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PRACTICE MAKES PERFECT: JUDICIAL DISCRETION AND THE 1993 AMENDMENTS TO RULE 11

Maureen N. Armour*

I. INTRODUCTION

This Article discusses the 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure and judicial discretion. The 1993 amendments signal the beginning of a new era in the courts' sanctions practice, but one in which judicial discretion inevitably plays a significant role. The Article examines the seemingly inevitable conflict between the courts' sanctions practice, based largely on subjective judgments and a fact intensive analysis, and their institutional commitment to produce a decision based in law. This issue is examined from the perspective of the judge. What does it mean to her when the rule states that she has the discretion to sanction?

The Article explores methods to limit the Rule's reliance on the courts' highly individualized approach to sanctions on a case by case basis in order to limit variability, and have more predictability and consistency in the case law. This goal is accomplished by proposing a

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1. See infra Appendix (including all versions of Rule 11 of the Federal Rules of Civil Procedure and a brief history).

2. As pointed out in recent commentary regarding the 1993 amendments: "By providing greater discretion to district court judges, the new rule will promote inequitable decisions. Since each judge brings his or her own experiences and perspectives to the bench, uniform interpretations of Rule 11, and corresponding predictability of results for litigants, are virtually impossible." Howard A. Cutler, A Practitioner's Guide to the 1993 Amendment to Federal Rule of Civil Procedure 11, 67 TEMP. L. REV. 265, 267 (1994) (footnote omitted).

3. A large body of commentary looks at whether or not Rule 11 provides adequate guidance to courts considering sanctions. The rule has spawned a body of confusing, conflicting case law that does not always provide lawyers with a clear sense of what is and what is not acceptable advocacy. See Edward D. Cavanagh, Developing Standards Under Amended Rule 11 of the Federal Rules of
method to ensure that the highly fact sensitive, subjective decisions of the courts involved in a sanctions decision are rendered with skill.\textsuperscript{4}

Rule 11, like so many other judicial reforms, has been a lightning rod for "arguments about the meaning of courts as institutions."\textsuperscript{5} Although the Rule is no longer intended to reach \textit{de minimis} or minor violations,\textsuperscript{6} the overriding institutional policies that should govern the
courts’ sanctions practice remain open to debate.\(^7\) As one commentator aptly states, resolution of the Rule 11 debate “implies the fundamental tenets of the federal system of civil procedure.”\(^8\) Should the courts’ discretion to sanction under Rule 11 be exercised aggressively, shifting away from institutional policies that have traditionally erred “on the side of, or [have] give[n] the benefit of the doubt to, the party”\(^9\) seeking access to the courts? Or should the courts exercise their discretion to sanction with restraint,\(^10\) only intervening in cases in which it is clear that there has been a serious abuse of judicial process leading to a detrimental impact on the court?\(^11\) The debate over the normative preferences to be given priority in a court’s Rule 11 sanctions practice has reached a stalemate with no immediate resolution in sight.\(^12\)

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7. See generally Tobias, 1993 Revision, supra note 3 (suggesting methods for the effective implementation of the 1993 amendments to Rule 11); Vairo, Where We Are, supra note 3 (presenting an empirical framework for the analysis of important issues raised by Rule 11).

8. Vairo, Where We Are, supra note 3, at 486.


11. Both Professors Tobias and Vairo argue that sanctions in a close case or a case which is less than clear amount to an unduly aggressive sanctions policy no longer mandated by the rule. See Tobias, 1993 Revision, supra note 3, at 173-74; Vairo, Prologue, supra note 3, at 69-78. Even Judge Schwarzer, an advocate of expanding attorneys’ duties under the rule adheres to this notion: “The Rule places a heavy burden on judges, one many judges would just as soon pass up. Judges have an obligation to . . . use the Rule with care and restraint. Judges, like lawyers, can stop and think before imposing sanctions, minimizing mistakes . . . .” William W. Schwarzer, Rule 11: Entering a New Era, 28 Loy. L.A. L. Rev. 7, 37 (1994).

12. See generally Schwarzer, supra note 11 (noting the difficulty with applying Rule 11 and the great burden placed upon judges having to exercise their discretion); Vairo, Prologue, supra note 3 (discussing the myriad criticisms of Rule 11 prior to the 1993 amendments and the virtues of various reform proposals aimed at remedying such problems). The issues raised in these articles mirror prior commentary. See Louis, supra note 9, at 1052-62 (looking at Rule 11 as a successful part of the courts’ efforts to reform the litigation interception system of the federal rules); Vairo, Where We Are, supra note 3, at 476 (discussing the divergence in opinion regarding the purposes of Rule 11, stemming from inconsistency in the case law prior to 1993 amendment); cf. Jeffrey W. Stempel, Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices, 60 FORDHAM L. REV. 257, 261 (1991) (arguing for treatment of the Rule as part of the pre-trial interception system, including sharing its policy goals and normative assumptions); Beverly Dyer, Note, A Genuine Ground in Summary Judgment
It is not the goal of this Article to resolve this debate. Instead it takes a much more limited look at the courts’ sanctions practice and the paradigm of judicial discretion that has shaped that practice in an effort to address the question of the proper scope and exercise of judicial discretion under Rule 11. Numerous articles about Rule 11 have addressed the problem of judicial discretion and Rule 11, but none from the perspective offered here. This Article looks at the courts’ exercise of judicial discretion under Rule 11 from the perspective of the decisionmaker. In doing so, it looks at the sense that judges have of their freedom to act and of their own discretion. How then do judges making sanctions decisions satisfy themselves and potential critics that their exercise of judicial discretion is legitimate? What standards


13. As aptly put by one commentator, “[t]he purpose, nature, and shape of courts . . . are up for grabs.” Resnik, supra note 5, at 1531; see Thomas D. Lambros, The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era, 50 U. PIT. L. REV. 789, 806 (1989) (discussing the adjudicative and managerial role of the courts and the need for judges to utilize creativity in fulfilling this role); cf. Lawrence Baum, Courts and Policy Innovation, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT, supra note 5, at 413 (looking at the adjudicative role of the courts within the larger social context); Wayne V. McIntosh, Courts and Socioeconomic Change, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT, supra note 5, at 281, 281 (assessing the “relationship between courts and the society in which they operate,” and the different functions they perform).

14. The term paradigm is a central organizing principle in the sociology of knowledge. See PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY 10 (First Irvington 1980) (1966); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 43 (2d ed. 1970); WERNER STARK, THE SOCIOLOGY OF KNOWLEDGE (1958). Paradigms denote the coherent frameworks within which disparate facts are ordered and related to larger belief systems or ideologies, and which guide action and communication. Paradigms provide a way to look at the normative parameters of “objective reality.” They provide a way to link our understanding of that reality to socially ordered and conditioned facts.

15. See supra note 2.


An appropriate exercise of judicial discretion must be done out of an awareness of the different foundations that comprise judicial discretion. An appropriate exercise of judicial discretion is an objective exercise of judicial discretion. . . . A proper objective exercise of judicial discretion must be done out of subjective awareness that judicial discretion is being activated. This approach places a heavy burden upon the judge.

Id.

17. See Keith Hawkins, The Use of Legal Discretion: Perspectives from Law and Social Science, in THE USES OF DISCRETION 11, 15 (Keith Hawkins ed., 1992) (distinguishing between discretion as a quality of rules, discretion as a quality of behavior, and discretion as the sense that people have of their freedom to act).

18. Taking the lead offered by Professor Charles Yablon, this Article starts with the premise that sanction decisions are made initially by the courts and we should look at what they perceive
should the courts use and what standards do they use to make sure that the result is not only fair and just, but perceived as such?19

Judicial discretion, for the purposes of this Article, defines the court's decisionmaking activities that are not viewed by the court as completely rule-bound or doctrinally constrained, which includes virtually all of them if the commentary is to be believed.20 For the purposes of this Article, judicial discretion is treated, not as a problem, but as a fact of judicial life. From the perspective of the decisionmaker, it is possible to identify two distinct dimensions of the courts' judicial discretion.21 Both dimensions affect how the decisionmaker understands and attempts to answer the following question: How does a court ensure that the discretionary decisions it renders are viewed as a legitimate exercise of its judicial power?

One dimension is internal and looks at the nature or structure of the courts' discretion in an effort to identify the decisional elements, judicial skills, activities, and normative assumptions involved in rendering a decision.22 One such decisionmaking paradigm is the "legal" paradigm.
The other paradigm defines the courts’ discretion, that is, their decisionmaking authority, in terms of their unique skills, experiences, and institutional expertise. For purposes of this Article, this latter paradigm of discretion is denoted the “skill” paradigm. Courts using the “legal” paradigm in rendering a decision focus primarily on the decisional activities and skills involved in the application of law to fact. This paradigm defines a “good” or legitimate decision as one in which the court adequately developed the relevant facts, accurately represented the

23. The paradigm of judicial discretion as skill is seen in both the managerial and procedural contexts. See, e.g., E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306, 309 (1986) (discussing the ideology of “managerialism,” the belief that “ad hoc procedural activism” can make the system work); Martin B. Louis, Discretion or Law: Appellate Review of Determinations that Rule 11 Has Been Violated or that Nonmutual Issue Preclusion Will Be Imposed Offensively, 68 N.C. L. Rev. 733, 733 (1990) (noting the distinction between inconsequential procedural issues and those that affect the outcome or merits of the case, with the former reviewed for “abuse of discretion” and the latter reviewed de novo for their adherence to the legal paradigm). See generally Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374 (1982) (noting that the courts’ managerial practice involves informal interaction, the receipt of diverse information, and wide variability in the decisional outcomes). The idea of deference to the courts as decisionmakers, reflecting their unique institutional competence, is seen in substantive arenas as well. Cf. Alan D. Hornstein, Book Review, 44 Md. L. Rev. 216, 221 (1985) (reviewing Richard Neely, Why Courts Don’t Work (1982)) (discussing the expansion of judicial authority beyond the limits of judicial competence and the problems posed by individual case adjudications that produce far-reaching consequences). Courts are more willing to strictly enforce Rule 11 in procedural areas that do not directly impact the merits. See, e.g., Henderson v. Department of Pub. Safety & Corrections, 901 F.2d 1288, 1296-97 (5th Cir. 1990) (sanctioning motions for change in venue and in limine).

24. The conceptualization of judicial discretion as “skill” has been noted by numerous commentators. See supra note 23. However, Professor Charles Yablon has addressed the issue most recently and thoroughly in an effort to define the normative assumptions of the paradigm. See Yablon, supra note 18, at 260-68.

25. See BARAK, supra note 16, at 113-51. Discretion in the context of the legal paradigm is often conceptualized as the gap or play in the normative structure of the law. See George C. Christie, An Essay on Discretion, 1986 Duke L.J. 747, 748 (defining discretion as the ability to pick alternative outcomes and noting that it is “quintessentially associated with variability of result”); Ronald M. Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 22 (1967) (criticizing legal positivism by pointing out the importance of standards that operate differently from rules in guiding judicial decisionmaking); Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 754 (1982) (asserting that discretion describes decisions that will not be reversed even if the appellate court disagrees because these are not decisions of law); Kent Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges, 75 Colum. L. Rev. 359, 364 (1975). (discussing the “open texture” of the law that exists after a “judge has thoroughly considered all relevant legal norms”). The question is whether courts are free to “legislate” in order to fill in this gap or are they “legally bound to reach one conclusion?” Id. at 365. Cf. Nicola Lacey, The Jurisprudence of Discretion: Escaping the Legal Paradigm, in THE USES OF DISCRETION, supra note 17, at 361 (arguing that discretion cannot simply be understood as the gap or play in the normative structure of the law or rules, but is instead the point of intersection between the legal paradigm and the world).
law, and then correctly applied the law to the facts. How then does a court justify its exercise of judicial discretion using the paradigm of discretion as "skill"? Or, stated from an institutional perspective, how are courts to be held accountable for their exercise of decisionmaking authority under the paradigm of discretion as "skill"? This is the question this Article ultimately seeks to answer with regard to the courts' Rule 11 sanctions decisions.

The internal or structural dimension of judicial discretion as decisionmaking is often discussed separate and apart from the second dimension, the context of the decisionmaking. When one talks about the context of a decision one is not simply talking about the "legal issue" as narrowly presented to the court for resolution. Context is used here to include both the "issue" and the institutional perspective brought to bear on the decisionmaking. At the risk of oversimplification, this Article looks primarily at the courts' evolving managerial and adjudicative roles and functions and the decisions that are treated as falling within those decisionmaking arenas in defining this contextual dimension.

26. This is not an effort to resolve all questions regarding what courts are in fact really about when they are attempting to adhere to the "legal paradigm" as a decisional model. However when asked to make or justify a decision, the trial courts and courts of appeals routinely refer to this model of decisionmaking. If the elements of the paradigm have been met, the decision is legitimate. This Article is not concerned with whether in fact there is a single correct decision. The discrepancy between the normative assumption of the paradigm that there is a single right or correct answer, and the reality that even doctrinally driven decisions contemplate some variability in decisional outcomes has been addressed elsewhere. See, e.g., Lea Brilmayer, Wobble, or the Death of Error, 59 S. CAL. L. REV. 363 (1986); Robert S. Thompson, Legitimate and Illegitimate Decisional Inconsistency: A Comment on Brilmayer's Wobble, or the Death of Error, 59 S. CAL. L. REV. 423 (1986). The focus here is on the paradigm as a way courts understand what they are about when they render a decision.

27. See EEOC v. Anderson's Restaurant, Inc., No. 90-2119, 1992 U.S. App. LEXIS 5458, at *7 (4th Cir. Mar. 24, 1992) (reported without published opinion at 958 F.2d 367) (holding that the trial court is uniquely competent to address the amount of a fee award); Rivarde v. Missouri, 930 F.2d 641, 642 (8th Cir. 1991) ("The district court dismissed appellants' complaint based on a rule of procedure, not a rule of law, and it is well settled that the district court has broad discretion in matters of judicial procedure."); Lepkowski v. United States Dep't of Treasury, 804 F.2d 1310, 1321 (D.C. Cir. 1986) (questioning whether dismissal of a case pursuant to the court's local rules was "so severe as to venture beyond the limits of judicial discretion"); infra notes 359-66 and accompanying text.

28. The contextual elements of discretion are obviously more complex than the two on which this Article focuses. For example, one contextual element that inevitably impacts a trial court's decisionmaking is the judge's perception of the appellate court's role upon appeal. Cf. Christie, supra note 25, at 752 ("Only where there is accountability can we meaningfully speak of discretion in choice. Accountability, not the existence of standards, is the identifying feature of contexts in which discretion is 'at home.'"). Here the adjudicative dimension refers to any decisions that impact upon the resolution of the case on the merits, even procedural decisions. See generally Louis, supra note 23 (discussing the difference between procedural matters treated as warranting de novo review, for
Article argues that this contextual element provides additional norms and goals that guide the courts’ exercise of their discretionary decisionmaking authority. Part II develops this contextual dimension for Rule 11 from a historical perspective. This Part describes how the courts’ discretion has been shaped by the larger institutional debate reflecting the tension between the courts’ managerial and adjudicative roles and functions.

In Part III, the decisionmaking paradigm of discretion as “skill” is examined. The focus is on the courts’ sanctions practice, and how that practice has been shaped by the paradigm of judicial discretion as “skill” and the corresponding shifting institutional priorities of the courts.

Another goal of this Article is to address whether or not the courts’ exercise of judicial discretion under Rule 11 is unique or sui generis. In order to answer this question, this Article examines an extensive body of commentary and case law discussing judicial discretion and relates it to the Rule. One modest goal of this endeavor is to see whether the theoretical insights developed in the commentary can address pressing questions of judicial practice. In this way, this Article attempts to put the question of judicial discretion and Rule 11 in a larger theoretical context.

It is important to realize that the paradigm of judicial discretion that has shaped the courts’ Rule 11 practice is not unique to the Rule. This paradigm, judicial discretion defined as the trial court’s unique experien-

29. For example, the paradigm of discretion as “skill” in the administrative context underlies the theory of judicial deference to the agency decisionmaker. As stated by Professor Sunstein, Agency decisions that involve pure issues of law are subject to independent judicial examination. No judicial deference is appropriate because strictly legal competence is sufficient to resolve the question. But decisions that involve the application of law to fact call for a different standard, since the agency’s specialized fact-finding capacity and accountability are highly relevant.


30. See James A. Gardner, The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint, 71 N.C. L. REV. 805, 808 (1993) (asserting that traditional adjudicative norms favoring judicial restraint are more in keeping with an open, diverse system of law and the diversity of today’s society); Stempel, supra note 12, at 260-61 (“T]he sanctions debate is a distributional political battle . . . “). If Rule 11 is applied stringently, claims will be lost but efficiency gained. If it is interpreted in a more forgiving manner, managerial goals must give way to zealous advocacy. Id. at 260.

31. See infra notes 63-146 and accompanying text. Discretion is not “peripheral to the operation of law” and once this is recognized “then the interaction between law and other schemes of values becomes of central importance.” John Bell, Discretionary Decision-Making: A Jurisprudential View, in THE USES OF DISCRETION, supra note 17, at 89, 110.

32. See infra notes 165-97 and accompanying text.

33. See infra notes 147-257 and accompanying text.
tial skills and institutional competence, is part of a larger institutional
trend and is one of the dominant judicial decisionmaking models used by
the courts today. Understanding this enables one to apply insights
from other procedural and substantive arenas to the courts' evolving sanctions practice under Rule 11.

A short digression is in order here to define the term "practice" as
it is used herein. Courts, commentators, and practitioners use the term "practice" to describe a variety of activities. For purposes of this Article, when reference is made to the courts' Rule 11 sanctions "practice," the term encompasses all of the activities undertaken by a court in rendering a sanction decision. Use of the term "practice" to describe these decisionmaking activities assumes that they are not merely random activities, that there is an element of skill involved in rendering the decision, and that this skill is acquired through experience. The term "practice" is used to distinguish between judicial activity that is largely rule-driven and is justified primarily in terms of its compliance with

34. See infra notes 147-98 (discussing a variety of writers who have looked at different dimensions of the paradigm).

35. The substantial amendment of Rule 16 in 1983 reflects the judicial institutions' reliance on judicial discretion as skill. Like Rule 11, Rule 16, prior to the 1983 amendments, had not been amended since being created in 1938. See Fed. R. Civ. P. 16 advisory committee's note (1983). Overall the rule is intended to guide the courts' actions, while deferring to their discretion to properly manage individual cases. Cf. Alvin B. Rubin, The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts, 4 Just. Sys. J. 135 (1978) (discussing the importance of the judge's role as manager/administrator of cases to the proper functioning of our system of justice); Note, Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts, 64 Va. L. Rev. 467 (1978) (proposing that local rules be altered to ensure flexibility of pre-trial practice, and provide a proper balance of judicial guidance and attorney preparation in pretrial conferences).

36. The paradigm of discretion as "skill" occurs in the adjudicative arena as well, although often under a different guise. See, e.g., Martin B. Louis, Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion, 64 N.C. L. Rev. 993, 1012 n.138 (1986) ("Assessments of relative competence are usually made primarily in terms of the nature of the question presented."). In many instances these questions include fact questions for the jury, questions of "predominantly legal content," and those that involve fact sensitive evaluations of legal issues. Id.; see William D. Popkin, A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens, 1989 Duke L.J. 1087, 1135 ("Judicial restraint implements principles of comparative judicial competence."); Yablon, supra note 18, at 262-63.

37. While the concept of the courts' "practice" is used in slightly different ways and with different nuances in this piece, Professor Yablon's work helped pull these ideas together. See Yablon, supra note 18, at 261-68.

38. Professor Yablon has written about the paradigm of discretion as "skill" and the courts' decisionmaking practices under the paradigm in a narrower adjudicative context. See id. I have taken this concept and developed and expanded it for purposes of this Article.

39. See id.
applicable rules and judicial activity that is not viewed so narrowly by the court.\textsuperscript{40} The term is used to capture the intangible elements of the courts’ decisionmaking that cannot be reduced to a neat formula, but nevertheless make their presence known.\textsuperscript{41} As seen in Part III, the federal courts’ current sanctions practice is characterized largely by an emphasis upon the unique facts of the case and by numerous subjective or intuitive judgments.\textsuperscript{42} A variety of practice elements are involved in rendering the sanctions decision and these are described in more detail in Part III.\textsuperscript{43}

The purpose of the Article, however, is not simply to describe the courts’ current practices. Rather, the goal is to develop the normative assumptions of the paradigm of discretion as “skill” that are used to justify its use by the courts in their sanctions practice.\textsuperscript{44} This Article takes the paradigm and fleshes it out using both case law and commentary in order to establish its normative contours. Only then can the fit between the paradigm and the courts’ practice be evaluated at both the trial and appellate level.\textsuperscript{45}

Discretion is not an abstraction to a judge, it is part of her daily life. To a sitting jurist, the paradigm of judicial discretion as “skill” has its own internal logic.\textsuperscript{46} If the matter is delegated to the trial courts’ discretion because of their perceived skill and institutional competence, a legitimate exercise of that discretion requires the courts to exercise that skill and expertise rather than engage in highly subjective, idiosyncratic decisionmaking.\textsuperscript{47} This Article argues that the courts’ sanctions decisions can be evaluated by examining how carefully the courts adhere to the internal criteria of the paradigm and the relevant contextual goals and decisional norms, in rendering a skillful (and therefore legitimate) decision.\textsuperscript{48} This approach enables one to discuss the “fit” between the

\textsuperscript{40} Id. at 261.
\textsuperscript{41} Id. at 262.
\textsuperscript{42} See id. at 262. While Professor Yablons touches briefly on other elements of the “skill” paradigm, the primary focus of his analysis is on the fact/skill dimension and the normative assumption shared by the trial and appellate courts that there are right answers and the trial courts are in the best position to make them. Id. at 264.
\textsuperscript{43} See infra notes 352-412 and accompanying text.
\textsuperscript{44} See infra notes 337-51 and accompanying text.
\textsuperscript{45} See infra notes 352-412 and accompanying text.
\textsuperscript{46} See infra notes 352-412 and accompanying text.
\textsuperscript{47} Commentators have grappled with the question of objectivity as a decisional norm ensuring predictability and consistency in judicial decisionmaking. See, e.g., Owen M. Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982).
\textsuperscript{48} See infra notes 352-412 and accompanying text.
Analyzing the courts' discretion in this way points out an important distinction between criticisms aimed at improving the courts' sanctions practice and criticisms that challenge the practice on its face. Even if particular instances of the courts' sanctions practice adhere to the criteria of a skillful sanctions decision, the practice itself can be criticized by reference to values and norms which are "recognized as relevant to judging the practice as a whole." Much of the criticism of Rule 11 has been of this type. Critics of Rule 11 have routinely challenged the assumption that a sanctions practice shaped by the paradigm of discretion as "skill" can yield fair results. In effect, these criticisms reflect a desire for a more doctrinally circumscribed, rule-based sanctions practice that adheres more explicitly to the adjudicative norms of the "legal paradigm," thereby restraining the courts' exercise of discretion. These critics reject the normative assumptions that shape the paradigm of discretion as "skill" and justify its application in the Rule 11 arena as a legitimate exercise of judicial discretion. Understanding the difference between these two critiques of the paradigm of discretion as "skill" and the courts' sanctions practice helps explain why it is so difficult to

49. The goal of this Article is to develop a normative model of judicial discretion as "skill" that makes explicit the assumptions courts bring to these types of decisions. This normative model can then be used to guide the courts' sanctions practice. Asking whether or not a discretionary decision is correct raises normative questions that cannot be answered solely by referring to the courts' sanctions practice. What is needed is a method that enables the courts to look at their practice critically. See Cavanagh, supra note 3, at 518 ("The Federal Rules are replete with vague terminology .... It may be further argued that the drafters of Rule 11 intentionally employed vague terminology to provide the courts with flexibility, enabling judges to develop clearer guidelines over time."); Yablon, supra note 18, at 256-57 ("[D]ebates over whether institutional decisionmakers have too much or too little discretion demonstrate that little consensus exists among practicing lawyers as to when discretion is exercised appropriately.").

50. See Yablon, supra note 18, at 265-66; infra notes 337-51 and accompanying text (discussing these different types of criticisms).

51. Yablon, supra note 18, at 266. This insight has been touched on in other works discussing judicial discretion. The decisionmaker is usually most concerned with improving the decisionmaking, while the critics are most concerned with the inevitable discretionary character of the decision. See infra notes 337-51 and accompanying text.

52. See infra notes 65-148 and accompanying text (discussing the body of criticism that followed the 1983 amendments to the Rule); cf. Lacey, supra note 25 (critiquing the assumptions underlying legal theorist's "law-discretion" dichotomy and questioning the utility of "legal methods" to limit or control discretionary power).

53. See infra notes 65-148 (discussing a variety of criticisms of the courts' sanctions practice).

54. See infra notes 65-148 and accompanying text.
respond to the latter. When the paradigm and the practice are challenged in this way, little can be done to fix the problems short of starting all over.55

Part IV of this Article examines the 1993 amendments to Rule 11 in light of the paradigm of discretion as “skill.”56 This Part argues that the 1993 amendments, interpreted and applied pursuant to the paradigm of discretion as “skill,” can significantly improve the courts’ sanctions practice. It also points out critical gaps in the fit between the courts’ practice and the paradigm that were not directly addressed by the amendments and suggests methods to continue to improve the courts’ sanctions practice and this “fit.”

