government's legal position was substantially justified would also foster consistency and predictability in EAJA litigation."); *Mars Steel Corp.*, 880 F.2d at 940 (Flaum, J., concurring) ("the most compelling reason for advancing de nova review over . . . abuse of discretion review is the enhanced opportunity the former affords an appellate tribunal to address the issue of uniformity in the imposition of Rule 11 sanctions").

flict. Although a few circuits have issued definitive rulings, "application of the Rule continues to generate varying results."⁷⁴ Kassin's 1984 study of Rule 11 revealed that the Rule suffered from "a good deal of interjudge disagreement" and suggested that "greater attention be directed toward articulating an internally consistent theory . . . for developing a clearer set of guidelines" for district courts to follow.⁷⁵ Despite Kassin's exhortations, commentators still agree that the current application of Rule 11 lacks consistency and predictability.⁷⁶

The lack of consistency that appears inherent in Rule 11 decisions is a strong argument for use of de novo review of Rule 11 issues. By utilizing a stricter or heightened standard of review, circuit courts are in a better position to set general guidelines for application across the board. This is especially true in the context of determining the plausibility of legal arguments for Rule 11 purposes.⁷⁷

On the other hand, the unpredictability and inconsistency innate in Rule 11 determinations may simply be the product of the Rule's complicated and fact-intensive nature. Professor Maurice Rosenberg has argued that

[o]ne of the "good" reasons for conferring discretion on the

74. C. SHAFFER & P. SANDLER, *supra* note 43, at 8.

75. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 45 (Federal Judicial Center 1985). The study found that although the 1983 amendments to rule 11 have apparently increased judges' willingness to enforce the certification requirements, the clarity and uniformity with which they are applied are thus far limited. Of specific concern are the findings that there is a good deal of interjudge disagreement over what actions constitute a violation of the rule, only partial compliance with the desired objective standard, inaccurate and systematically biased normative assumptions about other judges' willingness to impose sanctions, and a continued neglect of alternative, nonmonetary means of response.

Id.

Note, however, that Kassin's study was performed in 1984 when the revised Rule was new and the law interpreting the Rule was just beginning to develop. Consequently, the results found in the Kassin study may not accurately reflect the current state of Rule 11 jurisprudence. See Schwarzer, *supra* note 6, at 1016 n.15.

76. See, e.g., Schwarzer, *supra* note 6, at 1015-17 ("In interpreting and applying rule 11, the courts have become a veritable Tower of Babel." *Id.* at 1015); Untereiner, *supra* note 7, at 902-03; Bates, *supra* note 7, at 3, 42; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 638-42 (1987) [hereinafter *Plausible Pleadings*].

77. "Because judges applying rule 11 have not been guided by a general theory for evaluating the plausibility of legal arguments, they have depended on their own individual notions of good legal argumentation and have produced varied and inconsistent results." *Plausible Pleadings*, *supra* note 76, at 638.

trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization—at least for the time being. . . . When the ruling under attack is one that does not seem to admit of control by a rule that can be formulated or criteria that can be indicated, prudence and necessity agree it should be left in the control of the judge at the trial level. That is true when the circumstances which rationally deserve attention are so infinitely variable that it is hopeless to try to cover them by general propositions.

. . . .
 The non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop, appears to be a sound reason for conferring discretion on the magistrate.⁷⁸

Rule 11 determinations involve “multifarious, fleeting, special, narrow facts that utterly resist generalization.”⁷⁹ As the *Thomas* court pointed out,⁸⁰ the decision whether to impose or deny sanctions involves a “fact-intensive” inquiry. Indeed, because Rule 11 sanctions are usually fact sensitive and difficult decisions, the goal of uniformity may be no better served by the *de novo* standard.⁸¹

Moreover, uniformity and consistency can be directly addressed by abuse of discretion review. The simple fact that an appellate court uses abuse of discretion review of Rule 11 issues does not prevent the court from promulgating general guidelines pertaining to the application and appropriate standards of the Rule. The Fifth Circuit’s decision in *Thomas* is illustrative. The *Thomas* court, while reviewing the district court’s Rule 11 determination for abuse of discretion, was able to set forth specific and definitive guidelines for future Rule 11 decisions.⁸²

78. Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 662 (1971). The majority in *Pierce v. Underwood*, 108 S. Ct. 2541, 2548-49 (1988), cited Rosenberg’s reasoning to support its holding that abuse of discretion is the correct standard when reviewing whether the litigation position of the United States is “substantially justified” under the EAJA.

79. Rosenberg, *supra* note 78, at 662. See also *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 935 (7th Cir. 1989) (en banc).

80. *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 873 (5th Cir. 1988) (en banc).