This Article also challenges the assumption that because the courts’ highly discretionary decisions under Rule 11 fall outside of the traditional “legal paradigm,”57 there is no “legal” standard by which they can and should be judged.58 Obviously the paradigm of discretion as “skill” is a legal paradigm to the extent that it describes legal decisions made by the court and legitimizes those decisions as an exercise of judicial authority. The term “legal paradigm” however is used here to denote the narrower decisionmaking model that emphasizes principled decisionmaking—the application of law to fact59—which is largely characteristic of substantive or merits-based decisions.60 This Article argues that the courts need a different normative model to evaluate their sanctions practice. The paradigm of judicial discretion as “skill” has its own internal logic and can provide such a normative decisionmaking model.61

Different matters, here sanctions, are routinely delegated to the trial courts’ discretion because of their perceived skill and institutional

55. See infra notes 414-35 and accompanying text (discussing the Advisory Committee’s response to these critiques).
56. See infra notes 436-500 and accompanying text.
57. See infra notes 168-200 and accompanying text (discussing the traditional legal paradigm).
59. See infra notes 355-412 and accompanying text.
60. Cf. Kent Greenawalt, Policy, Rights, and Judicial Decision, 11 GA. L. REV. 991, 1035-53 (1977) (noting that it is when the courts have to address questions of substantive rights that the legal paradigm comes to the fore, especially in cases in which there is consensus that there should be one right answer).
61. See Catharine Wells, Situated Decisionmaking, 63 S. CAL. L. REV. 1727, 1737 (1990); infra notes 355-412 and accompanying text (discussing the need to develop a normative model of pragmatic decisionmaking).
expertise in handling them. A legitimate exercise of that discretion requires the courts to justify their discretionary decision by demonstrating that the decision was skillfully made. Approaching the problem of discretion from the “inside-out” is not designed to be a purely academic exercise. Requiring the courts to undertake this explication and explanation to test their adherence to the paradigm of discretion as “skill” in rendering a sanctions decision will help build an experiential database of case law, yielding a more coherent sanctions jurisprudence. At the very least, it will better respond to the critics’ concerns.

II. RULE 11 IN ITS HISTORICAL CONTEXT—DEVELOPING THE COURTS’ SANCTIONS PRACTICE

The enactment of the 1983 amendments to Rule 11 were intended to fundamentally alter the federal courts’ sanctions practice. The Advisory Committee’s Note to the 1983 Amendment to Rule 11 made it clear that the Committee viewed the paucity of Rule 11 sanctions in the case law as reflecting unwarranted judicial reluctance to punish colleagues in the face of a perceived litigation explosion threatening a crisis in the courts. This “crisis in the courts” motivated the Committee to encourage aggressive judicial regulation of the litigation process to punish and deter the filing of frivolous claims.

62. See, e.g., Yablon, supra note 18, at 260-67 (discussing the courts’ exercise of their discretion as “skill” in the area of criminal sentencing); infra notes 413-35 and accompanying text.

63. See Yablon, supra note 18, at 267-68.

64. See infra notes 503-28 and accompanying text.


67. See FED. R. CIV. P. 11 advisory committee’s note (1983) (“The new language is intended to reduce the reluctance of courts to impose sanctions . . . .”).

Originally amended in an era of judicial reform,69 Rule 11 can only be understood within that historical context. The procedural reforms of the 1980s were driven by concerns that the federal rules70 encouraged unrestrained adversarialism on the part of litigants and unwarranted neutrality on the part of the judiciary.71 This “critique of adversarialism” challenged the traditional tripartite structure of adjudication—a neutral judge72 refereeing all-out combat between two trained advocates73—as

69. See Stempel, supra note 12, at 262-67. Stempel describes the procedural reforms of the 1980s as a decade of “counter revolution” spawned by the profession’s increasing belief that existing pretrial termination procedures were not being effectively used by the courts. Id. While efforts to amend Federal Rule 68, rendering it a de facto fee shift, were thwarted, the conservative elements of reform gained ground in Rule 11. Id. at 264-65.


73. Judge Schwarzer was an early critic who focused on the lack of balance within the adversarial paradigm in defining the role of the attorney. He argued that there was an over-emphasis on the duty of the zealous advocate and an inadequate emphasis on lawyers’ duties as officers of the court, including the duty of candor. See Schwarzer, supra note 71, at 184 (noting that the attorney’s “duty to place his client’s interests ahead of all others” is “subject to the correlative obligation to comply with the rules and to conduct himself in a manner consistent with the proper functioning of [the justice] system”); cf. John B. Attanasio, Foreword: Verstehen and Dispute Resolution, 67 NOTRE DAME L. Rev. 1317, 1317 (1992) (discussing the adversarial method of dispute resolution—each party putting forth their strongest arguments to a neutral judge and jury to determine who wins—as one among many methods of legal dispute resolution representing a
being inefficient and burdensome on the courts. The 1983 amendments to Rule 11 were one of a number of procedural reforms intended to alter the basic character of the federal judicial system. As stated by one observer of the process of reform: "We have moved from arguments about the need to foster judicial decisions 'on the merits' by simplifying procedure to conversations about the desirability of limiting the use of courts in general and of the federal courts in particular."

The procedural reforms of the late 1970s and 1980s represented a significant change in attitude toward the judicial system. The system had been characterized by a "deep distrust of the tribunal's . . . competence and neutrality" and emphasized instead strong party control of the litigation process.

The procedural reforms of this era favored expanding judicial discretion to aggressively manage the courts' dockets and cases as the strategy most likely to achieve the goal of an efficient and effective court
system.79 Trial court judges were deemed to have the institutional skill and expertise necessary to implement this reform strategy.80 Commentators at the time questioned whether the impetus to judicial reform was in fact fueled "solely by a 'neutral' agenda of... 'efficiency' and... 'economy,'" since it appeared to reflect, at least in part, a political agenda of exclusion.81 One observer expressed her concerns as follows: "I am concerned about the hostility to and trivialization of individual claims. I have often heard from federal judges that they don't have the time to spend on a small claim—that it's not 'worth it,' that their time (and they) are too important... ."82

In keeping with their criticism of the adversarial method of adjudication, reformers of this era also challenged the ethical boundaries of the attorney-client relationship by challenging the assumption that an attorney owed her sole and ultimate allegiance to her client. According to the commentators and the courts, this definition of the attorney’s obligations failed to give due emphasis to other significant dimensions of the attorney’s role.83 The reformers particularly emphasized the role

79. See Bundy, supra note 77, at 376-77; Resnik, supra note 23, at 378-79. Two strategies available to the courts to achieve that goal, settlement and sanctions, share similarities. Each addresses the need for court reform by attempting to limit potential litigants’ access to the courts, thereby conserving scarce judicial resources. At their core, many of the policies of Rule 11 sanctions and the policies encouraging private dispute resolution—i.e., settlement—are aimed at the same thing, limiting the adversarial process and the expenditure of institutional resources on formal dispute resolution. See, e.g., Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1075 (1984) (rejecting settlement as preferable to judgment and looks at it as a “highly problematic technique for streamlining dockets [and] a capitulation to the conditions of mass society [which] should be neither encouraged nor praised”); Carolyn L. Dessin, Recent Case, 31 Vill. L. Rev. 1073, 1088-91 (1986); Jennifer O’Hearne, Comment, Compelled Participation in Innovative Pretrial Proceedings, 84 Nw. U. L. Rev. 290, 293-95 (1989); David A. Rammelt, Note, “Inherent Power” and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?, 65 Ind. L.J. 965, 967 (1990).


81. Resnik, The Domain, supra note 71, at 2220; see also THE POLITICS OF JUDICIAL REFORM I (Philip L. Dubois ed., 1982) (arguing that court reform is not merely a process of modernization, but involves organizational and procedural changes that redistribute power within and without the court system). Changes aimed at restricting access to the courts or undermining the legitimating triad of a neutral judge applying law to facts and publicly explaining the outcomes undermine the legitimacy of a judicial system in a democracy. See id. at 76-77. The legitimacy of the courts’ exercise of power rests on their perceived neutrality and the availability of public scrutiny. Id. at 73.

82. Resnik, The Domain, supra note 71, at 2228.

of attorneys as officers of the court and their duty to consider both their client's interests and the courts' interest when pursuing litigation.  

On balance, the 1983 amendments to Rule 11 were greeted with enthusiasm as one of the court reforms most likely to increase the efficiency and effectiveness of the judicial system by deterring the filing and pursuit of frivolous litigation. Recited with almost mantr
like regularity in the Rule 11 commentary, the "litigation explosion" had become an article of faith—an unquestioned assumption underlying the perceived need to reform and aggressively apply the Rule.87

The response to the courts' efforts to use Rule 11 to further the goals of managerial reform was immediate and defined the Rule 11 debate for the next ten years. The Rule's critics questioned its use to limit access to the courts;88 its inconsistent and variable application;89 its potential use of attorney fee shifts in violation of the American Rule;90 and the limited appellate review provided sanction decisions

87. See Vairo, Where We Are, supra note 3, at 481.


89. Even proponents of the Rule such as Judge Schwarzer note the problem of "subjectivity and inconsistency" in the application of the Rule, particularly as applied to evaluating the threshold merits of the case. Schwarzer, supra note 84, at 1023-24; see, e.g., Burbank, supra note 80, at 1930; Nelken, Chilling, supra note 3, at 1326; Tobias, Public Law Litigation, supra note 3, at 303-05; cf. Carl Tobias, The Transformation of Trans-Substantivity, 49 WASH. & LEE L. REV. 1501 (1992) (responding to the argument that some procedural rules impact disproportionately upon certain classes of litigants).

90. See Nelken, Chancellor's Foot, supra note 3, at 401 (noting that most "courts have resisted the argument that a losing paper is necessarily a sanctionable paper, the ultimate cost-shifting view"). Nelken notes the tension in the rule between sanctioning attorney conduct and legal product. To avoid problems with the American Rule, Nelken argues that "Rule 11 focuses on inputs, not outputs, conduct rather than result." Id. at 402 (quoting Mars Steel Corp. v. Continental Bank N.A.,
under the Rule.91 A substantial body of the critical commentary focused on "fine tuning" the Rule's application on a case by case basis and improving the courts' sanctions practice.92 There was, however, a more fundamental concern raised by some critics: the discretionary nature of the courts' decisions whether or not to deem a claim legally or factually frivolous, the threshold liability issue. These critics were concerned that the lack of doctrinal limitations in the Rule generated inconsistent and conflicting case law and gave undue play to the individual judge's normative assumptions about worthy litigation.93 These critics also expressed concern that these matters were delegated to the trial courts' skill to resolve on a case by case basis—a strategy not designed to yield a coherent body of case law or sanctions jurisprudence.94 Yet the critics acknowledged the difficulty of fundamentally altering the courts' sanctions practice and limiting the Rule's reliance on the trial courts' discretion in generating a decision.95 Overall, what was most problemat-
ic in the courts' sanctions practice was the extent to which the courts' subjective judgments were inevitably involved in the interpretation and application of the Rule. The critics wanted to see fundamental changes in the courts' sanctions practice under Rule 11, including an increased emphasis on the traditional judicial norms of neutrality, objectivity, reasonableness, and restraint.

Emphasizing the managerial utility of the Rule and the need to let the courts develop their Rule 11 expertise, proponents of the rule favored allowing the courts' sanctions practice to evolve. According to them, the practice of delegating sanctions to the courts' discretion was not a fundamentally flawed procedural strategy. The trial courts possessed the necessary skills and institutional competence to effectively and fairly oversee the implementation of the Rule. The Rule's critics did not want to wait, and favored immediate amendment in order to forestall what they saw as the Rule's adverse impact on the courts. In their view, the highly subjective judgments of the courts that formed the basis of their sanctions decisions failed to generate a sufficiently bright regulatory line to guide attorneys, or at least put them on notice as to the limits of acceptable advocacy. The critics argued that the resulting highly variable, potentially overinclusive application of the Rule, with its threat of sanctions, undermined the fundamental values of an open court system and the institutional commitment to decisions based on law.

Historically, interception systems designed to deter or terminate litigation prior to a full trial on the merits have "err[ed] on the side of,
or give[n] the benefit of the doubt to, the party opposing interception.” 101 This policy is designed to avoid the overinclusive application of these systems 102 and the potential erosion of such institutional values as an open court system, the resolution of disputes through neutral adjudication, and the litigants’ right to unfettered representation and adversarial zeal. 103 In drafting the 1983 reform of Rule 11, the Advisory Committee intended to change this and encourage a more aggressive sanctions practice. 104 Yet, mentioned nowhere in the 1983 rule or accompanying Advisory Committee’s Note were the “countervailing considerations that formerly commanded the opposite result”; an institutional bias favoring restraint in the sanction process. 105 The assumption made in 1983 was that aggressive enforcement was needed. 106 Those who took this position argued that the federal courts were being crushed by an onslaught of litigation, including doubtful or frivolous claims. According to this view, the “litigation crisis” posed such a threat to the courts that the risk of overinclusive application of the Rule was warranted. 107 This position has been debated in the commen-

101. Louis, supra note 9, at 1052. Other commentators have focused on judicial restraint as a necessary element in a sanctions jurisprudence. See Burbank, supra note 80, at 1933-34; Nelken, Chilling, supra note 3, at 1346; Vairo, Prologue, supra note 3, at 77-78.

102. See Louis, supra note 9, at 1029 (noting the extent to which countervailing considerations under the older doctrines disposed the courts to err on the side of no sanctions in a close case or in a case that did not present a clear violation of the sanction rule).

103. Id. at 1030-32.


105. Louis, supra note 9, at 1036.

106. See id. at 1053. Professor Louis argues that the potential institutional cost of over-deterring or chilling is warranted in light of the improvement in the judicial system. Id. at 1055.

107. There is, in fact, substantial evidence indicating that there is an under-filing of meritorious lawsuits. See Howard H. Hiatt et al., Special Report: A Study of Medical Injury and Medical Malpractice, 321 NEW ENG. J. MED. 480, 484 (1989); William P. McLauchlan, Courts and Caseloads, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT, supra note 5, at 395, 395-407 (discussing the range of empirical work that has looked at “caseload” as the variable of concern and the lack of understanding of what has caused the increase in case filings leading to larger court caseloads); William B. Eldridge, Research on Judicial Administration and Court Administration at the Federal Judicial Center, 10 LAW. LETTER, Oct., 1992, at 5 (discussing the five year project being undertaken by the Federal Judicial Center to measure demand on court time from various types of litigation).

108. Louis, supra note 9, at 1055.

Inevitably some judges will exceed these limits, appeals will become necessary and sometimes fail, injustice will be done, legitimate advocacy will be chilled, and access to the courts will be denied. The question is not whether such evils will occur but how often. Thus far their incidence has been very small, small enough to make them, for the time being, an acceptable cost of eliminating other, greater evils from the system. This is not to deny that access to the courts and the right to advance factual and legal
One commentator described the development of Rule 11 case law following the 1983 amendments as follows:

This new, more balanced [sanctions] doctrine . . . often amounts to little more than a set of new, countervailing cliches from which the judges may pick and choose. Such flexibility, which amounts to a discretionary license or its functional equivalent, is sometimes desirable, but here it involves judicial power to resolve the merits.\(^{10}\)

However, the debate over Rule 11 is not just a debate about the relative merits of an underinclusive or overinclusive approach to sanctions, or the relative merits of an approach that errs on the side of managerial activism versus one that embraces a policy of judicial restraint. The regulatory line of Rule 11 that defines frivolous litigation and distinguishes it from merely meritless litigation, also limits disputants’ access to a powerful arm of the state and the legitimating function that power plays in resolving social conflicts.\(^{11}\) The power and authority of the judiciary to enforce Rule 11 does not simply refer to its power to regulate lawyers’ conduct and their potential for abusing that power by imposing undeservedly large fines.\(^{12}\) The judiciary’s power under contentions are fundamental goals of our legal system. Without some controls on these goals, however, the system almost failed.

\(^{10}\) Id. (emphasis added) (footnote omitted).

\(^{11}\) Defining frivolous litigation is not a new activity for the courts. The common law has long regulated the filing of frivolous claims through private litigation. See Warren Freedman, FRIVOLOUS LAWSUITS AND FRIVOLOUS DEFENSES: UNJUSTIFIABLE LITIGATION (1987) (discussing common law actions for malpractice, abuse of process, malicious prosecution, false arrest, barratry, champerty and maintenance, and remedies such as contempt of court).


\(^{14}\) See Keeling, supra note 95, at 1139 ("If litigants perceive that the objective standard in a sanctions provision will allow a court to impose severe sanctions against them for asserting certain
Rule 11 includes defining what disputes may be brought into the judicial arena, and by implication, what disputes may not be brought without risk of public censure and sanction.\textsuperscript{115} When sanctions are issued under Rule 11, the Rule explicitly excludes the availability of the courts to “others similarly situated.”\textsuperscript{116} These sanctions decisions will inevitably shape the courts of the future.\textsuperscript{117}

It is clear from the history of the Rule that something more than the routine managerial or procedural goals of efficient and effective dispute resolution are at issue. The public debate concerning Rule 11 and its use by the courts reflect the ongoing institutional debate regarding the role and function of the federal courts. Which role and function of the courts should be given priority in the sanctions arena—the courts as efficient managers of disputes or the courts as open, accessible adjudicative fora? If the answer is neither, how should the courts balance these competing institutional interests, goals, and policies on a case by case basis? Should the courts approach their sanctions practice with an eye toward defending and maintaining the public adjudicative role of the courts,\textsuperscript{118} or should the courts give more free play to managerial and procedural concerns that emphasize the need to restrict adversarialism in the dispute resolution process?\textsuperscript{119}

\textsuperscript{115} See, e.g., \textsc{Redish}, supra note 112, at 1385. See generally \textsc{The Politics of Judicial Reform}, supra note 81 (containing a series of essays which look at court reform as a function of larger political forces and as a means to redistribute power).

\textsuperscript{116} \textsc{Fed. R. Civ. P. 11}(c)(2). The 1993 amendments focus on deterrence as one of the primary functions of the rule. \textsc{Fed. R. Civ. P. 11}(c)(2) advisory committee's note (1993).

\textsuperscript{117} \textsc{Cf. Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse 99-100 (1989)} (describing Rule 11 as unique in the scope of its delegation of discretion to sanction good faith or \textit{de minimis} mistakes, and its intent to regulate negligent, rather than intentionally abusive, litigation practices under an objective standard); Stempel, \textit{supra} note 70, at 178-81 (describing the impact on the courts’ summary judgment practice of the managerial reforms of the 1980s); Stempel, \textit{supra} note 12, at 262 (describing the procedural reforms of the 1980s as a decade of “[c]ounter-[r]evolution”).

\textsuperscript{118} See \textit{infra} note 373 (noting cases in which the courts treated this as the overarching institutional goal).

\textsuperscript{119} \textsc{Cf. Marc Galanter & Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1342 (1994)} (addressing whether the myriad judicial and legislative efforts to promote settlement over full-blown adjudication is “a good thing”); Robert M. Parker & Leslie J. Hagina, “\textit{ADR}” \textit{Techniques in the Reformation Model of Civil Dispute Resolution},
Courts have grappled with the challenge of developing a sanctions practice that is able to balance the need for enforcement with judicial restraint. The early case of *Golden Eagle Distributing Corp. v. Burroughs Corp.* illustrates this tension within the Rule. The court in *Golden Eagle* construed the Rule 11 standard requiring “objective reasonableness” in the presentation and pursuit of claims to mean the reasonableness of the advocate. The emphasis in *Golden Eagle* is worth noting since other courts have adopted a similar “close case” approach in attempting to draw the line at tolerable advocacy. “[T]he Rule discourages wasteful, costly litigation battles by mandating the imposition of sanctions when a lawyer’s position, after reasonable inquiry, will not support a reasonable belief that there is a sound basis in law or in fact for the position taken.”

The *Golden Eagle* court emphasized that the question is whether a competent advocate could not have believed in the merit of the position taken, not whether an officer of the court would have. The position espoused by *Golden Eagle* recurs throughout the case law. As one district judge stated: “This judge is a believer in a policy of judicial restraint with regard to Rule 11 that is perhaps in contrast with the more activist role that is envisioned” by the circuit.

Routinely, the courts that talk about the need for judicial restraint in the

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120. 801 F.2d 1531, 1538 (9th Cir. 1986).

121. *Id.* at 1542 (“It is not in the nature of our adversary system to require lawyers to demonstrate to the court that they have exhausted every theory, both for and against their client.”).

122. *Id.* at 1538.

123. *Id.* at 1542 (the reasonableness of the attorney does not assume a duty to step into the shoes of your opposing counsel or to step into the shoes of the judge); accord Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., 9 F.3d 1263, 1270 (7th Cir. 1993); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 873 (5th Cir. 1988) (discussing the need to develop a reasonable inquiry standard that looks at the particular circumstances of the attorney).

124. Naked City, Inc. v. Aregood, 117 F.R.D. 634, 636 (N.D. Ind. 1987); see, e.g., Curtis Management Group, Inc. v. Academy of Motion Pictures Arts and Sciences, 717 F. Supp. 1362, 1370-71 (S.D. Ind. 1989) (asserting that sanctions are warranted precisely because this is not a close case); South Shore Bank v. Stewart Title Guar. Co., 688 F. Supp. 803, 806 (D. Mass.) (denying sanctions in a “close case” in order to avoid chilling zealous advocacy), aff’d, 867 F.2d 607 (1st Cir. 1988); International Shipping Co. v. Hydra Offshore, Inc., 675 F. Supp. 146, 154 (S.D.N.Y. 1987) (noting the potential chill if sanctions are misapplied, yet imposing sanctions with reluctance on ground that “[i]t is . . . an egregious example of the violation of the spirit and letter of Rule 11”), aff’d, 875 F.2d 388 (2d Cir.), cert. denied, 493 U.S. 1003 (1989); Skepton v. County of Bucks, 613 F. Supp. 1013, 1020 (E.D. Pa. 1985) (denying sanctions in this “close case” in deference to the attorney’s efforts to create a novel claim).
"close case" have done so in situations in which they find themselves confronted with a case that, under a purely objective analysis, seems to call for sanctions. Yet there is some hesitation to impose sanctions when the courts cannot readily characterize the violation as an egregious or clear violation of the rule:

In many respects, this is a close case; the record is scant, the disputes are great, the objective evidence is minimal. Rule 11 has no application in such a case. Sanctions are merited only where a party has not even a glimmer of succeeding, where it is clear to all that the actions taken could serve only improper purposes. Rule 11 applies where the case is black and white, not where it is a matter of shading and degree.125

What underlies this analysis is the tension between the dual function of the courts and the dual role of counsel. On a case by case basis, many courts are reluctant to further the managerial goal of an efficient judicial system by imposing upon counsel a role inconsistent with that of the zealous advocate.126

The question of the proper balance between the duties of counsel to her client and to the court have not been laid to rest by the most recent amendments.127 The Advisory Committee’s Notes indicate a desire to emphasize a duty of candor to the court.128 Questions have already been raised whether this duty of candor is “intended to do more than stop abuse”129 and whether it will undermine the role of attorneys as zealous advocates. One of the inevitable concerns is whether this expanded emphasis in the Rule on the lawyer’s duty of candor will drastically alter

125. MacBride v. Caravelle Broadcast Group Consol., Inc., No. 89-0008-C, 89-0028-C, 1990 U.S. Dist. LEXIS 19619, at *8-9 (W.D. Va. June 4, 1990) (unpublished decision); see, e.g., Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204, 211 (N.D. Ill. 1985) (“[T]hough this is an extremely close case and our initial inclination is to assess costs and sanctions, defendants’ legal theories are not so unreasonable ... as to justify sanctions under Rule 11.”).

126. See Vairo, Prologue, supra note 3, at 57. Professor Vairo articulately points out the fundamental threat to the legal system posed by demands made upon trial counsel to step into the shoes of the judge or comply with a “duty of candor” that limits advocacy. Id. at 56.

127. See Schwarz, supra note 11, at 12-13 (noting that the 1993 revisions are “motivated by a purpose to expand the enforcement of attorneys’ professional obligations ... The 1993 Notes state that the Rule ‘retains the principle that attorneys ... have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation. ...’” (quoting FED. R. CIV. P. 11 advisory committee’s note (1993))); Vairo, Prologue, supra note 3, at 42 (arguing that Rule 11 shifts the “attorney’s duty away from client advocacy toward judicial efficiency and case management as an officer of the court”). Additionally, Professor Vairo argues that this “model of lawyering ... may be moving lawyers too far away from the traditional model of a legal profession independent from the state.” Id.


129. Vairo, Prologue, supra note 3, at 57.
the way courts approach the definition of "objective reasonableness" under the Rule. In the past, many courts erred on the side of no sanctions in close cases in deference to the open court system and the lawyer's duty of aggressive advocacy within the adversarial model. Is this change in the Rule instructing these courts that the balance should tip the other way? Once more, the new amendments require courts to revisit the problem of balancing institutional policies favoring an open court system with institutional policies favoring the harboring of scarce judicial resources and restricting access to the courts. In a close case, should the judge favor restraint or should she authorize sanctions?130

Rule 11 will play an increasingly important role in this ongoing institutional debate.131 With the recent amendments to the Rule, courts will find themselves dealing with fewer, harder sanction decisions.132 Whether the content of a claim is so marginal, or the conduct of the litigation so exceeds the bounds of zealous advocacy that it should be sanctioned, are decisions that will require the courts to balance competing institutional interests. These concerns and tensions have had some constraining influence on the courts' sanctions practice in the past. The new Rule, putting aside the question of the "duty of candor," further reflects the Advisory Committee's intent to limit and focus the courts' use of sanctions. But as with any rule, while there may be agreement about the conduct that is clearly sanctionable, the question is less clear at the margins.133 In his recent article on the amendments, Professor

130. See id. at 86 (expressing hope that courts will "exercise greater restraint by moving for and imposing sanctions only in clear cases of Rule 11 violations"). One method suggested by Professor Vairo to ensure this is to improve appellate review requiring "detailed descriptions of the Rule 11 violation and careful explanations of the sanction imposed." Id.

131. This is particularly so now that de minimis violations cease to require the attention of the courts and obvious, but remedial, problems are dealt with via the "safe harbor" provisions of the rule. See FED. R. CIV. P. 11(c); FED. R. CIV. P. 11 advisory committee's note (1993) ("Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b)").

132. See infra notes 436-500 and accompanying text.

133. The idea that rules generate "easy" cases and "hard" cases has existed for a long time. See infra note 197. Much of the commentary on judicial discretion talks about the radiating control of rules. As the courts move farther from the core meanings there is less clarity and less doctrinal control exercised by the rule over the decisionmaking. For these commentators, the interesting question has always been: How does a rule guide or control decisions that occur at the margins? How do courts decide what principles, standards, or policies to use in making their decisions other than the black letter of the law? See, e.g., Christie, supra note 25, at 754-72 (discussing the urge to narrow judicial discretion and the urge to expand judicial discretion, and whether the legal system can be reconciled to open-ended judicial decisionmaking); Dworkin, supra note 25, at 32-40 (outlining his theory of the discretionary nature of principles and rules, and those entrusted to interpret them).
Tobias points once more to the fact of judicial discretion as a significant element in the Rule. He argues that their substantial discretion should both constrain trial courts and encourage appellate courts to watch out for overzealous enforcement. This analysis brings everything full circle.

There is a growing awareness that Rule 11 exists in large part to regulate conduct that is not merely inefficient or questionable, but that threatens the integrity of the courts. This is especially true where litigants improperly use judicial process to pursue frivolous claims.

134. See Tobias, 1993 Revision, supra note 3, at 180 (discussing the Advisory Committee's Interim Report on the proposed 1993 amendments of the rule). The report "admonished that Rule 11 should not be considered as the major vehicle for deterring groundless lawsuits." Id. at 181. The article notes that the Committee's care in drafting and its intent could be undermined by inevitable slippage in the process of judicial interpretation and enforcement. Id. at 189. "Some pragmatic realities, therefore, apparently required that the revisers place their trust in judicial discretion when effectuating the new Rule . . . ." Id. Professor Tobias notes the ongoing problems inherent in attempting to define "frivolous" litigation which have given rise to a wide spectrum of formulations in "terms of stringency." Id. at 198. Ultimately Professor Tobias argues that the "approach leaves district judges with too much discretion while providing for insufficiently rigorous appellate review." Id. at 208. Harkening back to earlier commentary, Professor Tobias argues that such "discretion" should breed restraint. Id. Yet a call for restraint poses its own problems. See Posner, supra note 10, at 22-23 (pointing out that self-restraint is not a principled basis for action). The same problems exist for Tobias's call for appellate review: What is the overzealous application of the Rule that warrants reversal? Tobias, like so many others grappling with the Rule, falls back on the reasonable jurist standard and admonishes courts to trust their gut instincts: "[I]f district judges entertain reasonable doubts that these litigants have contravened Rule 11, they should be extremely reluctant to find violations or should at least exercise their discretion in favor of not awarding sanctions." Tobias, supra note 3, at 208. Is Rule 11 now merely a question of one jurist's gut instinct versus another?

135. See Burbank, supra note 90, at 1006 (discussing the source of the courts' power to enact and use Rule 11 to sanction merely negligent conduct); infra notes 436-500 and accompanying text (discussing the 1993 amendments). In the early case of United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812), the Court stated that "[c]ertain implied powers must necessarily result to our [c]ourts of justice from the nature of their institution." Id. at 34. These powers reflect "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962). Equally important is the use of this power to ensure the legitimacy and respect due court actions. See Chambers v. NASCO, Inc., 501 U.S. 32, 43-45 (1991); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); John Papachristos, Comment, Inherent Power Found, Rule 11 Lost: Taking a Shortcut to Impose Sanctions in Chambers v. NASCO, 59 BROOK. L. REV. 1225, 1225-27 (1993).

136. See Harris v. Marsh, 123 F.R.D. 204, 228 (E.D.N.C. 1988), aff'd in part, rev'd in part sub nom. Blue v. United States Dep't of Army, 914 F.2d 525 (4th Cir. 1990), cert. denied, 499 U.S. 959 (1991). In upholding Rule 11 sanctions the court stated as follows:

Today concludes, at least at this level, a disappointing chapter in the history of American litigation. Pursuit of this seriously flawed and meritless case was a disservice to its purported objective—the eradication of racial discrimination in the workplace. The egregious conduct of the case has eroded confidence in our judicial system. This court’s personal disappointment is inconsequential. But the erosion of confidence of the court, as an institution, is a serious matter for both the Bench and Bar. No litigant, no lawyer and no cause warrants a lack of integrity in the presentation of a case, for such lack is
Allowing litigants to intentionally misuse the courts impairs the court system's effectiveness and undermines their legitimacy as public, adjudicative fora. Rule 11 addresses a significant institutional, as well as political, concern—how to improve the courts' functioning by reducing adversarialism and imposing needed limits on potential litigants access to the judicial process? The courts must address these questions within the larger institutional context and with an emphasis on consciously reshaping and protecting their public adjudicative role. The question is whether the courts' current sanctions practice under Rule 11 adequately addresses these concerns.

In her most recent Rule 11 article, Professor Georgene Vairo suggests that one solution to the problem of ensuring accountability and restraint in the courts' sanctions practice is already provided by the Rule. The 1993 amendments require courts ordering sanctions to make findings. The Rule provides that these findings must describe the conduct that violates the rule and why sanctions were ordered. Professor Vairo suggests that "as a practical matter, it is likely that the [appellate] courts will move toward closer scrutiny" of sanctions decisions in these situations and this increased appellate scrutiny will help further develop and clarify the Rule. Professor Louis has taken a similar position, also criticizing the use of the single highly deferenc-
tial standard of appellate review, abuse of discretion, for all Rule 11 appeals. He argues that a more flexible appellate approach is needed, one that provides an appropriate level of review depending upon the nature of the decisionmaking involved in the issue raised on appeal. Professor Louis's and Professor Vairo's comments signal a significant evolution in the courts' sanctions practice. It is time to solidify and build on the courts' experience and growing expertise.

By 1991, the pendulum of reform had begun a backward swing. The Advisory Committee recognized the need for care, restraint, and accountability in the courts' sanctions practice. Yet the Rule continues to rely on the discretion of the courts to fill any interpretive gaps, and weigh conflicting institutional policies and goals on a case by case basis. The courts' sanctions practice is clearly evolving, but it is difficult to predict whether and to what extent the courts will follow the direction set by the Advisory Committee.

The next Part examines the dominant decisionmaking paradigm of the courts' sanctions practice, discretion as "skill," and its evolution. It also examines the following questions: How can the courts justify their "discretionary" sanction decisions, because that is precisely what they are being asked to do by the new rule? How should the "abuse of discretion" standard be applied on appeal in light of this procedural mandate?

III. THE COURTS' EVOLVING SANCTIONS PRACTICE—DEFINING THE PARADIGM OF DISCRETION AS SKILL

Judicial discretion stands at the core of Rule 11, yet the term is often used without ever being defined:

[It has been argued that the rule leaves more discretion with the district courts than is necessary or desirable, or perhaps tolerable. At

144. Professor Louis wrote his article before the Supreme Court decided Cooter & Gell v. Hartmarx, Corp., 496 U.S. 384 (1990), the case establishing the standard of review on appeal of Rule 11 sanctions. But he correctly predicted the outcome: an abuse of discretion standard. See id. at 405; Louis, supra note 23, at 758.

145. Louis, supra note 23, at 760. Professor Louis notes that this is taking place to some extent. Id. This "undisclosed flexibility" is problematic because it fails to give the litigants and other courts adequate notice of what is in fact going on. Id. at 761.

146. This call for gradation in appellate review is raised by other commentators, see, e.g., Friendly, supra note 25, at 755-67, including those writing about Rule 11. See, e.g., Vairo, Prologue, supra note 3, at 72-74.

147. See Tobias, 1993 Revision, supra note 3, at 182-83; Vairo, Prologue, supra note 3, at 52-53.

the same time, it has also been proposed that the 1983 amendments were too mandatory in language, that 'may' should be substituted for "shall" in Rule 11.149

Other comments emphasize this reductive approach: "The Civil Rules have generally favored judicial discretion as a means to secure just results and have avoided procedural rigidity. On the other hand, indeterminacy in the sanctions rules can weaken their instructive value."150 Whether ill-defined or not, the element of judicial discretion in a Rule 11 decision is not a mere by-product of the drafting process,151 but is instead a "favored . . . means" to achieve the purpose of the Rule.152

This reductive approach to the element of discretion in Rule 11 is subject to criticism because it inevitably interweaves different senses of judicial discretion in a single term.153 If the term "discretion" simply describes the personal input of decisionmakers, what results is a discussion at cross purposes. Is discretion an essential dimension of judicial decisionmaking under the Rule or do courts only have discretion when the Rule fails to adequately constrain their decisionmaking?154

The problem is that treating discretion in this reductive fashion blurs important differences in judicial decisionmaking and reduces "the entire range and diversity of decisional possibilities . . . to one repetitive description."155

From the judge's perspective, it is possible to identify two models of decisionmaking, the "legal" paradigm and the paradigm of discretion.

149. CALL FOR COMMENT, supra note 66, at 6.
150. Id.
151. Many writers have focused on discretion as what is left over after the legislature or court has done its best to draft a law, but that is not the case here. The Advisory Committee and the United States Supreme Court, in its decision in Cooter & Gell v. Hartmarx Corp., treat the element of judicial discretion as a necessary and essential part of the rule. 496 U.S. 384, 400; see infra notes 170, 178.
152. CALL FOR COMMENT, supra note 66, at 6.
154. Some commentators define discretion as the decisionmaking authority of the courts that exists in the "absence of 'governing rules.'" Id. at 278.
155. Id. at 279. Decisions are also discretionary in the sense in which they could be further constrained, id. at 282-83, or in the sense that the decisionmaker is justified in referring to their "discretion" in justifying the decision, id. at 283. This "self-referring appeal to one's own judgment and subjective input in the decisionmaking process" has limited scope and would not be acceptable in determining a matter of merit or substantive law. Id. at 284. However, it is usually deemed appropriate in areas involving the courts' exercise of managerial authority or procedural expertise. Id. at 284-85.
as “skill.” These are explicitly referred to in the case law, including Rule 11 case law, and the courts consciously use these two paradigms to justify their exercise of decisionmaking authority or discretion.\footnote{156}{See, e.g., Smith Int’l, Inc. v. Texas Commerce Bank, 844 F.2d 1193 (5th Cir. 1988) (reversing an order of sanctions, not deferring to the trial court on the state of the law or a litigant’s reasonable belief regarding that law, and instead pursuing its own analysis of precedent and the reasonable legal inferences to be drawn therefrom); Noonan v. Cunard S.S. Co., 375 F.2d 69, 71 (2d Cir. 1967) (relying upon the paradigm of trial court discretion as “skill,” the court’s “feel of the case,” the impracticality of rules, and the reality of disparate facts).} Implicit in the courts’ view that their decisionmaking needs to be explained or justified is an awareness that all judicial decisions raise concerns about the human element—the judge—and the institutional commitment to produce decisions based on law. Thus, the fact and process of justification, the explication and explanation of a decision, is an integral part of the judicial system and the courts’ decisionmaking activities. This Part looks at how courts should justify their discretionary sanctions decisions under the “skill” paradigm, and by doing so ensure enhanced appellate review and accountability.\footnote{157}{Accountability is defined for these purposes as how the risk of error is allocated. See Pierce v. Underwood, 487 U.S. 552, 563 (1988) (noting that the appellate standard of “abuse of discretion” shifts the risk of error to the litigants).}

Viewed within the larger historical context, the Advisory Committee’s deference to judicial discretion as a key element in the implementation of Rule 11 is understandable as the by-product of an era of managerial reforms that gave rise to the courts’ current sanctions practice.\footnote{158}{The development of a species of judicial decisionmaking denoted “managerial” in nature was one result of these reforms and represents a significant expansion in the courts’ authorized decisional activities:}

In itself, there is nothing remarkable about portraying a judge as a decisionmaker.

The business of judging is the business of deciding. But by conceiving of certain decisions as “managerial” decisions, rather than legal decisions, the concept of managerial judging posits a kind of decisionmaking that is different from what we traditionally expect of judges. Proponents of managerial judging generally overlook this distinction. Elliott, supra note 23, at 310-11.
This trend towards delegating the practice of legal problem-solving to the trial courts' discretion extends beyond the procedural arena. Increasingly when the formal adjudicative process of the courts is invoked, the resulting substantive legal decisions are made expressly contingent upon, or otherwise limited in their impact to, the unique facts of the particular case at hand, foreclosing any broad or formal hortatory role for the adjudicative process. This highly contextual or "situationalist" approach to resolving legal problems is also reflected in the courts' reliance upon legal standards and norms that are in their application fact specific, grounded in the particular context of the

159. This growing reliance upon the courts' procedural pragmatism is grounded in large part in the assumed expertise of the decisionmaker to address the underlying issue with little appellate supervision. See Bone, supra note 70, at 98 (discussing the "critical mechanism at work in the reformers' pragmatic approach" to procedural reform, judicial discretion coupled with flexible procedures). Flexible rules allow jurists to amend procedures to accommodate the realities of practice and ensure their fair application in the individual case. Id. at 99-100. Yet, even early reformers expressed concern that "judicial discretion should play a much narrower role with respect to . . . the parties' substantive rights. To the extent possible, these questions were best left to clearly drawn rules in order to guard against bias and error." Id. at 100. See Linda S. Mullenix, User Friendly Civil Procedure: Pragmatic Proceduralism Slouching Away from Process Theory, 56 FORDHAM L. REV. 1023 (1988) (book review). This review discusses how to turn current procedural theory from its "avowedly practical orientation towards thinking more broadly and critically about underlying premises," id. at 1029, including the potential for practical procedural problems to warrant "attention to process values other than efficient administration." Id. at 1029 n.32 (quoting Stephen B. Burbank, The Costs of Complexity, 85 MICH. L. REV. 1463, 1487 (1987) (book review)).

160. See Mullenix, supra note 159, at 1023.

161. See Atiyah, supra note 112, at 1259 ("The bulk of the law has grown exceedingly as the search for individualized justice has proceeded."); Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635, 642-43 (1971) (noting the need for courts to fashion highly individualized responses to new cases or matters not amenable to regulation by rule). See generally Yablon, supra note 18 (outlining a range of legal standards giving rise to highly individualized responses from the court).

162. See Atiyah, supra note 112, at 1258-59 (looking at an increasingly pragmatic judicial process that emphasizes fact finding, flexible legal standards, and the exercise of judicial discretion to achieve the goal of "individualized justice"); Yablon, supra note 18, at 276-77 (pointing out an increasing emphasis on legal standards that rely more on equitable considerations and the personal dimensions of the dispute than traditional legal analysis of rights and duties).

163. See Ruth A. Putnam, Justice in Context, 63 S. CAL. L. REV. 1797, 1808 (1990) ("'Situated' judges' intuition is shaped by their prior training, their character, and the totality of their past experience. What 'situationalist' and 'formalist' judges share is precisely that they were trained in the same legal system . . . .").

164. This "situationalist" approach to sanction decisions must confront the critics who have rejected efforts to expand the procedural context within which the courts operate to include, or at least address, the special interests or needs of particular groups of disputants. See Tobias, 1993
individual case, and expressly limited to the courts’ exercise of their specialized skill and expertise. A diverse array of critics has challenged this trend toward pragmatic decisionmaking on grounds that it creates power without guidelines or procedural restraints, erodes traditional due process safeguards, and threatens the tradition of judicial objectivity and impartiality with regard to litigants, individual attorneys, and their cases. Critics of the courts’ sanctions practices under Rule 11 have expressed many of these same concerns.

A. Describing Discretion from the Inside-Out

Many of the concerns, criticisms, and questions raised by the critics of Rule 11 have been raised in other contexts. This Article uses this commentary for two purposes. The first is to develop a larger perspective

References


165. See Atiyah, supra note 112, at 1271 (expressing concern that this decline in use of the formal decisional elements of law and principled decisionmaking in resolving disputes might ultimately undermine the moral authority of the courts).

166. In the procedural arena Professors Mullenix and Resnik have both challenged the increasing pragmatism of the courts. See Mullenix, supra note 159, at 1025; Resnik, supra note 23, at 497-98. In the adjudicative arena Professor Atiyah’s seminal critique stands as an early comment on the courts’ movement away from highly structured, doctrinally driven decisions—the “legal” paradigm. See Atiyah, supra note 112. More generally, critics challenge this approach on grounds of “radical indeterminacy” and their pragmatic opponents have helped clarify the debate. Cf. Michael S. Moore, The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism, 69 CORNELL L. REV. 988, 1012-13 (1984) (attacking the theory of “pragmatic instrumentalism” as being inadequate as a “new” theory of adjudication); Steven D. Smith, The Pursuit of Pragmatism, 100 YALE L.J. 409, 423, 439 (1990) (noting that the pragmatic perspective does not look at indeterminacy in rule structures as undermining the legitimacy of the legal system, but as providing flexibility within which a fact sensitive response can be crafted by the judiciary). The competence of the decisionmaker to make the decision is a crucial element in pragmatic theory. Id. at 430-34. Cf. Robert S. Summers, On Identifying and Reconstructing a General Legal Theory—Some Thoughts Prompted by Professor Moore’s Critique, 69 CORNELL L. REV. 1014 (1984) (advocating the pragmatic instrumentalism approach to theorizing).

167. See generally Keeling, supra note 95 (pointing out that such an approach can have an obvious chilling effect on litigants’ access to the courts); Tobias, 1993 Revision, supra note 3 (discussing the erosion of due process with respect to certain classes of litigants brought about by harsh standard of Rule 11 prior to the 1993 amendments); Vairo, Prologue, supra note 3 (asserting that even after the 1993 amendments, the fear of sanctions creates overwhelming disincentives for lawyers to take certain cases and is undermining the lawyers’ duty to clients and making them extensions of the state).
from which to approach the question of how to define the courts' evolving Rule 11 practice, and how to analyse the problem of discretion, decisionmaking, and sanctions. The method used is simply to note the points of convergence between this general body of commentary on discretion, and the case law and commentary generated by Rule 11. The second purpose is to use this substantial body of commentary on judicial discretion as a lens through which to look at the courts' and commentators' approach to this topic in the Rule 11 context.

Using this method, it is possible to develop a descriptive paradigm of the courts' discretion defined as its skill and institutional expertise. 168 This paradigm of discretion is characterized primarily by an emphasis on the individualized facts of the case, the specialized expertise and "situatedness" of the decisionmaker, and the broad delegations of discretion afforded to the decisionmaker to exercise that expertise 169 in fashioning an individualized response. 170 This paradigm of judicial discretion is further shaped by the institutional context within which it is exercised. The question to be considered is whether the court is looking at a managerial problem, attempting to resolve a procedural issue with a substantive impact, or attempting to render a decision on the

168. This definition of judicial discretion is used by Professor Yablon in a narrower context than in this Article. See Yablon, supra note 18, at 261-68.

169. A number of writers have focused extensively on the concept of the specialized institutional competence of the courts to handle a range of matters without undue guidance from the law or the appellate courts. See Fletcher, supra note 153, at 283-86; Thomas M. Mengler, The Theory of Discretion in the Federal Rules of Evidence, 74 IOWA L. REV. 413, 414-15 (1989) (explaining how the discretion built into the rules of evidence reflects the perceived expertise on the part of the trial judge to "consider the cumulative effect of the close prejudice and reliability rulings and to split them fairly among the parties"); Rosenberg, supra note 161, at 663 (discussing the trial courts' special expertise to address matters not amenable to regulation by rules as a function of "his nether position . . . he sees more and senses more"); Yablon, supra note 18, at 244-52; cf. George C. Christie, Judicial Review of Findings of Fact, 87 Nw. U. L. REV. 14 (1992) (looking at appellate standards as a function of the relative expertise and skill of the trial and appellate courts).

170. In the Rule 11 arena, this paradigm of judicial discretion is articulately set forth in Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990). See Atiyah, supra note 112, at 1258-59 (discussing fact sensitive nature of the legal process and the growth of the law as a search for individualized justice); Smith, supra note 166, at 439 ("[A] certain degree of indeterminacy does not necessarily threaten the basic legitimacy of the legal system; indeed, it may provide desirable flexibility within which a fact-responsive equity has room to operate."). The competence of the decisionmaker to make the open decision is a crucial element in pragmatic theory. Id.; cf. Moore, supra note 166, at 1002-10 (discussing how the theory of adjudication comes into play in the decisionmaking process); Summers, supra note 166, at 1018 (suggesting that "[j]udges and other officials should not pretend that the law is always determinate"). But see Donald N. Bersoff, Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law, 46 SMU L. REV. 329 (1992) (criticizing the courts' pragmatic preference for professional, rather than judicial, decisionmaking in mental disability cases).
merits. This institutional context largely defines the goals of the practice and the decisionmaking norms to be applied.

The paradigm of discretion as "skill" contrasts sharply with the traditional "legal" paradigm of judicial discretion. The successful outcome of this decisionmaking process—the courts' exercise of judicial discretion adhering to this paradigm—has traditionally been measured by the specificity of its fact findings and the clarity of its legal reasoning in the interpretation and application of law to fact. This paradigm of judicial discretion focuses in part on the success with which the court

171. The concept that a court's institutional competence is shaped by the particular context in which the discretionary decision is raised is touched on by numerous theorists. See Fletcher, supra note 153, at 283 (noting that the internal point of view of the judge is not tolerated in traditional legal discourse, even though it is often "appropriate for a decisionmaker to refer to his or her own discretion in offering a justification" for decisions in the managerial or procedural arena); Louis, supra note 23, at 734-35 (discussing how courts treat various procedural issues differently if they raise issues affecting the outcome or merits of the case, and observing that courts of appeals are less likely to defer in the latter case).

172. The term "practice" is used throughout this Article to describe the courts' application of its "skills" in a particular context. For example, the Article talks about the courts' sanctions practice and how the courts exercise their "discretion as skill" in the Rule 11 arena. See supra part III. In the procedural and managerial arena the success of the practice is largely measured by the practical efficacy of the result. See Bone, supra note 70, at 5. In the adjudicative arena, the goals are different. Originally, the institutional goal was to produce an acceptable legal decision, but now the goal is measured more in terms of individualized justice. See Atiyah, supra note 112, at 1259.

173. See Barak, supra note 16, at 114-15 (noting that adjudicative discretion is defined by its restraint, objectivity, neutrality, and logic applied to find or render the best or "right" decision); Bone, supra note 70, at 5 (noting that the procedural reforms of the twentieth century "made practical efficacy the test of a sound procedural system and relied on community experience and judicial expertise as guides to normative judgment"). Whether or not there is in fact a single best or right legal answer to a problem is a question beyond the scope of this Article. See generally Brilmayer, supra note 26 (attempting to define the concept of legal error within the context of the determinacy/indeterminacy debate). For the purposes of this analysis, it suffices that this is a norm used by the courts to guide their decisionmaking.


175. Adjudication is used here to describe a decisional paradigm of the courts and is distinct from adversarism, a process model leading up to an adjudication. In the former, a judge, sitting as a neutral decisionmaker in a legal dispute, develops a factual record, researches the applicable law, and then applies the law to the factual record. The model of adversarism assumes that the best way to prepare and present the factual and legal arguments of the case to the court is through two advocates, each attempting to engage and persuade the judge on the contested legal and factual issues. See generally Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 382-84 (1978) (discussing the necessity of adversarism in the process of adjudication and its corresponding prominent role in a democratic society).
resolves the dispute before it. However the court's decision is not evaluated primarily by how well it provides "individualized" justice to the parties, but by how well it states, clarifies, and applies the law ensuring its future development. This paradigm is also shaped by the institutional context. In the adjudicative arena, the courts' use of the paradigm of legal decisionmaking emphasizes the public dimension of adjudication—the formal, state-sanctioned resolution of controversies involving conflicting legal rights. The goal of adjudication, as a normative theory or model of decisionmaking, is to produce uniform results in similar cases in a manner that demonstrates consistency and predictability in the courts' application of the law. By way of contrast, the successful application of the paradigm of discretion as "skill," whether in the managerial or adjudicative arena, is measured

176. See Atiyah, supra note 112, at 1249-51 (noting the hortatory goals of the traditional legal paradigm and principled decisionmaking). The Cooter Court defined the same process and goals for a traditional analysis using the "legal" paradigm. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404-05 (1990).