81. *Id.* See also *Mars Steel Corp.*, 880 F.2d at 936.

82. See *supra* note 39. Of course, the *Thomas* opinion was decided en banc by the

The issuance of Rule 11 guidelines is especially appropriate when the reviewing court determines that the lower court has abused its discretion in either imposing or not imposing sanctions. Of course, guidelines should not be given in a manner which has the effect of removing discretion from the trial court. In other words, the reviewing court should be sensitive to the core issue behind all Rule 11 determinations—did the signer conduct a reasonable inquiry under the circumstances into the factual and legal sufficiency of the motion or pleading? The guidelines should allow room for the necessary district court flexibility to deal with violations of the Rule.

Consistency is also furthered by carefully reasoned Rule 11 guidelines. District courts will be able to utilize these guidelines to achieve more uniform and predictable applications of Rule 11. The goal of consistency, however, must be viewed in combination with the fact-intensive nature of Rule 11 determinations. Since each Rule 11 situation differs as to the facts and underlying circumstances,⁸³ it is difficult to predict with certainty the outcome. This is no excuse, however, for not attempting to achieve some degree of consistency through the use of relevant guidelines for courts, litigants and attorneys to follow.

F. Legal, Factual or Mixed Questions

For standard of review purposes, trial court decisions have traditionally been divided into three categories: (1) questions of law which are reviewable de novo; (2) questions of fact which are reviewable for clear error;⁸⁴ and (3) matters of discretion which are reviewable for abuse of discretion.⁸⁵ This division is a major aspect of the rationale underlying the application of de novo review to Rule 11 issues. For instance, the de novo “three-tiered” approach breaks down Rule 11 issues into questions of law, fact

Fifth Circuit. This was especially helpful as it unified and clarified the Rule 11 standards and procedures on a circuit-wide level. The Fifth Circuit’s approach to Rule 11 could be followed in other federal circuits currently experiencing intra-circuit inconsistency. For instance, the Seventh Circuit, en banc, recently resolved an intra-circuit split of authority regarding the appropriate Rule 11 appellate standard of review. *Mars Steel Corp.*, 880 F.2d 928. The Seventh Circuit stated that its rationale for deciding the issue en banc was to “achieve harmony.” *Id.* at 930.

83. *Mars Steel Corp.*, 880 F.2d at 933 (“each Rule 11 case in the district court is unique”).

84. See FED. R. CIV. P. 52(a).

85. *Pierce v. Underwood*, 108 S. Ct. 2541, 2546 (1988).

or discretion, and applies the standard of review accordingly.⁸⁶ The "legal sufficiency" approach holds that the legal sufficiency of a motion or pleading is a question of law and is therefore reviewed de novo.⁸⁷ On the surface, these approaches seem logical and appear to neatly fit into the traditional divisions of appellate review. However, the Rule 11 analysis may not be as categorically simple as would appear. The factual or legal sufficiency of a document hinges on whether a "reasonable inquiry" was undertaken by the signer.⁸⁸ The reasonableness test is fact sensitive and therefore presents a mixed question of fact and law.⁸⁹ It follows that this "mixed question" should be reviewed for abuse of discretion due to the district court's more intimate knowledge of the facts and circumstances of the underlying case.⁹⁰

On the other hand, once the district court gets past the reasonableness inquiry of legal sufficiency, all that remains is a pure question of law or, in other words, whether the motion or pleading is warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law. A careful reading of the Rule and the corresponding advisory committee notes, however, suggests that the reasonableness inquiry and legal sufficiency cannot be separated, since, for purposes of the Rule 11 determination of when sanctions should be imposed, reasonableness and legal sufficiency are interrelated. The degree of legal sufficiency needed to pass muster under the Rule, therefore, depends on what was reasonable under the circumstances. The district court is more familiar with the facts and circumstances of the case and is more capable of correctly determining the reasonableness of an attorney's conduct. Consequently, the district court's decision to impose sanctions should be reviewed deferentially.

G. *Substantial Consequences of Rule 11 Sanctions*

A final concern against using abuse of discretion review is that the imposition of Rule 11 sanctions can have substantial and lasting consequences. Often sanctions imposed on an attor-

86. See *supra* notes 17-18 and accompanying text.

87. See *supra* notes 19-20 and accompanying text.

88. FED. R. CIV. P. 11.

89. See *Century Prods., Inc. v. Sutter*, 837 F.2d 247, 253 (6th Cir. 1988).

90. See, e.g., *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 793 (6th Cir. 1988); *Schaefer v. Transportation Media, Inc.*, 859 F.2d 1251, 1256 (7th Cir. 1988), *petition for cert. filed*, Feb. 6, 1989.

ney may color her reputation and permanently damage her credibility before the court and her peers. A sanctioned law firm faces similar financial and reputational concerns. In addition, sanctions imposed on litigants may have the direct or indirect effect of denying them further access to the judicial system. These potentially drastic consequences weigh in favor of a heightened standard of review.⁹¹ The appellate court needs to be able to carefully analyze and evaluate the imposition of sanctions to assure that any substantial consequences sustained by the parties affected are just and warranted.