177. The distinction between adjudicative and managerial decisionmaking as descriptions of different functions and roles of the courts is based in large part on the work of Professor Judith Resnik. See Resnik, The Domain, supra note 71, at 2230 (discussing the pressures undermining adjudication, in particular, "rational factfinding based upon a limited record"); Resnik, Failing Faith, supra note 71, at 534-39 (looking at the rise and decline of adjudicatory process in the face of increased emphasis upon managerial judging and alternative dispute resolution); Resnik, supra note 23, at 380-414 (documenting a shift in the perceived role and function of the federal judiciary from the neutral, dispassionate arbiter of legal claims to an active managerial stance); Judith Resnik, Tiers, 57 S. CAL. L. REV. 837, 840 (1984) ("Procedure is a mechanism for expressing political and social relationships and is a device for producing outcomes."). Procedure also reflects assumptions regarding the adjudicative process and, in particular, the difficulty of rendering legal decisions and the role of government in resolving social conflicts. Id. at 844-45. Contra Elliott, supra note 23, at 326-36; Steven Flanders, Blind Umpires—A Response to Professor Resnik, 35 HASTINGS L.J. 505, 520-22 (1984) (questioning whether in fact managerialism has not increased the quality, not just the quantity, of decisions); Jon O. Newman, Rethinking Fairness: Perspectives on the Litigation Process, 94 YALE L.J. 1643, 1652-56 (1985) (arguing that procedural fairness, viewed as a benefit to the individual and larger community, comes at too high a cost, including the adverse impact on others involved in the litigation process).

178. In Cooter, the Supreme Court acknowledged that the goal of uniformity and consistency is the goal of appellate review under the traditional legal paradigm: Has the judge correctly stated and applied the law? In doing so, the Court emphasized the extent to which that goal of appellate review was tied to the trial and appellate courts' ability to ground their legal analysis in repeating factual paradigms. Cooter, 496 U.S. at 405. See generally BARAK, supra note 16 (reviewing and integrating disparate writings on judicial discretion; pulling together numerous threads into a richly detailed description of the process of adjudication); REYNOLDS, supra note 174, at 48-70 (discussing judicial decisionmaking and what makes a good decision). The idea that the courts' interpretation and application of the law is tied to repeating fact paradigms has been addressed in other contexts as well. See, e.g., Jay M. Feinman, The Jurisprudence of Classification, 41 STAN. L. REV. 661, 696-716 (1989) (discussing paradigms as pertains to classification in areas such as contract and tort law).
primarily by criteria that focus on individualized outcomes. Here the primary concern is whether the solution is skillfully tailored to the unique facts and circumstances of the case, and the extent to which it successfully resolves the litigants’ immediate problem.\(^{179}\)

The two paradigms differ in another important way. The “legal” paradigm approaches decisions with the normative assumption that there is always a best or right answer, a correct application of law to facts.\(^{160}\) There is an obvious parallel here between the internal logic of the “legal” paradigm and the adjudicative function and institutional role of the court. The “fit” between the two is not inadvertent. If the goal of adjudication is to produce uniform results in similar cases in a way that affirms and develops the law, it is not surprising that variability in outcomes is seen as problematic when the “legal” paradigm is applied in the adjudicative context.\(^{181}\) In the paradigm of discretion as “skill,” there is no expectation that similar cases will necessarily produce observably similar results precisely because of the fact-sensitive nature of the courts’ judgments.

\(^{179}\) There is evidence that this trend toward decentralizing and deemphasizing the legal dimension of dispute resolution is part of a trend that reflects larger social pressures. See, e.g., Atiyah, supra note 112, at 1255-59 (discussing pressures to achieve decisions designed to realize justice versus the orotatory effect the judge wishes the decision to have); Rowe, supra note 74, at 830 (pointing out complaints in the system including “excessive complexity and formality; stress and aggravation of tensions between parties; [and] lack of access to justice for many”). When complex social relationships are at issue participants prefer mediation and negotiation. When relationships and conflicts are simpler, participants prefer adjudication. See generally THE DISPUTING PROCESS—LAW IN TEN SOCIETIES (Laura Nader & Harry F. Todd, Jr. eds., 1978) (looking at mediation, harmonization strategies, and private dispute resolution as motivated by a desire to avoid encounters with state power); LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE (1990) (arguing that limited access to adjudicative procedures creates unequal power relationships); NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (Laura Nader ed., 1980).

\(^{180}\) For purposes of this Article, I am treating this as a normative assumption to which courts attempt to adhere in their decisionmaking. Whether there is in fact a single right answer and all other answers are “error” is a theoretical question beyond the scope of the Article. See Brilmayer, supra note 26, at 369-71; Anthony D’Amato, Pragmatic Indeterminacy, 85 NW. U. L. REV. 148, 150 (1990) (discussing indeterminacy and the lack of rational constraints on judges’ decisionmaking that may in fact be present in our system of justice).

\(^{181}\) Much of the work on judicial discretion has focused on the question of acceptable variability in the adjudicative context. If the legal paradigm assumes a decision determined by the law, how are the presence of discretion and variability reconciled with this assumption? See generally Brilmayer, supra note 26 (discussing a permissible level of variability in outcomes and the failings of such characterizations as “wrongly decided” and “legal error” resulting from the natural indeterminacy of legal decisionmaking); Thompson, supra note 26 (critiquing Brilmayer and generally agreeing with her, but arguing that the “decisional inconsistency” deemed entirely acceptable by Brilmayer does not always carry out normative goals and is therefore not always “right”); infra notes 227, 247 (discussing various writers who have attempted to address this question).
and intuitions involved in the decisionmaking. The goal of the paradigm is to produce "skillful" decisions, a decisional norm that clearly tolerates wider variability in outcomes.

To summarize briefly, there are two different paradigms of discretion which, for ease of reference, have been labeled as the "skill" paradigm and the "legal" paradigm. The different institutional contexts that shape the courts' exercise of discretion are also examined. Is the court being asked to address managerial or simple procedural issues, or is the court looking at issues of substantive law traditionally addressed through the process of adjudication? This approach enables examination of the two distinct dimensions of a judicial decision. Which paradigm is being applied and what context is being invoked? When a judge looks at a discretionary decision, what does she think she is supposed to do and how is she supposed to do it?

The paradigm of discretion as "skill" has obvious utility in the managerial and procedural context. It is equally true, conceptually, that using the "legal" paradigm to address issues of substance or merit poses few problems for decisionmakers. There is a clear institutional reluctance, however, to use this narrower, more demanding decisionmaking paradigm to address issues of court management or procedural questions other than those raising important substantive issues. The more problematic situation involves the application of the paradigm of discretion as "skill"

182. See Cooter, 496 U.S. at 404-06 (recognizing that fact sensitive decisions generate greater variability in their outcomes).

183. Cf. id. at 404 (discussing the problem that occurs when there are not easily classifiable fact patterns for the appellate courts to check for "fit"); Feinman, supra note 178, at 696-705 (discussing the "fit" between legal theories and certain repeating fact paradigms or templates); Martha Minow & Elizabeth V. Spelman, In Context, 63 S. CAL. L. REV. 1597, 1617-21 (1990) (discussing the impact of the "call for context," on traditional legal analysis, in particular, the inability to identify routinized fact paradigms in the face of increasingly rich factual detail).

184. Any effort to clarify or classify judicial discretion in this fashion runs the risk of being criticized as too simplistic or as failing to take into account important dimensions of the courts' decisionmaking. This approach is not offered as a comprehensive theory of discretion. This Article's more limited goal is to develop descriptive paradigms of two dimensions of the courts' discretion or decisionmaking that are referred to and relied upon to justify the courts' decisionmaking activities. The goal is to be able to evaluate the fit between the courts' practice and the paradigm in any given case.

185. Jurists addressing managerial and procedural issues want flexible rule structures that provide guidance without unduly burdening the decisionmaking process. See Cavanagh, supra note 3, at 518 (pointing out that the vagueness of Rule 11 is typical of the federal rules and may reflect the drafter's strategy to "intentionally employ[] vague terminology to provide the courts with flexibility"); Mengler, supra note 169, at 457-58 (discussing the need for flexible evidentiary rules to enable the courts to address these issues quickly and without becoming bogged down in a traditional "legal" analysis).
when issues of substance are raised in an adjudicative context. Here the internal logic of the paradigm appears to be at odds with the decisional norms and institutional goals that largely define this type of decisionmaking. Yet, increasingly this occurs.

There is little doubt that sanction decisions, particularly those considered to be close cases, are resolved in part by reference to norms, factors, policies, and principles that are external to the black letter of Rule 11 and beyond the scope of its Advisor Committee's Note and the Rule's "legislative history." Many of the decisionmaking norms, policies, standards, and principles applicable to the courts' exercise of their discretion are grounded in the decisionmaking paradigm itself. The decisional norms and principles found in the two decisionmaking paradigms at issue here, the "skill" paradigm and the "legal" paradigm, are discussed in more detail below. Additional norms, policies, rules,
and principles that guide the courts' decisionmaking, including defining the goals of the practice, are imbedded in the institutional context.

One of the problems with Rule 11 is that it cannot be neatly classified. Some have viewed it as one rule among many in the courts' procedural arsenal to control and manage litigation. Others approach it more circumspectly, particularly when addressing the threshold issue of whether or not a claim is legally or factually frivolous. This question is treated by many courts as raising a legal question calling for the application of the "legal" paradigm. Yet others argue that the rule should not be construed in this fashion precisely because of the problems such an approach creates. These commentators argue that the Rule is primarily intended to regulate the conduct of the litigation, not its content, and that regulation is wholly proper under the paradigm of discretion as "skill." If the courts' sanctions practice is looked at from the perspective of the decisionmaker, the picture is one of the courts grappling with a series of complex issues in order to ensure the

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Phelps, supra note 10, at 381 (arguing that the broad grant of discretion under Rule 11 should encourage judicial self-restraint); Wilder, supra note 10, at 808-09 (discussing various arguments explaining why judges may restrain themselves before imposing Rule 11 sanctions). But see Posner, supra note 10, at 9 (discussing the problem of treating judicial self-restraint as a norm to guide the courts' principled decisionmaking—it fails to tell the jurist what principles to pick and apply).

192. As one commentator states, what is needed is an "internally consistent theory in which the rationales for imposing rule 11 sanctions provide the basis for developing a clearer set of guidelines" for enforcing the rule. Kassin, supra note 78, at 45.

193. See, e.g., Schwarz, supra note 71, at 204 (discussing other disciplinary actions that courts might take, including disbarment, referring the matter to the local bar for sanctions, or banning the attorney from appearing for a period of time).

194. The courts adopting the three-tiered standard of review clearly fall into this class. These courts were of the opinion that the threshold question of liability, the application of Rule 11 to the facts of the case to determine whether or not a claim had adequate legal or factual merit, should be decided at the trial court level using the legal paradigm and reviewed "de novo" as a question of law on appeal. These courts' opinion that the "legal" paradigm was the proper method of justification may say less about the nature of the decision and more about the importance of the decision. Adoption of a de novo standard on appeal acts as a judicial restraint. For cases adopting this standard of review in sanctions cases, see Brown v. Federation of State Medical Bds. of the United States, 830 F.2d 1429, 1434 (7th Cir. 1987); Robinson v. National Cash Register Co., 808 F.2d 1119, 1126 (5th Cir. 1987); Zaldivar v. City of L.A., 780 F.2d 823, 828 (9th Cir. 1986). In other circuits, the decision regarding the legal sufficiency of the claim was reviewed de novo, while other grounds for sanctions were reviewed deferentially. See, e.g., United States v. Milam, 855 F.2d 739, 742 (11th Cir. 1988).


196. See Schwarzer, supra note 84, at 1019 (rejecting notion that the Rule is an "adjunct to case management," while agreeing that this position "finds implicit support in the Advisory Committee's unfortunate reference to 'streamlin[ing] the litigation'"). Schwarzer argues that other mechanisms exist to address pure issues of merit and that Rule 11 is designed to regulate conduct. Id.
full and fair implementation of the rule.\textsuperscript{197}

It is easy to understand the confusion. Courts routinely manage cases and lawyers, imposing their norms and expectations, in bringing the litigation to trial. This highly variable exercise of the courts' managerial discretion emphasizes the subjective dimension of the courts' judicial expertise.\textsuperscript{198} In this arena, the courts' have had little appellate oversight.\textsuperscript{199} Then along comes Rule 11, which seems to give these same courts the power to sanction lawyers who violate the courts' norms or expectations regarding acceptable advocacy. But now the courts' regulation is viewed from an objective standard—would a reasonable attorney have filed the suit or proceeded in this manner—and not simply from the perspective of the court. This tension between the subjective and objective dimensions of Rule 11 standards is an ongoing concern and reflects the conflicting normative assumptions brought to bear in the interpretation and application of Rule 11.\textsuperscript{200}

\textsuperscript{197} The decision to treat the threshold issue of liability as a legal question sent a clear message. Rule 11 raised important issues calling for restraint and objectivity in the analysis. The fact that these questions were "fact" sensitive did \textit{per se} render them beyond the reach of the "legal" paradigm. See \textit{supra} note 194. Other courts developed alternative ways to articulate their perception that Rule 11 decisions should be approached with care. Many courts approached the problem by developing standards that required them to err on the side of no sanctions. See, e.g., Indianapolis Colts v. Mayor & City Council, 775 F.2d 177, 181 (7th Cir. 1985) (holding claim must be utterly meritless for imposition of sanctions); see \textit{supra} notes 120-30 (discussing the standard of the "close case" as a way to avoid sanctions). In this same vein, a body of "easy" cases began to build. See, e.g., Hecht v. United States, 609 F. Supp. 264, 267 (S.D.N.Y. 1985) (holding that seeking injunction barred by statute merited sanctions); McLaughlin v. Bradlee, 602 F. Supp. 1412, 1418 (D.D.C. 1985) (holding history of meritless cases and frivolous motions merited sanctions), \textit{aff'd}, 803 F.2d 1197 (D.C. Cir. 1986). But when the cases did not present easy issues, the courts responded in kind. See, e.g., Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 574-75 (E.D.N.Y. 1986) (holding that Rule 11 should be enforced in such a way that it does not "chill" advocacy), \textit{modified}, 821 F.2d 121 (2d Cir.), \textit{cert. denied}, 484 U.S. 918 (1987). This does not mean that other jurists did not take a more aggressive approach. See, e.g., Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313, 321 (5th Cir. 1989) (imposing sanctions on A.C.L.U. participating attorney in a "sniffer dog" case), \textit{cert. denied}, 496 U.S. 935 (1990); Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986) (holding no special treatment for attorneys that represent poor or indigent clients or who bring difficult claims), \textit{cert. denied}, 480 U.S. 918 (1987); International Shipping Co. v. Hydra Offshore, Inc., 675 F. Supp. 146, 152 (S.D.N.Y. 1987) (authorizing the sanctioning court to consider an attorneys prior behavior and matters off the record in issuing sanctions), \textit{aff'd}, 875 F.2d 388 (2d Cir.), \textit{cert. denied}, 493 U.S. 1003 (1989).

\textsuperscript{198} See Elliott, \textit{supra} note 23, at 316-17 (discussing the potential for arbitrariness under a managerial judging model due to the dearth of procedural safeguards); Resnik, \textit{supra} note 23, at 380 (describing this emerging "managerial" role as a new form of "judicial activism" with few procedural safeguards and the potential for the abuse of authority).

\textsuperscript{199} See \textit{supra} note 65-148 and accompanying text (discussing managerialism).

\textsuperscript{200} Professor Louis argues that focusing Rule 11 on legal product emphasizes objective standards and results in a type of decisionmaking amenable to review as a question of law. See
B. The Courts' Evolving Sanctions Practice

The paradigm of discretion as "skill" is aptly characterized throughout the commentary as a pragmatic model of decisionmaking which emphasizes decentralized decisionmaking at the trial court level. The courts' evolving sanctions practice clearly parallels this institutional trend. By looking at the two dimensions of judicial discretion developed in the preceding section, a number of different approaches to the courts' sanctions practice under Rule 11 can be identified. Following the amendment to the rule in 1983, some courts approached their sanctions practice as a natural evolution of their touted managerial skills. Other courts treated their sanctions practice, or at least that aspect of the practice that required the court to evaluate the legal or factual merits of a case, as invoking the "legal" paradigm and the adjudicative context. Still others grappled with the conceptual

Louis, supra note 23, at 748-51. He notes that Professor Burbank, in his Third Circuit Study of Rule 11, emphasizes the conduct dimension of the rule and argues that it is appropriate to use more subjective standards. Id. at 745. Ironically, Professor Burbank, in turn, is of the opinion that courts are more likely to agree on sanctionable conduct then they are to agree on what makes a frivolous lawsuit. See Burbank, supra note 80, at 1932-33. Some courts have tried to merge the two approaches by looking at the objective dimensions of the litigation first, and then moving onto a subjective approach if needed. See, e.g., Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1470 (2d Cir. 1988), rev'd in part on other grounds sub nom. Pavelic & Leflore v. Marvel Entertainment Group, 493 U.S. 120 (1989).

201. See Mullenix, supra note 159, at 1027-29. Care should be taken to distinguish between overlapping, yet distinct uses of the term "pragmatism" in the procedural arena and its use in a broader, philosophical context which this Article attempts to illuminate. Pragmatism focuses on the context of the decision and the situatedness of the decisionmaker. This dimension of the courts' discretion is defined in commentary and case law as the courts' institutional expertise. Professor Mullenix attempts to use the critique of legal pragmatism, which focuses on pragmatism's lack of a normative structure or content, to raise questions about the courts' procedural strategy of relying on the courts as pragmatic decisionmakers. Id. See generally Moore, supra note 166, at 988-92 (discussing whether pragmatic instrumentalism can support a normative theory of adjudication); Smith, supra note 166, at 424-29 (analyzing the apparent tension between pragmatism, with its emphasis on experience, context, and future outcomes, and legal formalism or theory development, with its focus on the normative structure of the law).

202. "Rule 11 came onto the scene amidst high hopes for streamlining the litigation process. It was designed as much more than a procedural rule; a societal goal was to be achieved." Charles M. Shaffer, Jr., Introduction: Rule 11: Bright Light, Dim Future, in LITIGATION SECTION, AMERICAN BAR ASSOCIATION FEDERAL PROCEDURE COMMITTEE, SANCTIONS: RULE 11 AND OTHER POWERS 1, 15 (2d ed. 1988). See, e.g., Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 873 (5th Cir. 1988) (claiming that trial judges have the daily hands-on experience with the litigants needed to resolve the case).

203. See supra note 194 (discussing courts who adopted de novo review as the appropriate standard to evaluate the trial courts' decision whether or not the product/conduct violated Rule 11).
middle ground. Should the courts' sanctions practice be driven by the managerial goals of efficiency and efficacy, or by the adjudicative concern of developing the exclusionary function of Rule 11 as a regulatory bright line? And how are the courts to apply the paradigm of discretion as "skill" in order to avoid the potentially chilling impact of an overinclusive interpretation of the Rule?  

Professor Yablon has looked at the courts' adaptation of the paradigm of discretion as "skill" in a similar context. The significant adaptation on which he focused was the development of a normative dimension to the paradigm that emphasizes "right" answers when significant adjudicative decisions are posed.

One underlying assumption is that there are right answers to sentencing decisions and that trial courts are more likely to make them than appellate courts. The superior institutional competence of trial courts is derived from the assumption that sentencing is not a rule-determined activity but a practice, a skill acquired through experience involving a finely tuned set of subjective judgments based on facts. This assumption of right answers in practice, which cannot be generalized or stated in rules, leads to a theory of institutional competence that legitimizes trial court discretion.

It is difficult to define this normative element or answer the question whether a "right" answer is anything more than a skillful answer. For the purposes of this Article, Professor Yablon's study provides important insight into the process of justification: How do courts explain, and how do they see themselves as needing to explain, their discretionary decisions? What norms of justification do the courts call into play in order to ensure that the decision rendered is perceived as legitimate?

The problem is that the paradigm of discretion as "skill" has no internal norm defining acceptable variability or "error" other than its

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204. One of the most illuminating bodies of case law on this point looks at the "close" case; that is, cases in which the courts saw themselves as approaching the limits of their discretion. See supra notes 120-26 and accompanying text (discussing the "close" case).

205. Professor Yablon studied "sentencing" cases as those involving "discretion as skill" as well as significant substantive issues. See Yablon, supra note 18, at 260-68.

206. Id. at 264.

207. Id.
commitment to produce skillful decisions.\textsuperscript{208} This normative element does not exist for many managerial or procedural matters.\textsuperscript{209} In the managerial arena, a court's skillful decision regarding discovery, pretrial orders, docket control, or settlement is the most to which one is entitled.\textsuperscript{210} Here the courts' exercise of their discretion is assumed to give rise to a range of acceptable alternatives because of the diverse nature of the problems and the need to make these decisions quickly and without undue investment of institutional resources.\textsuperscript{211} There is also the view that spending more time will not necessarily make the decision any "better," or that "right" decisions are even at issue.

The courts' evolving sanctions practice occupies a conceptual middle ground defined largely by the tension between the paradigm of discretion as "skill" and the "legal" paradigm, and the competing institutional perspectives regarding the role and function of the courts and sanctions.\textsuperscript{212} As a result, one end of the sanctions spectrum is defined largely by the courts' managerial concerns and pragmatic decisionmaking. The other end of the sanctions spectrum is defined largely in terms of the courts' adjudicative concerns and their commitment to a decision based on law. To be successful, the middle ground of the courts' evolving sanctions practice must resolve the tension between the two.\textsuperscript{213}

\begin{itemize}
\item \textsuperscript{208} See generally Brilmayer, supra note 26 (discussing different types of decisions and the type and degree of variation in outcomes that is tolerable).
\item \textsuperscript{209} The courts' willingness to treat certain procedural issues as questions of law requiring justification under the "legal paradigm" has been noted in the commentary as a deviation from the institutional norm. Cf. Louis, supra note 23, at 734-760 (discussing procedural questions reviewed under the stricter standard of de novo review).
\item \textsuperscript{210} See Fletcher, supra note 153, at 271 (pointing out that discretionary decisions are reversed only if there is an abuse of discretion and the decision falls outside of the "range of normal practice").
\item \textsuperscript{211} See Elliot, supra note 23, at 307-355 (discussing the ad hoc and highly personalized perspective of the managerial judge). Numerous commentators focus on this highly individualized response. See Mengler, supra note 169, at 414 (arguing that courts need flexible rules that enable the judge to decide "on the run," that more detailed rules are not feasible because of time constraints and that ultimately the decision is driven largely by concerns to mitigate and apportion the potential harmful effects of the evidence equitably amongst the litigants); Yablon, supra note 18, at 268 (discussing decisions made with little information under time constraints and with a limited range of outcomes, for example, whether to admit or exclude evidence).
\item \textsuperscript{212} See supra notes 65-148 and accompanying text.
\item \textsuperscript{213} The \textit{Cooter} Court made it clear that the paradigm of discretion as "skill" that defines the courts' sanctions practice is defined as an alternative to the "legal" paradigm as a decisionmaking model. See \textit{Cooter} & \textit{Gell v. Hartmarx Corp.}, 496 U.S. 384, 400-04 (1990). In \textit{Cooter}, the Court adopted "abuse of discretion" as the standard of review, but it did so while acknowledging the importance of the analysis. \textit{See id.} at 399-406. The Court did not relegate Rule 11 to the courts'
The managerial reforms of the late 1970s and early 1980s were attractive in large part because they were easy to implement—simply allowing the judiciary more discretion to manage their own affairs. Whether or not it can be said that there was a coherent theory of “managerial discretion” driving these reforms, there was a growing consensus among the advocates of reform, including the judiciary, regarding its characteristics, scope, and exercise. When examined from the perspective of the analysis laid out here, it is possible to see the courts’ managerial discretion as the paradigm of judicial discretion—as “skill” practiced within the managerial or procedural arena. Rule 11 was one of the managerial reforms of the 1980s and yet it is fundamentally different from its kindred rules governing pre-trial procedures and discovery. Unlike its procedural cousins, Rule 11 is inevitably tied to a determination regarding the merits of the pending litigation.

Elements of managerial discretion inevitably surface throughout the early Rule 11 commentary and case law. Points of convergence

managerial discretion. See id.; infra notes 261-336.
214. See Bone, supra note 70, at 89-95 (discussing the added discretion given to judges in various areas, including the field of Rule 11 sanctions); Burbank, supra note 80, at 1936-37 (“The question . . . is whether and when the only or the best answer . . . lies in reliance on the discretion of judges, guided by general directions that usually are not informed by empirical study, to deliver on the promise of equal justice.”).
215. See Resnik, supra note 23, at 374-80 (describing the widespread modern trend of judges toward a managerial role as distinguished from their former adjudicatory role).
216. See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 554-70 (1991) (Kennedy, J., dissenting) (pointing out the inevitable link between Rule 11 and a determination on the merits). It is easy to understand the move to reconcile Rule 11 with Rule 12(b)(6) dismissal, but more importantly, with Rule 56’s summary judgment procedures and case law. See Fed. R. Civ. P. 11 advisory committee’s note (1993) (linking Rule 11 to a summary judgment determination and statutory fee shifts); see also Stempel, supra note 12, at 261-62 (arguing that factual and legal issues which violate Rule 11 should be dismissed by summary judgment); Dyer, supra note 12, at 425-29 (proposing a presumption that claims surviving the pre-verdict stage be immune from Rule 11 sanctions).
217. See, e.g., White v. General Motors Corp., 908 F.2d 675, 683-84 (10th Cir. 1990) (stating that Rule 11 was enacted to streamline court dockets and facilitate case management), cert. denied, 498 U.S. 1069 (1991); Sussman v. Salem, Saxon, & Nielsen, P.A., 152 F.R.D. 648, 652 (M.D. Fla. 1994) (noting that Rule 11 designed to aid in “streamlining court dockets and facilitating case management”); Harris v. Marsh, 123 F.R.D. 204 (E.D.N.C. 1988) (discussing Rule 11 as a rule enacted to improve the efficient litigation of meritorious claims while assessing sanctions in case involving an attorney who unsuccessfully litigated a race discrimination case), aff’d in part and rev’d in part sub nom. Blue v. United States Dep’t of Army, 914 F.2d 525 (4th Cir. 1990), cert. denied, 499 U.S. 959 (1991); Shaffer, supra note 202, at 15 (noting that Rule 11 enacted to streamline the
between the structure of Rule 11, the nature of sanctions decisions, and the courts' managerial discretion are easy to isolate. First, both are characterized by an express delegation of authority, whether through the rule-making process or as part of the courts' inherent powers, to the trial judges to act in areas essential to the courts' day to day operations.\textsuperscript{218} This delegation is coupled with a mandate to consider efficiency and the disposition of disputes, as distinct from their formal adjudicative resolution, as an institutional priority.\textsuperscript{219} The delegation of discretion in both instances is characterized by few procedural restraints\textsuperscript{220} and open legal standards.\textsuperscript{221} These open standards were designed to ensure that the court had sufficient flexibility to respond to the diversity of matters it must handle quickly and efficiently.\textsuperscript{222} While the courts exercised this discretion with an emphasis on the law, there was more emphasis in the Rule 11 arena on elaborating and clarifying the basic standards of the rule. This often took a tremendous amount of the courts' time.\textsuperscript{223}

\textsuperscript{218} See FED. R. CIV. P. 11 advisory committee's note (1993); FED. R. CIV. P. 11 advisory committee's note (1983); Burbank, supra note 90, at 1006-11 (discussing whether the express delegation of discretion to trial courts under Rule 11 was authorized under the inherent power doctrine or the Rules Enabling Act); Resnik, supra note 23, at 396-97 (describing the sources of power for judges and how the powers delegated by Congress have played a role in the shift toward managerialism).

\textsuperscript{219} See FED. R. CIV. P. 11 advisory committee's note (1993); FED. R. CIV. P. 11 advisory committee's note (1983); CALL FOR COMMENT, supra note 66, at 2-3; Fletcher, supra note 153, at 283-86 (discussing cases in which an internal reference to the courts' discretion and ability to achieve the goals is legitimate and when it is not); Mengler, supra note 169, at 463-66; Resnik, supra note 23, at 395-431.

\textsuperscript{220} See Burbank, supra note 80, at 1929-37; Cavanagh, supra note 3, at 500-15; Mengler, supra note 169, at 457-58; Resnik, supra note 23, at 397-410. The courts and the 1993 amendments changed this by imposing procedural obligations on courts considering sanctions. This is a significant point of evolution in the courts' sanctions practice. In 1983 there were no procedural restrictions in the rule. During the early years the courts' increasingly added process as it was deemed due. See Maureen Armour, Fifth Circuit, in SECTION OF LITIG., AM. BAR ASS'N, SANCTIONS: RULE 11 AND OTHER POWERS 99, 104-05 (Melissa L. Nelken ed., 3d ed. 1992). Following the 1993 amendments, Rule 11 bears no resemblance to any other rule of civil procedure and includes an express mandate to provide a hearing and make findings. See FED. R. CIV. P. 11(c) (1993); infra notes 436-500.

\textsuperscript{221} The 1993 amendments make the standards more specific and tie them to existing bodies of law. See infra notes 436-500.

\textsuperscript{222} See Cavanagh, supra note 3, at 518.

\textsuperscript{223} See Mengler, supra note 169, at 415. This has been another significant point of development. Early cases emphasized the need to make the procedural decision, often before a final disposition on the merits, and move on. In addition, the vague standards of the 1983 rule did not lend themselves to the typical process of interpretation and elaboration. While the courts saw a need to fill in the interpretive gap, they did so in a fact specific manner generating a body of case law. While there was little focus on traditional doctrinal explication or elaboration, the courts saw a need
In both instances, the delegation of discretion explicitly acknowledged that the matters sought to be regulated were not easily reduced to a series of formal rules or a routinized practice.\textsuperscript{224} In this context, the courts were not expected to engage in a process of \textit{ad hoc} rulemaking or otherwise attempt to give deeper doctrinal definition or meaning to the black letter law. Efforts to do this would undermine the Rule’s inherent flexibility and require an inordinate investment of time and resources.\textsuperscript{225} In this situation, the system must rely on the trial judge’s specialized skill—a combination of her professional expertise, personal experience, and institutional perspective—\textit{to fairly balance the institution’s and the litigants’ competing interests in pursuing the case to a full trial on the merits.}\textsuperscript{226}

What defines the nature of the courts’ managerial or procedural discretion is not so much the permissible range of alternatives to be

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\item to develop the overarching, guiding principles and policies of the Rule. See \textit{Hays v. Sony Corp. of Am.}, 847 F.2d 412, 419 (7th Cir. 1988) (noting the objective reasonableness standard does not make allowances for the particular circumstances of the attorney); \textit{Thomas v. Capital Sec. Servs., Inc.}, 836 F.2d 866, 873 (5th Cir. 1988) (defining “reasonable inquiry” to mean reasonable under the circumstances); \textit{Rachel v. Banana Republic, Inc.}, 831 F.2d 1503, 1508 (9th Cir. 1987) (holding that factual errors standing alone would not warrant sanctions); \textit{Vatican Shrimp Co. v. Solis}, 820 F.2d 674, 680-81 (5th Cir.) (reversing sanctions where there was legal uncertainty surrounding the claim found to lack merit and a potential for chilling advocacy), \textit{cert. denied}, 484 U.S. 953 (1987); \textit{Eastway Constr. Corp. v. City of New York}, 762 F.2d 243, 253-59 (2d Cir. 1985) (holding that the standard to be applied was that of the objective reasonable person), \textit{cert. denied}, 484 U.S. 918 (1987); \textit{Century Graphics Corp. v. Harris Graphics Corp.}, No. 86-5375, 1987 WL 25132 (E.D. La. Nov. 23, 1987) (unreported decision) (warning counsel of duty to reevaluate the reasonableness of their claim periodically).
\item \textit{See} \textit{Cooter & Gell v. Hartmarx Corp.}, 496 U.S. 384, 404 (1990) (discussing the difficulty of generalizing from the facts or otherwise doctrinally narrowing the scope of the analysis); \textit{Mengler}, supra note 169, at 425-27 (discussing the alternatives between a flexible system and a more rigid rule-driven system).
\item \textit{See} \textit{CALL FOR COMMENT}, supra note 66, at 6-7 (illustrating this dilemma); \textit{Elliott}, supra note 23, at 311; \textit{Resnik}, supra note 23, at 376-77.
\item \textit{See} \textit{Fletcher}, supra note 153, at 271-72 (stating that the trial court is in the best position to balance the interests of the party in a particular decision and their interests in fair and speedy trial); \textit{Mengler}, supra note 169, at 441-46 (arguing that in making rulings, the judge must balance the parties’ interests); \textit{Resnik}, supra note 23, at 445 (asserting that the judge must balance the parties’ interests). In the Rule 11 context, the assumption that the courts have the requisite “skill” runs throughout the commentary and case law. Judges are expected to use that skill to balance the one party’s interest in the efficient disposition of the litigation against the other party’s right to a full and fair adjudication on the merits. See, \textit{e.g.}, \textit{Schwarzer}, supra note 84, at 1018-19. \textit{But see} \textit{Burbank}, supra note 80, at 1935-37 (arguing that the perception that the best or right answer lies in the discretion of the judge is open to question). \textit{Burbank} expresses concern that the lack of uniformity in the Rule 11 case law reflects the play given to individual judge’s normative preferences by the rule. \textit{Id.} at 1931-32 (expressing confidence that with some guidance from the Supreme Court there will be more uniformity in lower court decisionmaking).
\end{itemize}
considered, but the "implicit objective" of delegating the decision to the expertise of the judge.\footnote{227} This delegation reflects the judge's institutional authority to select the appropriate managerial response from a wide range of acceptable practices.\footnote{228} As a result, the delegation of managerial and procedural discretion is routinely coupled with a policy of extreme deference at the appellate level.\footnote{229} This policy mirrors the willingness of the institutional actors—judges and litigants alike—to tolerate a wide range of variability in managerial responses because it is difficult to argue convincingly that any particular judicial response is a mistake.\footnote{230} Moreover, the need for expediency in the managerial context is posed as a significant counterbalance to any efforts to unduly burden the decisionmaking process by requiring formal hearings, briefs, evidentiary records, and other accoutrements of appellate review.\footnote{231}

This is not the case with Rule 11. While early claims for expediency were noted, it soon became apparent that the sanctions question would be decided \textit{after} the litigation was resolved.\footnote{232} Claims that Rule 11 would enhance case management quickly fell by the wayside. It also became readily apparent that the Rule could be construed to compensate the current litigant or deter future bad acts.\footnote{233} The 1993 Amendments

\footnote{227. See Burbank, supra note 80, at 1936-37 (discussing whether it is correct to assume that delegating matters to the courts' discretion will produce correct or right answers); Fletcher, supra note 153, at 272.}

\footnote{228. See Resnik, supra note 23, at 431-35. One difference between these types of decisions and Rule 11 is the limited range of responses available—to sanction or not. It has become clear that the courts' expertise is focused on defining and highlighting this decision. While there may be a range of activities giving rise to the sanction decision, the decision itself is an either/or decision as a threshold matter.}

\footnote{229. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400 (1990) (discussing the express delegation of discretion to the courts mandated by Rule 11 and the Advisory Committee's Note calling for institutional deference); Louis, supra note 23, at 734-36. Contra Rosenberg, supra note 161, at 641-43 (challenging this assumption).}

\footnote{230. See Fletcher, supra note 153, at 271 (discussing variable outcomes in managerial decisions and their insulation from strict appellate review); Mengler, supra note 169, at 415 (discussing variable outcomes in evidentiary decisions); Rosenberg, supra note 161, at 662-63 (discussing variable outcomes in cases presenting diffuse circumstances, which justifies vesting discretion in trial judges).}

\footnote{231. This policy of deference is further justified by the assumption that there is no direct nexus between the managerial issues and the substantive outcomes at trial. See Fletcher, supra note 153, at 271. But see Resnik, supra note 23, at 429-31 (arguing that the managerial and adjudicatory roles of the judges cannot be so easily separated, and that the managerial model of judging undermines the judge's ability to fulfil this more important traditional adjudicatory function).}

\footnote{232. See Armour, supra note 220, at 109 ("While the dual goals of streamlined court management and enhanced efficiency have pushed the circuit to define the trial court's discretion in applying Rule 11 broadly, procedural limitations ... have also been recognized.").}

\footnote{233. See infra notes 436-500 and accompanying text (discussing sanctions and Rule 11).}
have rejected compensation and narrowed the Rule’s focus to deter-
rence. Early on, it was obvious that the rule would do little to
improve the management of the pending case. To the contrary, it would
draw it out.

Unlike more typical managerial or procedural decisions, Rule 11
does not contemplate a range of tolerable responses to the threshold issue
of liability. Put simply, the courts must decide whether or not the case
is “frivolous.” This type of decision is not unique and the courts often
address a limited range of alternatives. Often in these circumstances,
however, the range of alternatives represents equally acceptable results.
It quickly became clear that was not the case with Rule 11. The decision
to sanction would be hotly contested.

The courts acknowledged that the fact patterns giving rise to a
sanction decision were potentially diverse, yet early on the courts began
looking for an internal guide or rough rule of thumb to help them. The
development of the “close” case as a way to define the limits of the trial
courts’ discretion to sanction is part of the courts’ search for such a
regulatory bright line. When the decision is either a yes or a no—to
sanction or not to sanction—it is not surprising that litigants are not
content to treat either one as falling within an acceptable range of

\[\text{234. See infra notes 436-500 and accompanying text.}\]

\[\text{235. See supra notes 120-26 and accompanying text. The “close case” was one way for the}
\text{courts to conceptualize the problem of “conflicting” results. Another was to invest significant}
\text{resources into interpreting the threshold “standards” of the rule, looking for an outcome}
\text{determinative formulation that captured the uncertainty they faced. Numerous judges found it}
\text{difficult to get a fix on the meaning of “frivolous” litigation, and the formulations range from the}
\text{forgiving, to the unforgiving, to the “middle.” See, e.g., In re Kunstler, 914 F.2d 505, 516 (4th Cir.
\text{1990}) (adopting a harsher standard for imposition of sanctions), cert. denied, 499 U.S. 969 (1991);
\text{United States v. Stringfellow, 911 F.2d 225, 226 (9th Cir. 1990) (adopting relatively forgiving}
\text{standard); Oliveri v. Thompson, 803 F.2d 1265, 1274-75 (2d Cir. 1986) (adopting forgiving stan-
\text{(reviewing denial of leave to amend under abuse of discretion even though decision is narrow and}
\text{impacts the development of the case’s merits)).}\]

\[\text{236. See infra notes 436-500 and accompanying text. For example, Rule 16 contemplates an}
\text{array of equally acceptable outcomes. The array of “formulations” available to define sanctionable}
\text{litigation in the Rule 11 context and others is impressive. See Hawaiian Engraving & Mfg., Inc. v.
\text{Fujikami, No. 90-15997, 1991 WL 230187, at *2 (9th Cir. Nov. 8, 1991) (limited use opinion}
\text{(reported without published opinion at 947 F.2d 949 (9th Cir. 1991)). What these formulations}
\text{illustrate is that legal judgments have both subjective and objective components. The former}
\text{represents the jurist’s own “practiced” judgment and the latter the sense all such decisionmakers have}
\text{of the need to approach these decisions from an objective perspective. Trying to capture that sense}
\text{and skill in a linguistic formulation is inevitably a daunting task.}\]

\[\text{237. See supra notes 120-26 and accompanying text (discussing the analytical value of the close}
\text{case).}\]
Numerous courts faced with an either/or proposition, a close case, refused to treat each as acceptable. The close case decisions reflect the courts' efforts to address this problem.

Despite efforts by commentators and drafters alike to encourage use of the Rule only to regulate conduct, an approach consistent with the courts' managerial expertise, the practice evolved more broadly. As the practice evolved, there was concerted pressure from litigants and lawyers alike to recognize that Rule 11 raised issues of merit and was not limited to regulating "conduct." Use of the Rule to regulate the "content" of litigation, a practice roundly criticized in the commentary, caused increasing concern.

What expertise on the part of the courts is called into play in the courts' sanctions practice? The points of tension and conflict within the Rule reflect the institutional debate that has given it shape and substance. In designing sanctions to ensure deterrence, the courts display the immediate hands-on experience of the local practice community. In evaluating the conduct of the litigation, the court is again displaying its managerial experience and expectations regarding the appropriate standards to govern lawyers' behavior. But when addressing the threshold legal issue—whether the claim is factually or legally meritless—this is not as clear. If the court determines that the prefiling investigation was adequate, but disagrees with the evaluation of the merits of the claim, the court has used traditional legal skills. While it may still be applying discretion as "skill," the perspective is different. Also different are the normative assumptions that the decisionmaker brings to the practice.

238. See supra notes 201-237 (defining the courts' discretion as an acceptable range of outcomes, none of which would be considered error or problematic); infra notes 239-57 (same).

239. Cf. FED. R. CIV. P. 11 advisory committee's note (1993) (linking Rule 11 to summary judgment procedures and case law). See generally Stempel, supra note 12 (discussing the need to harmonize Rule 11 and summary judgment and the perception that sanctions raise merit based issues); Dyer, supra note 12 (discussing the confusion surrounding Rule 11 and the courts' application of the Rule).

240. There was a parallel movement in the commentary to bring Rule 11 in line with these procedures. See supra notes 65-148 and accompanying text.

241. See, e.g., Burbank, supra note 80, at 1943-49; Schwarzer, supra note 84, at 1018-19; cf. Tobias, 1993 Revision, supra note 3, at 195-96 (pointing out the lack of a clear distinction between the content and the conduct of the litigation in certain instances); Vairo, Prologue, supra note 3, at 49 (noting that it is difficult to make Rule 11 solely applicable to conduct).


243. See supra notes 149-200 and accompanying text.
regarding the range of tolerable variability, and the process of explication and explanation.\textsuperscript{244} Although neat dichotomous variables do not exist, it helps to think of the courts' adjudicative discretion in contrast to their managerial discretion. Elements of the courts' adjudicative discretion recur throughout the sanctions case law as well, but it is clear that the courts find this decisionmaking model difficult to apply broadly to the typical sanctions case.\textsuperscript{245} The "legal paradigm" encompasses a set of decisional norms that contemplate rationality, logic, objectivity, consistency, and predictability in the interpretation and application of law to fact.\textsuperscript{246} The decisional norm deemed most characteristic of the courts' adjudicative discretion is its stated commitment to apply the law in rendering a correct decision.\textsuperscript{247} While acknowledging that there are potentially different outcomes in the adjudicative context, the tolerable differences in results are expected to be narrower, explicable, and predictable by reference to the legal standards, adjudicative norms, and relevant facts.\textsuperscript{248} These adjudicative norms are inevitably coupled with a decisional process that requires explication and explanation of the adjudication as evidence of a legitimate, nonarbitrary exercise of judicial power.\textsuperscript{249} Finally, the process of adjudication is subject to relatively

\textsuperscript{244} The move to reform the Rule focused on such issues. The reforms were two-pronged: fine tune the legal standards and impose procedural restraints. See \textit{infra} notes 436-500.

\textsuperscript{245} \textit{See}, e.g., Cooter \& Gell v. Hartmarx Corp., 496 U.S. 384, 401-05 (1990). The Court pointed out that appellate review of sanctions decisions are, by their nature, highly fact specific and are "unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law." \textit{Id.} at 405.

\textsuperscript{246} This paradigm is used here as a normative paradigm defining for the courts what they are about. Adherence to the paradigm is viewed as essential in the adjudicative context to render the courts' decisionmaking legitimate. \textit{See} \textit{BARAK, supra} note 16, at 122; Resnik, The \textit{Domain}, \textit{supra} note 71, at 2222-27; Resnik, \textit{Failing Faith, supra} note 71, at 546-55.

\textsuperscript{247} \textit{See} \textit{BARAK, supra} note 16, at 12-18; Ronald Dworkin, \textit{Hard Cases}, 88 \textit{HARV. L. REV.} 1057, 1060-65 (1975) (arguing that legal materials should generate a single right answer for every legal issue).

\textsuperscript{248} \textit{See} Carl E. Schneider, \textit{Discretion and Rules: A Lawyer's View}, in \textit{THE USES OF DISCRETION}, \textit{supra} note 17, at 47, 48-49 (discussing normative values imbedded in a system of justice based on rules fairly applied and the tension between rules and judicial discretion). Professors Brilmayer and Thompson have discussed the issue of acceptable variability as distinguished from legal error. \textit{See generally} Brilmayer, \textit{supra} note 26 (describing the inherent variability in judicial decisionmaking as "wobble" and arguing that the search for truly "right" answers is fruitless); Thompson, \textit{supra} note 26 (critiquing Brilmayer and asserting that she goes too far in claiming that such sweeping decisional inconsistency does not threaten the process and integrity of judicial decisionmaking).

\textsuperscript{249} \textit{See}, e.g., \textit{REYNOLDS, supra} note 174, at 55-60; \textit{cf}. Owen M. Fiss, \textit{The Social and Political Foundations of Adjudication}, 6 \textit{LAW \& HUM. BEHAV.} 121, 125 (1982) (theorizing that the role of the judiciary is to give meaning and application to public values); Fuller, \textit{supra} note 175, at 363-81
strict institutional scrutiny. The appellate courts are deemed to have equal if not greater institutional competence to review and revise the doctrinal analysis, substituting their opinions for those of the trial judge as needed. The appellate courts more readily defer to the trial courts’ fact competence than to those courts’ doctrinal skills. This deference, however, is not absolute and there are doctrines that enable an appellate court to substitute its judgment for that of the trial court’s—or at least require the lower court to revisit certain factual issues.

Appellate review is deemed essential in this context to ensure that the correct decision was reached, or at least that everything was done to ensure that the court arrived at the best decision possible. The assumption that underlies the adjudicative process is that the openness and thoroughness of the analysis at the trial court level, when coupled with a commitment to provide a detailed record for appeal, fosters judicial neutrality, objectivity, and adherence to external legal standards. This element of public and institutional scrutiny is intended to restrict the courts’ reliance upon highly personalized, subjective, or internalized standards or the influence of bias in reaching the final result. More simply stated, use of the “legal” paradigm, and the inevitable de novo review on appeal, legitimate the courts’ decision as an exercise of judicial authority and not one of personal bias or preference.

This brings the entire issue back to Professor Yablon’s analysis. The question again is: What is going on when courts take the position that “there are right answers . . . and that trial courts are more likely to make them than appellate courts”?

Clearly, there is a range of variability in “skills-based” decisions and it is hard to say that there is ever going to be only one legally “correct” answer. It is also difficult, however,
to look clients in the face and tell them that sanctions depend on the court’s discretion. What is at work here is the normative assumption that the court is exercising skill and attempting to, through the exercise of its skill, apply the law to the facts and render a correct decision. Judicial skill is not simply to pick from an array of possible outcomes; it is to pick the right outcome from the array.

Lawyers talking about this type of decision would likely say that the judge is exercising his or her adjudicative discretion. They would be very surprised if the court asserted that this decision was no different than decisions regarding pretrial orders, discovery sanctions, or docket management. In fact, this is one way these decisions differ. There are some decisions where judge, lawyer, and litigant freely acknowledge that the judge has broad discretion and others where this would be anathema. In Professor Yablon’s study, the paradigm of discretion as “skill” is shaped both by the decisional norms of the adjudicative context and the “legal” paradigm. In the situation described by Professor Yablon, the paradigm of discretion as “skill” is, in effect, substituted for the “legal” paradigm as the court’s decisionmaking model. The latter might be preferred because it produces a more “legitimate” decision, but it is difficult to apply. This substitution occurs when the courts determine that a more doctrinally circumscribed approach is simply not feasible. Professor Yablon’s work is further evidence of the trend away from principled decisionmaking defined narrowly as the application of the traditional “legal” paradigm. Yet this movement is inevitable, as the courts become increasingly involved in an array of diverse and difficult regulatory activities—like Rule 11.

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note 112, at 1255-59; D’Amato, supra note 180, at 184-88; Dworkin, supra note 25, at 29-40.

255. See Fletcher, supra note 153, at 271-73.

256. Yablon, supra note 18, at 262-68.

257. The idea that the paradigm of discretion as “skill” is used adaptively to substitute for the traditional “legal” paradigm is discussed in Cooter. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400-05 (1990); infra notes 261-336 and accompanying text.

258. Professor Christie argues in favor of institutional deference by appellate courts reviewing lower courts’ findings of fact. Christie, supra note 169, at 20.

259. See Mengler, supra note 169, at 459-66; Yablon, supra note 18, at 266-68.

260. Commentators who criticize this pragmatic trend in the courts’ decisionmaking do not always address the question of the alternatives available to the courts. If it is decided that a highly discretionary approach to the problem by the courts is unacceptable and the matter is not subject to a rule-driven approach, must the court simply retreat? Professor Atiyah might argue that they should because then the courts cannot legitimately render these decisions. See Atiyah, supra note 112, at 1270-72. Numerous others have less trouble with this role of the courts, although they too grapple with the problem of justification. See, e.g., Rosenberg, supra note 161, at 660-67 (arguing that the discretion granted to trial courts and the deferential standard of review applied to their discretionary
The next section examines the Supreme Court’s efforts to define the nature and scope of the trial courts’ discretion in a particular Rule 11 sanctions case. This case helps define where the trial courts’ discretion falls on the continuum and reveals the Supreme Court’s own normative assumptions about Rule 11 and judicial discretion.

C. The Supreme Court’s Definition of Discretion as Skill

The Advisory Committee’s pragmatic response is in line with the Supreme Court’s, as indicated by its repeated citation of *Cooter & Gell v. Hartmarx Corp.* in its notes to the 1993 amendments. This opinion anchors the Advisory Committee’s Note to the 1993 amendments. The *Cooter* opinion is the clearest articulation of the paradigm of discretion as “skill” within the Rule 11 case law, but it does something more than simply affirm the Court’s commitment to this model of legal decisionmaking. The *Cooter* opinion and 1993 amendments focus on the importance of the paradigm of discretion as “skill” as a paradigm of legal decisionmaking able to address issues going to the merits of the case. The *Cooter* Court’s analysis treats this “skill” paradigm as an appropriate substitute for the “legal” paradigm in certain circumstances. The decisional goals nevertheless remain essentially the same: identify the facts, state the law, and apply the law to the facts. The fact that the practice is reviewed under the deferential “abuse of discretion” standard does not mean that the overarching decisional norms and goals that define the “legal” paradigm and the courts’ exercise of adjudicative discretion, do not apply.

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decisions are warranted under our system of justice, even though some traditional justifications are less than compelling). Others would argue that courts often retreat by simply hiding behind the “false objectivity” of the legal paradigm. See Martinez, *supra* note 20, at 611-18.