This concern, however, can be addressed under abuse of discretion review. Abuse of discretion is by no means a uniform one-sided standard of appellate review.⁹² Rather, as has been indicated by Judge Friendly,⁹³ abuse of discretion can invoke a broad spectrum of review standards and applications. In other words, there is not just one standard of abuse of discretion appellate review. The scope or degree of scrutiny can depend upon whether the particular issue for review has substantial and lasting effects. Thus, if a Rule 11 sanction involves substantial or drastic consequences, the reviewing court can still apply a sufficient degree of scrutiny without resorting to the more intrusive and duplicative standard of *de novo* review.⁹⁴ A heightened abuse of discretion standard is especially appropriate when reviewing district court decisions imposing rather than denying sanctions. Even if decisions denying sanctions are overturned, the case will typically be remanded to the district court for a formulation of an appropriate sanction consistent with the appellate court's opinion and guidelines.⁹⁵ This formulation is ulti-

91. In *Pierce v. Underwood*, 108 S. Ct. 2541 (1988), the United States Supreme Court, in holding that the abuse of discretion standard is appropriate when reviewing a district court's determination of whether the government's litigation position is substantially justified for EAJA purposes, noted that "[i]f this were the sort of decision that ordinarily has . . . substantial consequences, one might expect it to be reviewed more intensively." *Id.* at 2549. The median attorney's fees awards under the EAJA were less than \$3,000. For further discussion of *Pierce v. Underwood* and of Rule 11's potentially severe consequences for litigants and attorneys, see *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 935-36 (7th Cir. 1989) (en banc).

92. See *supra* notes 12-13 and accompanying text.

93. Friendly, *supra* note 12, at 763.

94. This does not mean, however, that if appellate courts apply varying degrees of review that uniformity will be completely sacrificed. As this note earlier emphasized, abuse of discretion review still allows appellate courts to establish specific guidelines for future district court Rule 11 determinations. See *supra* notes 82-83 and accompanying text.

95. See, e.g., *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 885 (5th Cir. 1988)

mately reviewable. On the other hand, when sanctions are imposed, the appellant faces potentially drastic consequences and this should be carefully reviewed to assure that the sanction is fair and warranted.

Additionally, if a violation of Rule 11 is present, the relationship between the violation and the imposed sanction should receive particularly careful scrutiny. One factor to assist this scrutiny is whether the violation was willful or negligent. Negligent violations of the Rule, while they also should be deterred, do not rise to the same level of concern. The reviewing court's degree of scrutiny should reflect this difference.

The concern over the substantiality of Rule 11 sanctions, however, is only applicable to the standard of review issue. Once a sanction is found to be reasonable and warranted, Rule 11's objective of deterring frivolous claims and defenses should become paramount.

V. CONCLUSION

The main objectives of amended Rule 11 are first, deterrence of frivolous claims and defenses, and second, elimination of expense and delay stemming from excessive appeals. Abuse of discretion appellate review of Rule 11 decisions is more consistent with these objectives than the alternative, *de novo* review. Abuse of discretion is economically and flexibly applied and requires no complex categorization of Rule 11 issues for standard of review purposes. Duplication of judicial resources is averted, and deference is deservedly given to the district court which is more familiar with the underlying circumstances of the case. The rationale behind giving deference to the district court is bolstered by Rule 11's "reasonableness inquiry" which applies irrespective of whether factual or legal insufficiency is alleged.

In applying abuse of discretion, however, federal courts of appeals should be aware of the legitimate concerns regarding uniformity, consistency, and the substantial consequences that may stem from imposition of Rule 11 sanctions. In regard to uniformity and consistency, the reviewing court should, in issuing its opinions, give specific and definitive guidelines for subsequent Rule 11 decisions especially when an abuse of discretion

(en banc); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1221-22 (6th Cir. 1986).

has been found. As for the substantial and lasting effects of Rule 11 sanctions, the key approach is to utilize a flexible abuse of discretion standard of review. Thus, a heightened degree of abuse of discretion can be applied to Rule 11 decisions that implicate substantial and lasting consequences. This will allow the reviewing court to temper the effects of a Rule 11 sanction, and at the same time, leave the decision to impose sanctions in the hands of the entity more able to decide the issue in light of Rule 11's "reasonable inquiry" analysis and fact-intensive nature.

D. Lee Decker