262. *See* *FED. R. CIV. P. 11* advisory committee’s note (1993) (citing *Cooter*, 496 U.S. 384). *Cooter* involved an antitrust complaint filed by a retailer of men’s clothing against a manufacturer of men’s clothing, alleging a nationwide conspiracy to fix prices and to eliminate competition. *Cooter*, 496 U.S. at 388-89. The manufacturer moved to dismiss the complaint and moved for sanctions under Rule 11. *Id.* at 389. After the retailer voluntarily dismissed the complaint, pursuant to Rule 41(a)(1)(i), the district court imposed Rule 11 sanctions. *Id.* The Supreme Court affirmed the sanctions on appeal. *Id.* at 405.


265. The “abuse of discretion” standard is sufficiently ambiguous itself to cover a wide range of applications. See Friendly, *supra* note 25, at 762 (“All agree that the rule requiring deference to the trial court’s discretion is not absolute; an appellate court may reverse if discretion has been ‘abused.’”). Friendly notes that “abuse of discretion” is defined in a number of ways, some coming
The Supreme Court's analysis in *Cooter* outlines its policy of institutional deference to trial courts in areas in which they are perceived as having unusual expertise or skill. The Supreme Court's deference to the trial courts due to their unusual "fact competence" is an overriding theme in the Court's analysis and is also ultimately used to justify the Court's policy of deferring to the trial courts on essentially legal issues. Yet, a significant difference exists between the two aspects of the trial courts' "fact competence" called into play in rendering a decision.

The *Cooter* Court recounted the courts of appeals' historical reliance on trial judges as skilled fact finders. The fact competence of a court sitting as a trier of fact and determining "historical" facts to be plugged into the legal paradigm is one type of fact competence. This differs from the fact competence of a trial court exercising its discretion as "skill" not simply to determine facts, but to substitute its subjective and intuitive judgments for a more finely honed legal analysis involving the application of law to fact. The *Cooter* Court views this latter "fact competence"—the merging of the trial court's fact competence and legal analysis—as the inevitable result of highly indeterminate rule structures. The *Cooter* Court's analysis of the "skill" paradigm treats it close to approximating "legal error." *Id.* at 762-64. See Louis, *supra* note 23, at 744 (arguing for a flexible approach to appellate review that more accurately reflects what has gone on in the case); George A. Somerville, *Standards of Appellate Review*, 15 LITIG. 23, 24 (1989) (distinguishing standards of review by the presumption of correctness accorded trial courts and arguing that the intensity of review should vary depending on what the appellate court is asked to do). The article distinguishes between cases involving questions that the trial court is in a better position to review and cases involving novel questions. *Id.* at 25-26. In the latter instance, the trial court is given discretion as an experiment and there is an expectation that the law will evolve and stricter review will result. *Cf.* Vairo, *Prologue*, *supra* note 3, at 72-74 (distinguishing between a "careful 'abuse' review" and a "loose 'abuse' review").

266. The traditional appellate paradigm distinguishing between factual and legal decisions as a way to distinguish between the relative institutional competencies of the trial and appellate courts has come under recent criticism. See Louis, *supra* note 23, at 735-36.

267. The fact/law dichotomy "act[s] as [a] surrogate[] for the system's division of decisional authority between the trial and appellate levels." Louis, *supra* note 23, at 735. Louis notes that this method of classification is most controversial when it involves the application of law to fact. *Id.* The question is whether to review this decision freely or deferentially. *Id.* at 736.


270. See *supra* notes 168-200. This issue consistently poses problems. See *Cooter*, 496 U.S. at 403-04; Christie, *supra* note 169, at 31; Louis, *supra* note 23, at 748-49.

271. See *Cooter*, 496 U.S. at 404-06. *Contra* Louis, *supra* note 23, at 741-45 (looking at the rationale justifying deference in procedural matters which require the application of law to fact, and
as something of a default approach to be used when the "legal" paradigm proves inadequate.

Yet the Court goes on to offer a devastating critique of the "legal" paradigm itself. Reflecting a number of different trends in academic scholarship, the Court points out that the distinction between "fact" and "law," two essential elements of the "legal" paradigm, cannot stand up under close scrutiny. If the application of law to fact, the core of the legal paradigm, is a more fact-sensitive than doctrinally-driven, the distinction between the two elements of the analysis becomes blurry. As the fact side of the analytic equation increases, emphasizing a rich contextual analysis of discrete, variable facts, it becomes increasingly difficult to claim that the final decision is determined by law.

A fundamental difference exists between the fact competence involved in determining the "facts" of the case and the fact competence involved in the analysis and classification of fact patterns—the factual dimension of a traditional legal analysis. In the latter case, the trial court is inevitably looking for points of convergence between the facts of the case and the law. While this analysis may not rise to the level of identifying repeating fact paradigms that "fit" the rule, it certainly involves analytic skills beyond those involved in merely determining or finding facts. The Supreme Court merges these two distinct dimensions of the courts' fact competence to achieve its objective. It is able to use the trial courts' acknowledged fact competence to justify deferring to the trial courts on questions that have traditionally been viewed as

pointing out that "not all fact-intensive procedural determinations are classified as discretionary").

272. The Cooter opinion is in line with a growing body of commentary that questions the real difference between questions of law and questions of fact. See, e.g., Christie, supra note 169, at 18; Louis, supra note 23, at 734-37; Adrian A.S. Zuckerman, Law, Fact or Justice?, 66 B.U. L. REV. 487, 489 (1986).

273. Cooter, 496 U.S. at 401. "The Court has long noted the difficulty of distinguishing between legal and factual issues. . . . "Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion."' Id. (quoting Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982)). Yet mixed-question cases, that is cases involving the application of law to fact, are not always classified as discretionary. See Louis, supra note 23, at 744; Minow & Spelman, supra note 183, at 1602 (discussing how legal perceptions vary with context); Wells, supra note 61, at 1734 (discussing contextual dimension brought to bear by decisionmaker).

274. See Christie, supra note 169, at 52-54 (arguing that courts should make these types of distinctions based on the nature of the decisionmaking, not law-fact distinctions); Feinman, supra note 178, at 679-80 (discussing the courts' "factual classification" of like cases and its doctrinal role in the decisionmaking process).

275. See Feinman, supra note 178, at 679-80.
legal in nature.\footnote{If a purely legal question is involved, the Court points out that it is easily addressed by the appellate courts on appeal.\footnote{This rationale, deference to the trial courts’ unique skill described as their hands-on experience, is well developed in the appellate case law.\footnote{It is therefore fair to ask what the Supreme Court means when it defers to the trial courts’ competence to determine facts, a competence seemingly grounded in their up-front and personal view from the bench. How does this fact competence translate into an ability to fashion law from the subjective judgments and intuitions that characterize the “skill” paradigm?\footnote{The Supreme Court does not directly address this question other than to point out that these are “fact sensitive” legal questions and should be delegated to the trial courts because of their fact competence.}}}}

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\footnote{Cf. David R. Keyser, \textit{State Constitutions and Theories of Judicial Review: Some Variations on a Theme}, 63 \textit{TEX. L. REV.} 1051, 1075-76 (1985) (arguing that the fact that courts exercise discretion and their decisions are based upon pragmatism instead of neutral principles does not undermine the essentially legal nature of the decision).} \footnote{See \textit{Cooter}, 496 U.S. at 405 (noting that while deference is paid to the trial court’s factual determinations, it is the province of the appellate court to determine the proper legal standard to be applied).} \footnote{See \textit{Jennings v. Joshua Indep. Sch. Dist.}, 877 F.2d 313, 321 (5th Cir. 1989) (deferring to the trial court judge where the imposition of sanctions did not amount to an abuse of discretion), \textit{cert. denied}, 496 U.S. 935 (1990); \textit{Thomas v. Capital Sec. Servs., Inc.}, 836 F.2d 866, 872-73 (5th Cir. 1988). The court in \textit{Thomas} did not wish to interpret the rule to remove from the district court the discretion which it must enjoy to effectively regulate its courtroom. . . . The perspective of a district court is singular. The trial judge is in the best position to review the factual circumstances and render an informed judgment as he is intimately involved with the case, the litigants, and the attorneys on a daily basis. . . . “The district court will have a better grasp of what is acceptable trial-level practice among litigating members of the bar than will appellate judges.”} \footnote{Id. (quoting \textit{Eastway Constr. Corp. v. City of N.Y.}, 637 F. Supp. 558, 566 (E.D.N.Y. 1986), \textit{modified}, 821 F.2d 121 (2d Cir.), \textit{cert. denied}, 484 U.S. 918 (1987)); \textit{see} \textit{Bryer v. Creati}, No. 89-1520, 1990 U.S. App. LEXIS 15721, at *11, *12 (1st Cir. August 31, 1990) (decision reported without published opinion at 915 F.2d 1556) (willing to give “appropriate weight to the district court’s greater familiarity with the case” and finding that the record failed to reveal “any meaningful error of judgment”). \textit{But see} \textit{Estate of Williams v. City of Harvey}, No. 93 C 7253, 1995 U.S. Dist. LEXIS 8556, at *22 (N.D. Ill. June 15, 1995) (dismissing portions of the complaint pursuant to Rule 12(b)(6) and issuing a warning to the plaintiff that an amendment would be accepted, but that Rule 11 sanctions were possible). Here, the court exercised its traditional legal analytic skills in issuing the Rule 12(b)(6) order and basing the Rule 11 warnings on the same standard. \textit{See id.}}\footnote{This rationale does not always apply in practice. In \textit{Automatic Liquid Packaging, Inc. v. Dominik}, 909 F.2d 1001 (7th Cir. 1990), the court held that the deferential standard applied even where the district court judge who imposed the sanctions being appealed was not the same judge who had heard the evidence in the case and had granted the summary judgment motion. \textit{Id.} at 1004.}
In other cases, the appellate courts have treated this “expertise” as the trial courts’ sense of what is acceptable litigation practices at the local level.\(^{281}\) This might be true as to the reasonableness of the prefiling inquiry, particularly where local practices are cited in mitigation or defense by the targeted attorney.\(^{282}\) Yet to apply Rule 11 as a way to enforce or endorse local practices is, on its face, contrary to the thrust of the Rule\(^{283}\) and would undermine its broad exclusionary function.\(^{284}\) When applied to considerations of merit, whether approached by the courts as a review of applicable law or as a question of the attorney’s state of mind—would a reasonable attorney have filed the claim—this local practice variation becomes even more problematic.\(^{285}\)

The Supreme Court and others have used this dimension of the decision to raise questions about the good faith or motives of counsel, elements traditionally used to raise questions about the reasonableness of professed beliefs.\(^{286}\)

And what of the trial courts’ views of these matters? Do they agree that they have the requisite skills to handle these issues? What do they think of the notion that matters not on the record are assumed to support their decision?\(^{287}\) And how will this factor be addressed under the 1993

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281. *See, e.g., Thomas,* 836 F.2d at 873 (noting that district courts are in a better position to evaluate the propriety of attorneys’ conduct at the trial level than appellate courts).

282. Professor Louis has pointed out the difficulty with this position. *See Louis, supra* note 23, at 744 (arguing that “[s]uch local factors should not . . . affect the question whether the attorney believed that the pleading or motion was well grounded in fact and law,” and therefore have no place in sanctions decisions).

283. *See Burbank, supra* note 80, at 1929-30 (discussing the goal of procedural uniformity and the problem of increasingly diverse local practices).

284. *Cf supra* note 135 (discussing this exclusionary function as a necessary part of the courts’ managerial power over their own affairs).


286. *See Louis, supra* note 23, at 746-47. Yet it is questionable whether these matters will continue to hold sway under the new amendments. Is the subjective belief of counsel a factor in determining whether or not a claim is frivolous? This question recurs because this is the point at which product and conduct overlap: Is our objective evaluation of the product influenced by the attorney’s conduct, including his thought processes? *See id. at* 747 (“Perhaps the trial judge will not limit her consideration to the attorney’s conduct with respect to the paper in question, but will consider the totality of the attorney’s conduct in this and perhaps other litigation.”).

287. *Cf. Rosenberg, supra* note 161, at 663-65 (questioning cases in which the inability to capture matters on the record is treated as warranting appellate deference).
amendments and their mandate to develop a formal record for sanctions
decisions?  

When viewed from this perspective, the convergence is striking
between the Supreme Court's theory of institutional competence and
deference, and Professor Yablon's analysis of a trial courts' approach to
indeterminate, fact sensitive questions. Both the trial and appellate
courts assume that the matters sought to be regulated are not subject to
a more rule-bound approach. They also share the assumption that the trial
courts have the practice skills necessary to produce correct answers. Here
the skill dimension of the courts' discretion "involve[s] the exercise of
a practice that is neither reducible nor justifiable in terms of a rule." The trial judge is deemed to have special knowledge that "enables her to
achieve an answer better than any that could be obtained by simply
following rules." She can bring this special knowledge to bear in
rendering a practical judgment. However the trial courts' activities
are conceptualized, this "skill" or "practice" element lies at the heart
of the Supreme Court's and the Advisory Committee's pragmatic
strategy.

It is fair then to ask what the Supreme Court believes this "skill" or
"practice" entails and how the Court looks at sanctions decisions to
determine if they adhere to the norms of the "skill" paradigm or
"practice". Unfortunately, the Court does not directly address this issue
in Cooter other than to argue that the fact sensitive legal issues involved
are best handled by the trial courts. Nothing in the Cooter opinion
indicates that this dimension of the courts' "fact competence" is anything
more than the courts' own experience and subjective judgments
concerning the nature of local litigation practices or frivolous litiga-
tion. If that is so, the concerns of the critics are certainly justified,
absent some device to guide and limit subjectivity and potential bias in
the courts' decisionmaking.

288. See infra notes 436-500.
289. See supra notes 168-260.
290. Yablon, supra note 18, at 262.
291. Id.
292. Id. at 262-63.
293. Professor Yablon's definition of the "skill" paradigm from the perspective of the trial
courts is the most useful definition for purposes of our analysis. See id. at 261-63; supra notes 149-
259 and accompanying text.
295. The legal meaning of Rule 11 is inevitably influenced by the courts' subjective views. Cf.
Wells, supra note 61, at 1728 (asserting that judges' legal decisions are inevitably influenced by their
personal experiences).
Having addressed the trial courts' fact competence, albeit somewhat elliptically, *Cooter* went on to address the legal issues raised by the appeal. The legal issues raised in *Cooter* posed a slightly different problem for the court than the fact questions posed. The primary legal issues in the appeal of a Rule 11 sanction decision were easily identified by the Court: Has the trial court properly ruled that the claim is frivolous and has the "attorney's conduct violated Rule 11"? In *Cooter*, the Court addressed the question of the proper standard of appellate review applicable to these trial court decisions. The circuits had been split on this issue. Some circuits adopted the position that all questions of law should be reviewed *de novo* on appeal. In these circuits, sanctions decisions were appealed under a three-tier standard. Questions of law were reviewed *de novo*. Questions of fact were reviewed under the clearly erroneous standard. Questions regarding the nature and scope of the sanction were reviewed under the abuse of discretion standard. Other circuits took the position that a single, unitary, "abuse of discretion" standard on appeal was warranted.

In deciding to adopt the unitary "abuse of discretion" standard, the Court made an interesting two-pronged argument. First, the Court asserted that the appellate standard for reviewing facts, the "clearly

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297. The Court starts its analysis of the proper standard of appellate review by noting that where a trial court is "empowered to exercise its discretion," a deferential standard of review is typically applied. *Id.* at 400. This position is roundly criticized by Professor Maurice Rosenberg. *See Rosenbergsupra* note 161, at 640-41, 645-47 (criticizing the notion that the express delegation of discretion automatically mandates a deferential standard of review). Ironically, Professor Rosenberg's article is cited in *Pierce v. Underwood*, 487 U.S. 552, 558-59 (1988), a case cited with approval in *Cooter*, 496 U.S. at 403.

298. The *de novo* issue was limited to the threshold determination of the frivolousness of the claim. *See*, e.g., *Zaldivar v. City of L.A.*, 780 F.2d 823, 828 (9th Cir. 1986), *abrogated by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Westmoreland v. CBS*, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985). It is interesting to note that the circuits viewed this as a two-step analysis: What was the "legal" character of the claim; and did it warrant sanctions. The first step calls into play the underlying doctrinal law while the second step calls into play the judgment that the claim is in fact frivolous. *See Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (citing *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc)). This two-step analysis has been reintroduced in the 1993 amendments to Rule 11. *See Tobias*, 1993 *Revision*, supra note 3, at 195-96 (discussing the threshold "calculus" to weigh merits and prefiling investigation); *infra* notes 436-74.

299. *See*, e.g., *Thomas*, 836 F.2d at 872.

300. *Cooter*, 496 U.S. at 399 (describing the three-tiered approach of the Ninth Circuit before ultimately rejecting it).

301. *See*, e.g., *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 757-58 (1st Cir. 1988); *Thomas*, 836 F.2d at 872.
erroneous" standard, has essentially the same effect on appeal as an "abuse of discretion" standard.\textsuperscript{302} Second, the Court noted "the difficulty of distinguishing between legal and factual issues . . . particularly . . . in the Rule 11 context [which] requires a court to consider [legal] issues rooted in factual determinations."\textsuperscript{303} Ultimately, in resolving the issue of the standard of review, the Court likened a Rule 11 determination to a finding of negligence, "which is generally reviewed deferentially."\textsuperscript{304} The heart of the Court's justification is as follows:

Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11. Of course, this standard would not preclude the appellate court's correction of a district court's legal errors . . . .\textsuperscript{305}

The theme of institutional competence and judicial discretion as "skill" is a large part of the Court's analysis.

A pivotal case cited in support of the \textit{Cooter} ruling is \textit{Pierce v. Underwood}.\textsuperscript{306} The Supreme Court relies heavily on this case for the proposition that deference is owed to the "judicial actor . . . better positioned than another to decide the issue in question."\textsuperscript{307} Adhering to this proposition, the Court held that as between the trial court and the court of appeals, the trial court was in the better position to render the highly fact specific sanctions decision.\textsuperscript{308}

This question of competence cuts both ways. The Court went on to state that institutional deference on the part of the appellate court to the trial court was even more justified where, as here, the appellate court's display of their institutional competence would accomplish little. The Court reasoned that the "legal" questions involved in rendering a sanction decision did not lend themselves to the normal law clarifying functions
of appellate review.\textsuperscript{309} The Court asserted that the utility of a traditional appellate review is limited in cases such as Cooter, where the underlying legal issues involve ""'multifarious, fleeting, special, narrow facts that utterly resist generalization.'"\textsuperscript{310}

While deferring to the trial court's "'fact competence," defined as its ability to establish "'historical" facts, the appellate courts have long been willing to intervene and review the trial courts' legal analysis: Was the law correctly stated and applied?\textsuperscript{311} According to the Cooter Court, however, even this dimension of appellate review raises questions regarding the relative fact competence of the trial and appellate courts. The appellate courts' review of these two elements of the "'legal" paradigm—stating the applicable law and applying the law to the facts—depends largely on the courts' ability to identify similarities in the fact patterns or paradigms between the cases offered up on appeal and the decisional case law.\textsuperscript{312} When a given case's facts are not subject to such generalizations or factual classifications, the typical method of appellate review is no longer available. According to the Cooter Court, without the ability to identify repeating fact patterns and paradigms, the appellate court is unable to move from the decisional case law to the case under review and test the application of law to fact against its predecessor.\textsuperscript{313} If the court of appeals cannot engage in this limited fact-based analysis, it cannot do much in the way of reviewing elements of the trial court's legal decisionmaking and should therefore defer to the lower court.\textsuperscript{314} According to the Cooter Court, it is the trial court that has the institutional expertise, or at least experience, to handle cases involving "'consideration of unique factors that are 'little susceptible . . . of useful generalization'"\textsuperscript{315} including "'fact-intensive, close calls'"\textsuperscript{316} regarding an attorney's violation of Rule 11. The Cooter Court could not have done a better job of conjuring up the image of the lower courts' pragmatic sanctions practice and the paradigm of discretion as

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  \item \textsuperscript{309} Cooter, 496 U.S. at 404-05.
  \item \textsuperscript{310} Id. at 404 (quoting Pierce, 487 U.S. 561-62 (quoting Rosenberg, supra note 161, at 662-63)).
  \item \textsuperscript{311} See Christie, supra note 169, at 772.
  \item \textsuperscript{312} See Cooter, 496 U.S. at 401-05; Feinman, supra note 178, at 696-700 (discussing "'legal" analysis as the ability to identify, develop, and classify repeating fact paradigms).
  \item \textsuperscript{313} Cooter, 496 U.S. at 404.
  \item \textsuperscript{314} Id. at 401-05.
  \item \textsuperscript{315} Id. at 404 (quoting Pierce v. Underwood, 487 U.S. 552, 562 (1988)).
  \item \textsuperscript{316} Id. (quoting Charles M. Shaffer Jr. & Paul M. Sandler, Sanctions: Rule 11 and Other Powers 15 (2d ed. 1988)).
\end{itemize}
The Cooter opinion makes a final telling point: While the courts’ pragmatic “skill” is rooted in the day to day experiences of the judge, the paradigm of discretion as “skill” as used in this context is a substitute decisionmaking model for the “legal” paradigm. The Court implies by its analysis that it first looks to see if the “legal” paradigm, the analytically preferred method of judicial decisionmaking, is available. The dimension of the trial courts’ legal analysis at issue in Cooter is not the “fact” element that has long been an object of institutional deference. The element of the “legal” paradigm actually at issue is the increasingly fact sensitive legal analysis involved in applying the law to the facts.317

It is important to appreciate how the Cooter opinion shapes our understanding of discretion as “skill” as a normative paradigm defining the courts’ legitimate decisionmaking activities.318 The courts’ pragmatic decisionmaking in the procedural or managerial context assumes a highly variable approach to the day-to-day problems of court management and a subjective or even idiosyncratic view of effective judicial administration.319 The experiential or fact-based legal skills invoked by the Cooter Court are viewed differently. Here the Supreme Court is forced to defer to the trial courts’ discretion as “skill” as the only effective decisionmaking method available to address the highly fact sensitive questions involving the application of law to fact in a Rule 11 sanctions decision. Underlying this analysis is an assumption that the appellate courts have tried to address this matter using the “legal” paradigm and traditional standards of appellate review, and it didn’t work.320 In delegating the sanctions question to the situated

317. See, e.g., id. at 401-05.
318. This Article treats these decisionmaking paradigms as normative in the sense that they shape the decisionmaking activities of the court. In addition, they largely define how the decision can be justified as a legitimate exercise of judicial power. Cf. Sanford Levinson, What Do Lawyers Know (And What Do They Do with Their Knowledge)? Comments on Schauer and Moore, 58 S. CAL. L. REV. 441, 453 (1985) (criticizing theories of legal interpretation that unduly rely on the judicial role). Levinson further points out that the judge’s role is not limited to finding the single right answer, but includes responding to advocates arguments. Id. at 454-55.
319. See supra notes 201-59.
320. See Cooter, 496 U.S. at 401-05. The Court’s analysis on this point is sketchy. It makes the argument that these are fact sensitive questions, yet it fails to address in detail any of the appellate cases using the three-tiered standard. See id. at 399, 405 (acknowledging, without expanding on, the existence of the three-tiered standard for which petitioner was arguing, and flatly dismissing it in favor of “abuse of discretion”). These courts seemed to have no difficulty with the process. The Court never illustrates the utility or difference between the two paradigms. More importantly, the Court never points out why those courts using the de novo standard were wrong or what was problematic about their decisions.
decisionmaker, the trial court judge, the Supreme Court nevertheless still expects the decisionmaking process to adhere in some fundamental way to the norms of the "legal" paradigm and the adjudicative arena.\textsuperscript{321}

The paradigm of discretion as "skill" is invoked here as a "pragmatic" alternative to the traditional legal paradigm. The paradigm of discretion as skill has no internalized norm defining the tolerable limits of variability or the expectation of consistency in the courts' decisionmaking. This is not true of the "legal" paradigm or the courts' exercise of adjudicative discretion. This difference in the two paradigms is a significant point of tension: When the courts emphasize the utility of their pragmatic "skills" and the disutility of their "legal" skills, what is their assumption regarding the tolerable limits of variability in the resulting decisionmaking? On one level, more variability must be tolerated simply because more factual variability is contemplated by the process. But how much more variability? How should the courts conceptualize this as a decisional "norm" to guide their own decisionmaking?\textsuperscript{322}

The Supreme Court freely acknowledges that this appellate strategy\textsuperscript{323} will do little to further the process of clarifying and developing the doctrinal basis of the Rule, or otherwise enhance uniformity and predictability in Rule 11 decisions.\textsuperscript{324} This does not cause the Court any undue discomfort, however. It appears willing to tolerate some level of variability, inconsistency, and lack of predictability in the Rule 11 arena in exchange for increased regulation. Apparently the Court was of the opinion that the trial courts' pragmatic sanctions practice was generating good enough decisions. In this situation the Court saw that it had two options. It could engage in a traditional appellate review of Rule

\begin{itemize}
\item \textsuperscript{321} See Putnam, supra note 163, at 1799 (discussing the similar perspectives of the structuralist and situationalist jurist).
\item \textsuperscript{322} Professor Yablon's study indicates that, in other adjudicative contexts, the substitution of the "skill" paradigm for the "legal" paradigm was based on the assumption of right answers that could be achieved in practice. See Yablon, supra note 18, at 264 ("This assumption of right answers in practice, which cannot be generalized or stated in rules, leads to a theory of institutional competence that legitimizes trial court discretion.").
\item \textsuperscript{323} The Supreme Court goes on to treat Rule 11's policy goals as further evidence of the need for a deferential standard of review. The Court posits that if the purpose of the Rule is to regulate local litigation practice, it is the trial courts who are acquainted with local litigation practices and who are most familiar with the need for regulation. Cooter, 496 U.S. at 404. The Court justifies its position by arguing that appellate "[d]eference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them." \textit{Id}.
\item \textsuperscript{324} \textit{Id}. at 405.
\end{itemize}
11 sanction decisions or it could adopt a policy of deference.

This article suggests that there is a third alternative, a middle ground between the highly deferential review afforded by the routine application of the “abuse of discretion” standard and the more restrictive “de novo” review using the “legal” paradigm. As set forth in Part III trial courts should be able to justify their exercise of discretion as “skill” by reference to the internal logic of the paradigm. The logic of the paradigm can also provide structure and content to the courts’ appellate review under the “abuse of discretion” standard. With this approach trial courts would be found to have abused their discretion if they didn’t address or comply with the decisional elements that go into making up the paradigm.

As a first step, both trial and appellate courts would be required to examine the case and present issues to determine what type of analysis is appropriate. If the more traditional “legal” paradigm should apply, even to parts of the analysis, the courts would do so. If the “skill” paradigm, or at least components of it applied, it would also be used. This method avoids the problem of appellate courts attempting to

325. The court expressed concern that such a standard would encourage appeals. Yet numerous circuits had been operating under the unitary “abuse of discretion” standard and there was no empirical evidence offered showing they experienced fewer or more appeals than the circuits using the de novo standard. The Court’s deference, particularly in “fact-intensive, close calls,” id. at 404 (quoting SHAFFER & SANDLER, supra note 316, at 14-15), is contrary to much of the commentary on the problem or challenge of close cases. See James W. Nickel, Uneasiness About Easy Cases, 58 S. CAL. L. REV. 477, 477 (1985) (worrying about using “easy cases” as the starting premise of an analysis of the law); Frederick Schauer, Easy Cases, 58 S. CAL. L. REV. 399, 410-11 (1985) (noting that easy cases reflect the “fit” of law and fact, but they are not as easy as they seem); cf. Daniel A. Farber & Phillip P. Frickey, Practical Reason and the First Amendment, 34 UCLA L. REV. 1615, 1654-56 (1987) (arguing that close cases should require courts to articulate the decisional principles or standards used to decide in order to allow for adequate appellate review); Janice Toran, Settlement, Sanctions, and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68, 35 AM. U. L. REV. 301, 324 (1986) (arguing the unfairness of attorney fee awards in close cases under English system and the lack of deterrent potential of such awards).

326. This middle ground has been identified by Professor Vairo and Professor Louis as a place to begin building a more coherent Rule 11 jurisprudence. See supra notes 138-48 and accompanying text.

327. See infra part III.E.

328. See infra notes 355-412 and accompanying text.

329. See infra notes 355-412.

330. Professors Christie and Louis both criticize the appellate courts’ over-simplified approach to this question. In examining the trial courts’ decisions, they seem to find the kind of complex analysis they are calling upon the appellate courts to render. See Christie, supra note 169, at 49; Louis, supra note 23, at 739.

331. This threshold analysis is similar to Professor Louis’s multi-factor appellate review. See Louis, supra note 23, at 739.
substitute their judgments for those of the trial court in cases where it is not feasible or appropriate to do so. The appellate courts' role is very limited in these highly fact intensive cases. Their function is to ensure that the trial court exercised the requisite "skill," as defined by the "skill" paradigm, in rendering its decision. This approach provides a structure for the trial courts' analysis of their fact intensive sanctions decisions and the appellate courts' review under the "abuse of discretion" standard that currently does not exist.

The Supreme Court's approach to Rule 11 reflects in large part the Court's desire to vest the regulatory power created by the Rule in the trial courts. This bias—and the Court's approach—makes sense from an institutional perspective. The trial courts are the courts in the best position to use the power and authority created by the rule to address the problems associated with the adversarial model of adjudication. Yet this strategy does not address the need for accountability and clarity in the form of standards to guide and limit the trial courts' exercise of their discretion under Rule 11. As critics pointed out in response to the Cooter decision, the highly deferential appellate standard of "abuse of discretion," when coupled with the subjective, fact intensive judgments that make up the trial courts' sanctions practice, does little to address the problems of variability, consistency, and predictability in the courts' decisionmaking.

It is difficult to tell from the Cooter opinion how much variability, inconsistency, or lack of predictability is tolerable under the paradigm of discretion as "skill" before a serious question is raised about the need for the constraining influence of the "law." The Cooter opinion does, however, analytically affirm the normative assumption of the courts that they are or should be attempting to find the single right or best answer in their sanctions practice. They cannot view all possible alternative outcomes of the decisionmaking as equally acceptable. While the Court is willing to defer to the trial courts' exercise of its discretion as "skill," it does not follow that the definition of a correct or right decision should be defined solely by the limits of the practice. Reviewing the skillfulness of the decision is one way to ensure that the courts are attempting to find

332. Cf Resnik, Failing Faith, supra note 71, at 527 (discussing the emergence of managerial judging and pointing out the expanded discretionary power accorded to trial court judges under the post-1983 Rule 11); Resnik, supra note 23, at 396 (discussing the delegation of power to the trial courts to make local rules that aid in ensuring the just and speedy resolution of cases).

333. Cf CALL FOR COMMENT, supra note 66, at 6-7 (noting that the Advisory Committee defined these as core problems to be addressed by amendment, if possible).
the best or right answer, along with adopting the normative assumption of the legal paradigm that there is a “right” answer. Adoption of this decisionmaking norm will encourage the trial and appellate courts to look at their decisions from a larger institutional perspective.\(^{334}\)

The problem of defining an acceptable level of variability in the application of the rule under the paradigm of discretion as “skill” nevertheless remains.\(^{335}\) It is proposed that the trial courts must adhere to the internal logic of the paradigm of discretion as “skill.” How then do they also address the normative assumption that their sanctions decisions should determine the best fit between the facts of their cases and the Rule defined from the perspective of the legal paradigm? How does their decision define and develop the law of sanctions and the tolerable limits of advocacy and adversarialism? The courts’ evolving sanctions practice makes this dimension of the sanctions analysis more critical than ever. As will be seen below, the 1993 amendments substantially restructure the rule by focusing on its exclusionary function. The new rule, in turn, focuses on significant or important decisions that define and exclude unacceptable dimensions of advocacy and adversarialism.\(^{336}\) A decision under the new rule has potentially far reaching implications as the courts begin to build this decisional data base. This is a significant evolution in the courts’ sanctions practice and warrants some consideration of the impact such decisions will have on the doctrinal development of the Rule.

**D. The Evolving Paradigm of Discretion as “Skill”**

The courts’ Rule 11 sanctions practice is evolving. Courts unable to fit their sanctions practice within the narrower “legal” paradigm are comfortable with this trend emphasizing the courts’ pragmatic skills.\(^{337}\) There appears to be a clear consensus among the courts that the practice is not easily reducible to rules and that the trial courts are well situated to handle the regulatory problem of frivolous litigation. However, it is less clear how the “shared [normative] assumption of trial and appellate judges” that Rule 11 sanction decisions “can be made correctly at the

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334. *See infra* notes 355-412 and accompanying text.
335. *See* Brilmayer, *supra* note 26, at 376 (discussing the difference between acceptable variability and reversible legal error).
336. *See infra* notes 436-500 and accompanying text.
level of practice”338 can be reconciled with the resulting inconsistency or variability in the case law. One solution is simply to define a skillful exercise of discretion as correct per se. Under this approach, the courts’ sanctions practice defines the tolerable limits of variability.339 Yet this is precisely the perspective challenged by the Rule’s critics. They argue that there should be constraints other than the courts’ experience and subjective judgments that limit and guide the courts’ exercise of discretion. This “skill” element represents a major point of tension within the courts’ evolving Rule 11 practice. On the one hand, a judge’s managerial competence is defined largely by her highly personalized, experiential view of litigation and the needs of her court.340 In the adjudicative arena this experiential dimension of the courts’ skill and expertise is deemed to encompass a larger institutional context and reflect a less personalized or idiosyncratic perspective. This difference can be illustrated by the different ways courts justify their subjective or intuitive judgments. In some instances it is deemed “appropriate for a decisionmaker to refer to his or her own discretion in offering a justification for a decision.”341 In other instances this internal reference is viewed as inappropriate and the court must justify its decision as an effort to reach the best or right result within an externally imposed legal framework. There is little doubt that the courts’ evolving sanctions practice has a significant experiential basis.

This subjective, experiential base to the courts’ Rule 11 competence is the reason why a form of justification is needed that is less self-referring or self-justifying. In a sanctions case, to pass muster, the practice of delegating decisions to the courts’ discretion as “skill” should produce decisions that represent acceptable applications of this skill and comply with the standards “recognized as relevant to judging the practice as a whole.”342 A highly idiosyncratic view is suspect. As a result, the problem of variability continues to plague the rule, with some critics inevitably arguing that it is too wide and others inevitably arguing that it falls within tolerable limits.

How are the courts to justify these increasingly diverse, fact sensitive, subjective judgments as a legitimate exercise of their judicial
power? If the court's power ultimately derives from its authority and ability to produce legal decisions—decisions based in the law—these pragmatic decisions are problematic. Numerous critics have questioned this move away from rule-based decisions and the role of the judge as a principled decisionmaker. These critics question the practice of delegating decisions to the courts' discretion as "skill" in matters that contemplate or call for a single best or right answer, or at least a narrower range of tolerable variability. While some of these critics challenge this trend in the procedural arena, the harshest criticism is reserved for "pragmatic" decisionmaking in the adjudicative context. These same concerns have been raised regarding the courts' sanctions practice under Rule 11.

The paradigm of discretion as "skill" can be better understood, if the paradigm can be challenged. There are two primary ways to criticize the courts' exercise of discretion as "skill." The first is to accept the decisional paradigm and utilize its internal criteria to evaluate its

343. See Putnam, supra note 163, at 1808. "Situated" judges' intuition is shaped by their prior training, their character, and the totality of their past experience. What 'situationalist' and 'formalist' judges share is precisely that they were trained in the same legal system .... They differ in the way they see themselves and in how they determine what to do at the next step (particularly in hard cases).

344. This idea of legitimate judicial authority and the legitimating function of this "legal paradigm" has been discussed previously. See supra notes 17-19, 26 and accompanying text.

345. The critique of radical indeterminacy challenges the legitimacy of legal decisionmaking that is not narrowly grounded or driven by a formal rule structure. In the adjudicative arena the critique of indeterminacy—the development of scholars exploring the work of legal realists—argues that to the extent the law does not generate a single right answer it is radically indeterminate. See Anthony D'Amato, Can Any Legal Theory Constrain Any Judicial Decision?, 43 U. MIAMI L. REV. 513, 514 (1989) (arguing that "legal theory is inherently incapable of identifying which party should win any given case" and that legal outcomes are largely a function of the interpretive community within which we live—not of the law); D'Amato, supra note 180, at 148 (the "[i]ndeterminacy debate ... is ... the key issue in legal scholarship today" and evidences "an immense paradigm shift in the way we think about law"). But see Robin West, Constitutional Skepticism, 72 B.U. L. REV. 765, 791 (1992) (arguing that the indeterminacy critique ignores the meaningfulness of the written law).

346. See Atiyah, supra note 112, at 1251.

347. See Brilmayer, supra note 26, at 363 (challenging the assumption that the legal paradigm assumes a single right answer and that deviations from that single right answer are "error"). Brilmayer asserts that tolerable variability, what she calls "wobble" in legal decisionmaking, is defined differently depending on the circumstances. Id. at 366. See Yablon, supra note 18, at 264.

348. See Resnik, supra note 23, at 380; Yablon, supra note 18, at 244-52 (discussing this "proceduralist" critique of discretion and the accompanying variability in discretionary decisions).

349. See Atiyah, supra note 112, at 1271 (expressing concern that this move away from principled decisionmaking will undermine the "moral authority" of the courts).
application on a case by case basis. The other acknowledges that even if the given instances of the practice adhere to the criteria of a skillful decision, the practice can be criticized by reference to values or factors which are “recognized as relevant to judging the practice as a whole.” Some of the criticisms of Rule 11 are clearly aimed at improving the skill dimension of the practice. Others challenge the practice itself. This latter approach to the paradigm reflects a deep-seated reluctance to treat the courts’ Rule 11 practice, or at least the threshold liability issues defining the frivolousness of the claim, as delegated to the courts’ broad exercise of discretion.

When the practice itself is challenged in this way, the institution has a limited repertoire of responses available to it. The courts can attempt to develop a more doctrinally circumscribed approach to the decision. They can withdraw from the practice until the legislature acts to define and clarify the regulatory reach of their practice, or they can continue to develop and improve the skills dimension of the practice with an eye toward developing a coherent jurisprudence and more detailed rule structure. It is unlikely that the courts current “skills”-centered sanctions practice will be set aside despite these criticisms, nor does a more circumscribed, doctrinally driven rule appear to be in the offing. The Advisory Committee is currently unwilling to revisit the underlying assumption that trial courts have the skill and experience to make proper Rule 11 decisions, nor are they willing to challenge the assumption that the courts’ sanctions practice is not amenable to doctrinal restrictions or further reducible to rules. The question is whether improving the practice can fully address the demand for decisions driven less by the subjective judgments and personal experiences of the courts, and more by articulated doctrine, rules, and a coherent sanctions jurisprudence. That is, can the courts ensure that a matter that is not rule bound meets the requirements of a decision based in the law? The answer is a hesitant yes. The next section addresses the question of whether the practice fits the paradigm, and if not, whether it can be made to fit better.

E. Constructing the Paradigm of Discretion as Skill

The paradigm of judicial discretion as “skill” has its own internal logic. Professor Yablon argued this point persuasively. See Yablon, supra note 18, at 267-68.
of their perceived skill and institutional competence, a legitimate exercise of that discretion requires the courts to exercise that skill and expertise. The decisionmakers’ inability to fit these pragmatic decisions within the traditional legal paradigm does not free them from the challenge of developing a method of decisionmaking that addresses the underlying normative concerns of the practice.\(^{353}\) This Article challenges the assumption that because the courts’ highly discretionary decisions under Rule 11 fall outside of the traditional “legal paradigm,” no “legal standard” exists by which they can be judged other than a vague “abuse of discretion” standard—itself viewed as inherently ambiguous.\(^{354}\) The courts need a normative decisionmaking model for their sanctions practice that addresses both the structural and contextual elements of the courts’ pragmatic decisionmaking. The paradigm of judicial discretion as “skill” has its own internal logic and can at least provide part of such a model.

One way to ensure the “fit” between the practice and the paradigm is to require the courts to demonstrate that their decision was “skillfully” rendered.\(^{355}\) The elements of this decisionmaking—what it takes to ensure the practice fits the paradigm—are outlined below. The solution being proposed—developing a model of normative decisionmaking for the courts’ pragmatic sanctions practice—essentially adds another element to the practice. This element requires the courts’ to justify their decision as a legitimate exercise of their pragmatic “skill.” The proposal is simple to state—establish the fit between the practice and the paradigm—but difficult to implement. One concern is whether expanding the courts’ sanctions practice in this fashion will unduly burden the courts. This should not be a problem in light of recent changes to the Rule. The Advisory Committee’s Note to the 1993 rule makes it very clear that Rule 11 is intended to reach serious breaches of conduct, and that the exceedingly broad and variable uses to which it has been put in

\(^{353}\) See Wells, supra note 61, at 1737.

\(^{354}\) See supra note 265 (discussing the inherent ambiguity in the “abuse of discretion” standard, which permits its application to a wide range of factual scenarios).

\(^{355}\) It is beyond the scope of this Article to resolve the underlying question regarding the legitimacy of these types of decisions—that is, whether or not they fall outside of the legal paradigm. For our purposes it suffices to attempt to bring the practice in line with more traditional legal decisionmaking. See Wells, supra note 61, at 1728 (discussing pragmatism in legal thought—the recognition “that all judges bring their own situated perspective to the case and do the best they can, under all the circumstances, to reach a fair and just disposition”). Wells goes on to argue that adopting a pragmatic perspective does not free the judiciary from adhering to a model of normative decisionmaking which includes both structured decisionmaking and contextual elements, and which must explicate both in order to justify the result. Id. at 1737-38, 1740.
the past should cease.356 Reducing the focus of Rule 11 enhances its institutional role and justifies consideration of the proposal set forth in this Article. If the Rule is intended to define the limits of tolerable advocacy and the courts’ formal adjudicative role, and not merely regulate attorney conduct,357 expanding the courts’ sanctions practice to include a more structured element of explication and justification should not pose an undue burden.

The decisional elements outlined here and proposed to be addressed by the courts in their sanctions decisions are derived from the internal logic of the paradigm. The first element, the courts’ “fact competence,” underlies the paradigm. Courts need to ensure that there is a record reflecting the “fact” sensitive nature of the inquiry.358 How are the facts so unique or variable that there is little opportunity for analysis, classification, and other forms of legal manipulation?359 The appellate

357. This narrower approach to Rule 11 is seen in the commentary and was discussed earlier. See supra note 113 and accompanying text (pointing out the commentators who view Rule 11 primarily as a means of forcing lawyers to fulfill their duties of professional responsibility). As Professor Vairo points out, attempts to define Rule 11 as focused primarily on lawyers’ conduct does not mitigate the institutional impact of Rule 11 as a limit on the adversarial process. Vairo, Prologue, supra note 3, at 40-42; see Morton Stavis, Rule 11: Which is Worse—The Problem or the Cure, 5 GEO. J. LEGAL ETHICS 597, 597-99 (1992) (describing the relative “openness” of the federal courts to litigants and lawyers alike prior to the harsher sanctions criteria embodied in the 1983 amendments to Rule 11); David B. Wilkins, Who Should Regulate Lawyers?, 105 HARV. L. REV. 801, 838-41 (1992) (noting that Rule 11 is merely a restatement of a lawyer’s professional obligation not to assert frivolous claims and that the rule is improperly used to gain economic or strategic advantages over one’s adversaries).
358. See, e.g., Ganheart v. Babbitt, No. 93-2013, 93-2570, 1994 U.S. Dist. LEXIS 15103, at *6 (E.D. La. Oct. 17, 1994) (unreported decision) (treating the multiple filing of lawsuits as an easy case without requiring much fact development and denying monetary sanctions, instead, issuing an order of contempt requiring plaintiff to seek court permission prior to filing further claims); Whitmer v. John Hancock Mut. Life Ins. Co., No. 91C3067, 1993 U.S. Dist. LEXIS 7163 (N.D. Ill. May 26, 1993) (unreported decision) (involving one of multiple suits filed by pro se plaintiffs in which summary judgment and dismissal were granted, but sanctions denied). In Whitmer, the court acknowledged the ongoing nature of the dispute between the parties, but refused to sanction despite clear evidence in the record that the claims had no legal merit. Id. at *24-26.
359. See Feinman, supra note 178, at 662 (asserting that the classification and categorization implicit in legal decisionmaking determines the way in which the law is viewed and what normative objectives are focused upon). In numerous cases, there doesn’t appear to be any claim that the facts require this type of deferential review. See Spiller v. Ella Smithers Geriatric Ctr., 919 F.2d 339, 346 (5th Cir. 1990) (sanctions granted with court castigating counsel for shoddy work and conclusory allegation of a “public policy tort”). Nothing indicates that the record cannot capture the nuance of the case or that sanctions are not based primarily on the court’s “legal analysis.” See Smith Int’l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1199-1201 (5th Cir. 1988) (reversing sanctions and refusing to defer to the district court on what it saw to be an essentially legal analysis—whether a reasonable attorney could have taken the position). Yet circuit courts retain the discretion to develop
Courts routinely defer to the trial courts' "fact competence." Even in close or hard cases, the appellate courts defer to the trial court particularly where they suspect that some factual nuance of the case could not be captured on the record.\textsuperscript{360} Care should be taken that this institutional deference does not merely sanction the inadequate development of a factual record. The paradigm of discretion as "skill" thus contemplates a decision that is fact driven and the courts should adhere to this norm in their decisionmaking. A brief review of the Rule 11 case law reveals numerous cases in which the "facts" are well developed and discussed.\textsuperscript{361} Overall, this decisional element is acknowledged and addressed. However, there is little effort in the case law to argue that the facts are unique or difficult to categorize, classify, or analyze under the "legal" paradigm.\textsuperscript{362} Yet, this aspect of the case justifies the courts not

a substantial factual record where they see fit. This stricter scrutiny is clearly seen in the following case: Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir. 1988) (indicating little, if any, deference to the trial court or any inability to develop the facts of the case), \textit{rev'd in part sub nom.} Pavelic & Leflore v. Marvel Entertainment Group, 493 U.S. 120 (1989). Two more typical cases illustrate the type of fact development routinely seen at the district court level. \textit{See} Morris v. Orman, No. 87-5149, 1992 U.S. Dist. LEXIS 20923, at *9-10 (E.D. Pa. Dec. 31, 1992) (granting sanctions, but facts not appearing difficult or so unique as to admit of no review); Allen v. Utley, 129 F.R.D. 1 (D.D.C. 1990) (stating that facts were well developed and not particularly complex or problematic).\textsuperscript{360} In one case the circuit court deferred to the trial court's personal knowledge of the lawyers and the dispute. Markwell v. County of Bexar, 878 F.2d 899, 903 (5th Cir. 1989). But in another case the same circuit undertook to fully re-examine the factual record. \textit{See} National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216, 222-24 (5th Cir. 1988) (reversing the award of sanctions after a detailed review of the facts and the inferences to be drawn therefrom). This case may also stand for the principle that sanctions imposed after trial are more closely scrutinized. \textit{But see} Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313 (5th Cir. 1989) (awarding sanctions after trial), \textit{cert. denied}, 496 U.S. 935 (1990). There is a line of cases in which appellate courts have deferred to the trial court in a close case. \textit{See} Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., Inc., 9 F.3d 1263, 1269 (7th Cir. 1993) (holding that "when the issue is not free from doubt we should accord great deference to the judgment of the district court"); Ladner v. Thornton Township, No. 91-2087, 1992 WL 163240, at *1 (7th Cir. July 14, 1992) (limited use opinion) (reported without published opinion at 968 F.2d 1218) ("While this is admittedly a close case, one that we might well have decided differently as an original matter, we defer to the district court's findings in this case"); Bass v. Southwestern Bell Tel., Inc., 817 F.2d 44, 47 (8th Cir. 1987) ("While this is a close case, we find no abuse of discretion here"). There is also a line of cases in which the courts of appeals have called for greater articulation. \textit{See In re} Shain, 978 F.2d 850, 855 (4th Cir. 1992) (Wilkinson, J., concurring) (in a "close case," the court requires greater articulation of the reasons for the decision); \textit{Markwell}, 878 F.2d at 902 (in a "close case" involving a dismissal for want of prosecution, the court looked for development in the record of aggravating factors).

361. \textit{See supra} notes 359-60.

362. Courts can respond two ways to indeterminacy or "new" fact patterns. They can respond by approaching the questions as calling for decisions characterized by "discretion." Alternatively, indeterminacy and "new fact" patterns can call forth a legislative response with the courts attempting to exercise traditional legal skills to fill in the interpretive gaps. That is not what has occurred in the
applying the traditional "legal" paradigm because there is no neat fit.

The paradigm assumes that the courts have the specialized skill and institutional competence to fairly and accurately evaluate these facts. To address this element, the courts should describe and explain the experiential basis of their decisions, particularly if the decision reflects a kind of rough empiricism. In the sanctions arena if the judge is relying on her knowledge of local lawyering practices or has developed experiential data from sitting on the court on which it relies to define acceptable advocacy, this should be made clear. The judge must also balance her personal experience and perspective against concerns regarding personal and institutional bias in the sanctions arena. The paradigm’s appeal to the judges’ skill and experience calls into play a larger institutional perspective on the part of the courts.

The paradigm assumes that this specialized knowledge and expertise renders the trial court judges competent decisionmakers and guides their exercise of discretion. The courts’ Rule 11 decisions must reflect more than judges’ personal views as judicial managers. Rule 11 calls upon judges to sit as objective jurists faced with the challenge of defining the limits of tolerable advocacy and the courts’ future adjudicative functions. The overriding assumption of the paradigm is that the courts’ experience

Rule 11 arena. See Barak, supra note 16 at 113-51 (discussing courts’ legislative acts as filling in the gaps in the law); Yablon, supra note 18, at 274-77 (discussing discretion as creativity). While courts grapple with the proper way to formulate the definition of a “frivolous” lawsuit, this activity bears little resemblance to the formal adjudicative acts we associate with judicial legislation. As Feinman points out, the traditional legal analysis would focus on developing and elaborating the fact patterns/paradigms and allowing how they fit with the law. See Feinman, supra note 178, at 704. What we have here is the opposite. The courts assume that the facts are unique (that assumption is open to question) and they grapple with ways to express their “practice” opinion regarding the relative merits or “sanctionability” of the claims. These formulations tend to focus on the subjective dimension of the courts’ opinions—how to express that “gut instinct.” This analysis does not address the skill element in the paradigm of discretion as “skill.” Courts need to move past this point and begin to look for patterns and evaluate the objective components of their sanction expertise. The “easy” cases may provide a model for this analysis. See Chapman & Cole v. Itel Container Int’l B.V., 865 F.2d 676, 684 (5th Cir.) (ordering sanctions where counsel has relied on unverified hearsay when other avenues of exploration were available), cert. denied, 493 U.S. 872 (1989); Callahan v. Schoppe, 864 F.2d 44, 46 (5th Cir. 1989) (looking in the telephone book is not adequate investigation, particularly when the error is brought to the attention of counsel); St. Arnant v. Bernard, 839 F.2d 379, 382-83 (5th Cir. 1988) (ordering sanctions when evidence was readily available through means other than the client); Corpus Christi Taxpayer’s Ass’n v. City of Corpus Christi, 858 F.2d 973, 976-77 (5th Cir. 1988) (holding as a matter of law that judge had failed to adequately explain his denial of sanctions when the claim was clearly barred by res judicata), cert. dismissed, 490 U.S. 1032, cert. denied, 490 U.S. 1065 (1989).

363. As noted by Professor Burbank, however, judges’ subjective judgments are not always grounded in an empirical reality. See Burbank, supra note 80, at 1937.

364. See cases cited supra notes 358-60.
has solidified into "skill" and "expertise," the ability to make practical legal judgments that will be acceptable to the relevant practice community. This "skill" dimension defines the contours of the courts' discretion and it must in turn be defined by the courts. Yet this element of the paradigm is rarely addressed in trial or appellate court opinions. The "skill" is assumed, but never defined or tested. In some instances courts grapple with this "task" of defining the practical judgments they need to bring to bear. More often than not, however, this dimension of the decision is not addressed explicitly and is merely assumed as part of the practice. This unwillingness to justify by any means other than to point to the facts, their discretion and their experience may in fact be one of the more interesting defining characteristics of the courts' practice.

Pragmatic decisions routinely require the courts to make principled choices in selecting a context within which to evaluate the dispute which represents the third element of the paradigm. The burgeoning body of writings on this topic forcefully makes the point that the definition of context largely defines the normative parameters of a dispute and its outcome. In exercising this element of discretion the court should select the context that best reflects the normative contours of the underlying legal debate. For example, in a Rule 11 case, is the underlying legal debate viewed as narrowly focused on the steps to be taken in a typical prefiling investigation? Or is the underlying legal debate viewed more expansively as raising questions about the duty of resource-poor litigants and lawyers to engage in the time consuming and expensive process of prefiling investigation? When evaluating

365. The research has yet to unearth a district court case in which this experiential dimension of the courts' practical judgments has been laid out. The skill is assumed as a given in most analyses, as is the rough empiricism inevitable in such decisions. What is clear is that most courts approach their task on a case-by-case basis, and there is little effort to classify the facts or otherwise explain the fit between facts and law in an effort to explain the law. See cases cited supra notes 358-62.

366. See supra notes 201-60 and accompanying text (discussing the concept of context and how it impacts legal decisionmaking).

367. See Minow & Spelman, supra note 183, at 1598-99 (arguing that since different contexts give rise to different legal interpretation, the courts' selection of and attention to context should be principled and made subject to scrutiny); cf. Tobias, 1993 Revision, supra note 3, at 171-75 (challenging the narrow normative context of typical Rule 11 decisions).

368. See Naomi R. Cahn, Inconsistent Stories, 81 Geo. L.J. 2475, 2477 (1993) (discussing the inherent difficulty that the legal system has appreciating the contextual dimensions of the representational relationship); Tobias, 1993 Revision, supra note 3, at 191-205 (discussing the need to expand the factual and contextual parameters of the attorney-client relationship in the Rule 11 context); Wilkins, supra note 357, at 814-19 (arguing that legal contexts can be defined by the identity of the client and the regulatory systems available to enforce the related professional norms);
whether a claim should be sanctioned as frivolous, should the court
consider the nature of the claim, such as whether it raises important
questions of public policy and individual rights? Or should the court
level the playing field and treat all claims in the same way?\(^{369}\)

It is obvious that certain fundamental procedural principles regarding
the trans-substantivity of the rules are called into play by this “call for
context.” However, so long as contextual elements play any role at all in
resolving the sanctions question, they must be addressed.\(^{370}\) The sanction-
ing court needs to be clear whether it is looking at the sanction issue
narrowly, with or without undue emphasis on the unique aspects of the
representational relationship, the type of claim being raised, or the role
of the lawyer viewed within a larger social or political context. This
element of the courts’ pragmatic decisionmaking has not been well
developed in the sanctions case law.\(^{371}\) While the courts appear to
approach these contextual elements objectively, trends in sanctions
indicate that this is not always the case.\(^{372}\)

The call to clarify the contextual elements of the case relied upon
by the court should also help the courts address questions of institutional
context. The courts can make it clear if they view the sanctions issue as
one calling for expediency and efficiency in its judicial resolution and a
simple rule structure to ensure future flexibility in the application of the
Rule. Or does the nature of the sanctions question require the courts to
apply the more traditional norms of restraint and objectivity with an eye

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Beck, supra note 82, at 878 (discussing the tension between Rule 11 and the traditional attorney
client relationship).

369. See Tobias, 1993 Revision, supra note 3, at 190-91; Tobias, supra note 89, at 1508
(describing the process by which Congress and the federal courts have eroded the tran-substantive
nature of the Federal Rules by developing myriad judicial approaches to different species of cases).

370. Professors Mullenix and Tobias have largely pinned down the parameters of the debate for
purposes of Rule 11. Professor Tobias persuasively argues that assuming a “neutral” context is naive
and shields the courts’ sanctions practice from the scrutiny it deserves. See Carl Tobias, Rule 11
that the call to context raises political and normative concerns that should not be left to the courts
to handle on a case by case basis and that should not cloud the procedural goals of the rules.
Mullenix, supra note 164, at 798-802; see Kenneth F. Ripple & Gary J. Saalman, Rule 11 in the

371. Professor Tobias makes an effective argument in favor of including a contextual element
in the courts’ sanction analysis of civil rights litigation. See Tobias, 1993 Revision, supra note 3, at
201, 214. He also argues that patterns in the sanction case law indicate the normative biases brought
to bear. Id. at 200-05. The goal is to challenge those biases by making them clear and requiring the
courts’ to defend these choices. Id.

372. See Martines, supra note 20, at 611-18; Tobias, Civil Rights Plaintiffs, supra note 3, at
1790 (arguing that the 1993 amendments allow for too much judicial discretion which has the
potential to impact unfairly upon civil rights plaintiffs).
toward elaborating, interpreting, and developing the exclusionary function of the rule? Regardless of how the individual court approaches its sanctions practice, these contextual elements of the decision need to be made clear.\footnote{373} This is one way to get at the underlying normative assumptions driving the decision. This enables other trial and appellate courts as well as practitioners, to evaluate the practice for “bias,” whether good or bad.

Justification for a decision under the “skill” paradigm should address the question of the fit between the practice and the paradigm. For purposes of this discussion, the question is whether the sanctions issue is one that falls within the paradigm of discretion as “skill.”\footnote{374} The push to limit the regulatory reach of the Rule to “conduct” may be an implicit recognition on the part of the Advisory Committee and courts that the paradigm of discretion as “skill” does not fit well those questions involving “legal content.” The court should be able to address the question of whether a pragmatic or a more doctrinally circumscribed approach is appropriate. That is, does the question before the court in fact involve unique or complex facts which are not currently amenable to a traditional doctrinal analysis?\footnote{375} Will this always be so or does the court need to address the demands of an evolving legal practice that can

\footnote{373} See Terrestrial Sys., Inc. v. Fenstemaker, 132 F.R.D. 71, 76-77 (D. Colo. 1990) (exercising restraint in a close case and not sanctioning as a way to maintain a balance between the need for deterrence and need for zealous representation); \textit{supra} notes 120-26 (discussing judicial restraint in close cases). In other cases the legal context has made a difference in how the court weighs the balance in a close case. See United States v. Terzado-Madruga, 897 F.2d 1099, 1119 (11th Cir. 1990) (“[T]he balance in close cases is struck in favor of admissibility . . . .”); Rush v. McDonald’s Corp., 760 F. Supp. 1349, 1365-66 (S.D. Ind. 1991) (holding that in a close case, court should lean toward the least severe sanction), aff’d, 966 F.2d 1104 (7th Cir. 1992); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 224 (N.D. Ill. 1975) (holding that in a close case, court should err on side of movant seeking disqualification), rev’d \textit{in part on other grounds}, 532 F.2d 1118 (7th Cir. 1976); \textit{In re} Associated Bicycle Serv., Inc., 128 B.R. 436, 456 (N.D. Ind. 1990) (holding that resolution of the contractual relationship is resolved in favor of employment and not an independent contractor in a close case).

\footnote{374} There are numbers of Rule 11 decisions that can be construed as “bright line” or easy cases. These are cases that lend themselves to an analysis that more closely fits the normative assumption of a traditional legal analysis. However “easy cases” are themselves prey to a set of normative assumptions about the “fit” between the “law” and the “facts” that should periodically be questioned. \textit{See} sources cited \textit{supra} note 19. \textit{But see} Tobias, 1993 \textit{Revision}, \textit{supra} note 3, at 195-202 (questioning the courts response to the fact paradigms that routinely define civil rights cases and arguing that a broader definition of context can alter the courts’ evaluation of these fact patterns).

\footnote{375} See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 (1990) (noting that it is particularly difficult within the context of Rule 11 decisions to make the traditional appellate law/fact distinction because “[r]ather than mandating an inquiry into purely legal questions . . . the Rule requires a court to consider issues rooted in factual determinations”).
be subjected to regulation under the rule on a more routinized basis? 376 Nothing in the case law indicates that the courts have ever challenged the "fit" head on when a trial court has relied upon its institutional "skill." There is, however, case law in which the courts veered toward a more traditional legal analysis when addressing different elements in the courts' analysis, particularly threshold liability issues. 377 While the courts' traditional doctrinal skills are not usually called into play in the paradigm of discretion as "skill," even highly "indeterminate" rules such as Rule 11 require the courts to acknowledge the guidance provided by the Rule's structure and applicable law. 378 Indeterminate rules by their nature call forth a myriad of factors and facts generating a potentially rich contextual analysis. But explication and explanation of the courts' understanding of the rule is still an essential part of the decisionmaking process. 379 In addition, the court should exercise their doctrinal expertise by examining each decision rendered to see what general principles and policies can be inferred from the facts and analysis. In particular, the courts need to examine how the particular matter adds to the developing case law and the courts' efforts to define the tolerable limits of advocacy.

The primary elaboration of the Rule to date has focused on clarifying the basic structure of the Rule and developing the underlying policies to guide decisions in "close" or "hard" cases. 380 The litigation over the past ten years has resolved much of the early confusion regarding the rule's scope and purpose. The ongoing debate over the threshold issues will continue despite the amendments' attempts to address the question of developing legal standards and the need for more

376. The Supreme Court also takes solace and comfort from the idea of "easy" or clear cases, that is, those that generate regulatory bright lines. See id. at 403-05 (discussing situations in which repeating fact patterns could become subject to a stricter application of the Rule).

377. Some courts construe the threshold liability issues more strictly than others. See, e.g., Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1081-82 (7th Cir. 1987) (stating that a court should determine if the litigant is arguing for a change in the law or is either intentionally ignoring the law by relying on obscure and likely overruled authority or simply has failed to perform adequate research), cert. dismissed, 485 U.S. 901 (1988).

378. See West, supra note 345, at 791 (arguing that the critique of indeterminacy ignores the fact that laws, even highly indeterminate laws, have meaning).

379. The Supreme Court made this point in Cooter. While deferring to the trial court's fact competence and unique institutional perspective and expertise, the Court reserved for itself the right to reverse if the law was incorrectly stated. Cooter, 496 U.S. at 402.

380. The courts' efforts to capture the essence of their practical judgments in formulas to guide future application of the rule is exemplified and discussed above. See supra notes 120-27 and accompanying text; see also cases cited supra note 223.
In any legal decisionmaking, the courts need to develop a way to address the "close" or "hard" case. While the practice tolerates variability in the accumulated output of the courts, throughout the commentary and the case law references to the "close" or "hard" case as a problem become apparent. These are cases in which the full range of options has been identified, to sanction or not, and the options are deemed to be in equipoise or in conflict. The paradigm of discretion as "skill" offers the courts a way to handle the question of the "close" case. The paradigm assumes that any given discretionary decision can be evaluated from the perspective of a similarly situated "skillful" practitioner. Viewed from this perspective the "close" case is a short hand way to examine the logic of discretion from the decisionmaker's point of view as well as a way to "test" the skillfulness of the decision.

The "close" cases decided in the Rule 11 context are indicative of how trial courts have tried to grapple with their own discretion. How do they define acceptable variability in their own decisionmaking and how do the courts determine whether their decision falls within this acceptable range? The range of acceptable variability in highly discretionary decisions is defined in the general literature on discretion as a "zone of possibilities." This "zone of possibilities" represents the alternative outcomes in the decisionmaking process that would be acceptable to knowledgeable lawyers or jurists comprising the relevant professional or

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381. Professor Tobias' analysis points out that there will continue to be confusion regarding the definition of threshold liability and the standards to be used to determine the need for, and nature of, appropriate sanctions. See Tobias, 1993 Revision, supra note 3, at 208-14.

382. See supra notes 120-26 and accompanying text (discussing as a general jurisprudential issue the challenge posed by the "hard" or "close" case).

383. See Brilmayer, supra note 26, at 365 (distinguishing between "wobble," an acceptable "discrepancy between a decision and the relevant decisionmaking inputs," and legal error). A finding of error is premised on the assumption that the actual result should have conformed to a particular result. Id. at 363. Professor Brilmayer points out that "wobble" or decisional variability can be a function of many factors not traditionally associated with legal error. See id. at 366-69. But cf. Thompson, supra note 26, at 424 ("[D]ecisional inconsistency, while neither abstract error nor necessarily wrong, is also not necessarily always right."). Professor Thompson argues that the goal of the adversary system is "to minimize the extent of avoidable unacceptable inconsistency of decisions," id. at 425, but that defining unacceptable variability is difficult to do. Id. at 426-27.

384. See supra notes 120-26 and accompanying text (discussing the jurisprudential concept of the "close" case).

385. See Yablonski, supra note 18, at 261.

386. See Yablonski, supra note 18, at 265 ("[T]he only way to critique a particular instance of a practice is to use one's own knowledge of what constitutes a skillful exercise of the practice . . . ").

387. See BARAK, supra note 16, at 9 ("[D]iscretion assumes a zone of possibilities rather than just one point. It is founded on the existence of a number of options that are open to judge.").
legal community.\textsuperscript{388} This formulation closely parallels the formulation of acceptable discretion under the “skill” paradigm.\textsuperscript{389} The use of the “close” case as a rough rule of thumb to define the limits of tolerable variability within the paradigm of discretion as “skill” also reflects the intuitive and subjective nature of the courts’ sanctions practice. Asking how a skilled practitioner would view the decision is another way of formulating the question of whether the legal community would agree with the result.\textsuperscript{390}

Commentators who advocate a more restrictive application of Rule 11 argue that the “close” case defines the point at which the trial court should exercise restraint and not order sanctions.\textsuperscript{391} In highly subjective fact sensitive decisions such as these, the decisionmaker’s ability to argue persuasively that similarly situated skillful practitioners would reach an opposite result should cause her to pause. Using the “close” case to define the limits of the courts’ discretion to sanction is certainly not a bright line, but it appears to have some utility—hence its use by the courts and commentators.

Incorporating the rough rule of thumb of the “close” case or “decisional opposite” as an element of the courts’ sanctions practice does not pose undue burdens. It simply asks a court about to order sanctions to pose to itself the decisional opposite as a way to test the skillfulness of its decision.\textsuperscript{392} By asking whether other jurists would agree with the decision, a judge also avoids an unduly idiosyncratic or highly personalized approach to the sanctions question. This approach asks the judge to think about the acceptability of her decision within the larger legal community, a perspective that is consistent with the restructuring of the

\textsuperscript{388} Id. at 11 (citing Fiss, supra note 47; Greenawalt, supra note 25, at 386).

\textsuperscript{389} See Yablon, supra note 18, at 261-68.

\textsuperscript{390} This point is made by Judge Barak:

The legal community is the professional outlook of the collectivity of lawyers in a particular state. An option is lawful if the legal community views it as such and if the legal community’s reaction to the choice of this option is not one of shock and mistrust. An option is unlawful if the legal community sees it as unlawful and considers it impossible that a knowledgeable lawyer would choose this option.

BARAK, supra note 16, at 11 (footnote omitted).

\textsuperscript{391} See sources cited supra note 191 (discussing the need for judicial restraint in Rule 11 decisions).

\textsuperscript{392} The technique or method of posing the opposite decision as a way to test or evaluate the courts’ decisionmaking has been suggested in other contexts. See Richard Delgado & Jean Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error?, 69 Tex. L. Rev. 1929, 1952-60 (1991) (discussing how to avoid the error of false objectivity by developing a critical perspective); Martinez, supra note 20, at 559 (suggesting that courts should look at the opposite result to test their own decisions for bias).
Rule to emphasize its exclusionary function. This approach is particularly apt when the rule is viewed as an attempt to institutionalize acceptable norms of practice. Viewed from this perspective the court should ask itself the key question: Will there be consensus within the relevant practice community regarding the exclusion of this type of case or conduct for all similarly situated attorneys and litigants? If not, why not? And if so, how would the courts avoid the overinclusive application of the decision?

A brief comment about the use of the “close” case at the appellate level is needed. Appellate courts reviewing decisions generated under the paradigm of discretion as “skill” use the “close” case differently. Here the “close” case is used to denote a difference in opinion between two sitting jurists and defines the case that the appellate court likely would have decided differently than the court below based on the record before it. When the appellate court makes the statement that a case is a “close” case it is implicitly acknowledging that the lower court has exercised “skill.” A “close” case is just that; it is not one in which the lower court is viewed as having abused its discretion warranting reversal on appeal. The appellate court’s statement poses a conundrum: What should be done when two skillful practitioners reach opposite or conflicting results? This is a problem particularly in the Rule 11 arena where the issue in the “close” case will increasingly be whether or not the appellate court should uphold the sanction ordered by the trial court. However, the case law indicates that appellate courts who raise the question of the “close” case, also routinely defer to the lower court. This deference is grounded in the appellate court’s assumption that the trial court is in a better position to observe and address factual nuances of the case that cannot be captured on appeal. While the appellate court might decide differently on the record, it typically assumes that the

393. See supra notes 3, 49 (discussing the regulation of attorneys and the adequacy of the dictates of Rule 11 in controlling and shaping their conduct).

394. While the United States Supreme Court has talked about the trial courts’ superior knowledge of local legal practices, see Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990), the relevant interpretive community is more broadly defined under the rule than just the local bar. To define it so narrowly would simply exacerbate the concerns regarding the lack of coherence in the case law and the problem of consistency and predictability in the courts’ decisions.


396. See supra notes 120-25 and accompanying text.

397. See cases cited supra notes 120-25 (indicating deference to trial courts and holding sanctions warranted in only the most extreme and obvious cases).

398. See Cooter, 496 U.S. at 403-04.
record cannot reflect the factual richness underlying the sanction decision. The appellate courts are also willing to defer to the trial courts' expertise regarding local litigation practices and the problem of regulating attorneys' conduct during litigation. As a result in these "close" cases the trial courts are given the benefit of the doubt.

As discussed in more detail in the next section, this policy of institutional deference becomes problematic when the appellate courts' deference is automatic. However, the paradigm of discretion as "skill" does not require automatic deference. The appellate courts, particularly in the "close" case, are appropriately asked to evaluate the sanctions decision to determine if it has all of the indicia of a "skillful" decision. This is especially true for decisions regarding threshold liability, that is when the courts' must determine whether a claim is legally or factually frivolous. Yet this call for enhanced review under the "abuse of discretion" standard still contemplates limited appellate intrusion.

One final point needs to be made regarding appellate review of Rule 11 decisions. To the extent a decision regarding threshold liability bears all the hallmarks of a traditional doctrinal analysis going to the merits of a claim, the appellate courts should approach that decision as they would any other exercise of decisionmaking authority under the "legal" paradigm. In Cooter, the Supreme Court adopted the abuse of discretion standard for all appeals under Rule 11. The Court opined that for it to substitute its judgment for that of the trial court would have no effect beyond that of substituting one fact sensitive, subjective judgment for another. Since this process was not likely to reduce variability in the case law or develop a regulatory bright line, the Supreme Court saw no point in investing institutional resources in this process. However, this policy of deference is grounded in an empirically assumption regarding the nature of the courts' decisionmaking and the underlying nature of their sanctions practice. If this assumption proves to be wrong, the appellate courts should rethink their approach.

The final decisional element of the paradigm of discretion as "skill" involves the subjective and intuitive judgments that underlie the practice.

399. Id. at 404.
400. These decisions can vary in nature and scope, requiring different levels of appellate review. See Christie, supra note 169, at 18; Louis, supra note 23, at 738-39, 760-61.
401. Cooter, 496 U.S. at 405.
402. See id. at 403-04; supra notes 261-336 and accompanying text (discussing in detail the Court's decision in Cooter).
403. Cooter, 496 U.S. at 404-05.
Although the courts’ sanctions practice remains grounded in their “individualized judgments, specifically tailored to the facts of the case,” the practice is evolving. One important dimension of that evolution is the movement away from the use of the paradigm of “discretion as skill” as a purely personal or internal reference. The internal logic of the paradigm of discretion as “skill” assumes that there is something called a “skillful sanction decision.” To define that element of “skill” reductively to include virtually any and all decisions reflecting the courts’ highly subjective, intuitive response to the sanctions case, flips the paradigm on its head. This approach would allow the courts to define, through their sanctions practice, the acceptable limits of that practice. Yet that is largely how the trial and appellate courts currently approach their Rule 11 sanctions practice. The courts need to make these normative judgments explicit as part of their “skills” analysis to give some paradigmatic coherence to the Rule 11 jurisprudence and provide greater legitimacy for these discretionary determinations.

This Article proposes limited but critical oversight of the district courts’ sanctions practice. While the courts’ sanctions decisions may vary when lined up next to each other and when viewed from the “inside-out,” from the perspective of the decisionmaker, the intent to render the most skillful decision possible should be clear. The more difficult question is whether it should also be evident that the courts share the normative assumption that there is a single right or best answer to the sanctions question in each individual case. This is the decisional norm that has proven the most problematic in the Rule 11 arena yet there is clearly movement in this direction. This trend is consistent with the Supreme Court’s analysis in Cooter and the 1993 amendments to construe Rule 11 as contemplating a single best or right answer as a norm toward which the courts should strive. This is not an argument that the courts must change their fundamental sanctions practice. Rather, adopting this decisional norm as an element of the paradigm of discretion as “skill” simply requires the courts to begin consciously narrowing the acceptable range of variability in their decisionmaking.

In his study of the paradigm of discretion as “skill,” Professor Yablon observed that in certain contexts and for certain types of

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404. See Yablon, supra note 18, at 262.
405. Id. at 267-68.
406. See BARAK, supra note 16, at 11; Yablon, supra note 18, at 260-61, 263-64.
decisions the courts shared this normative assumption. The question is whether this assumption is different in the Rule 11 context? The internal logic of the paradigm cannot resolve the question regarding the acceptable limits of variability in decisionmaking under the rule. Clearly, wide variability is anticipated in the actual case law: However, how does the court define this norm for itself and apply it as a guide for its decisionmaking? Cooter treats this normative dimension of the paradigm as defined by the institutional commitment to produce a decision based on law. It must be recognized, however, that when the paradigm of discretion as “skill” is substituted in place of the “legal” paradigm as the decisionmaking model, the question becomes whether the normative assumptions that narrowly define the acceptable scope of variability persist.

Invoking the normative assumption of a single right or best answer as a restraint upon the courts’ exercise of discretion is one way to address the problems of consistency and predictability in the case law. Unfortunately, this normative assumption is not addressed in Rule 11 itself, the Advisory Committee’s Note, or the case law. The only intimation of an overt institutional concern regarding variability as a Rule 11 norm is the “close” case law.

The Advisory Committee need not acquiesce to critics who challenge the trial courts’ sanctions practice head on, since the Rule has established a place for itself in the procedural lexicon of the courts. The Advisory Committee should not ignore the underlying concerns of the critics regarding pragmatic decisionmaking in the Rule 11 context. These concerns can be addressed, at least in part, if the courts approach their sanctions practice as calling for a structured analysis that lays out the pragmatically appropriate reasons justifying the sanctions decision. Expediency, efficiency, or the efficacy of the sanction decision in deterring future similar conduct are not sufficient in and of themselves to define a good or acceptable decision. These practice goals do not

407. See Yablon, supra note 18, at 264-267 (discussing the acceptance and application of this assumption in cases involving criminal sentencing).

408. See supra notes 245-59 and accompanying text.

409. See cases cited supra notes 124, 358-60 (discussing a variety of Rule 11 cases).

410. Courts using this rough rule of thumb reject the notion of alternative, conflicting decisions as being equally right, that is, falling within the acceptable scope of variability. See supra notes 120-26 and accompanying text (discussing the jurisprudential approach to the “close” case). See generally Brilmayer, supra note 26 (discussing the growing indeterminacy of legal decisions and the accompanying erosion of any meaningful criteria for or definition of “legal error”).

411. See Wells, supra note 61, at 1745-46 (arguing that context-based judgments must have a structural framework that is pragmatically appropriate).
adequately address the question of whether the court has rendered a skillful sanction decision as defined by the internal criteria of the paradigm or the relevant contextual norms. In this same vein, a highly doctrinal approach may also prove problematic. There is no guarantee that efforts to force the decision into the narrower “legal” paradigm give adequate weight to other dimensions of the case.412

IV. THE 1993 AMENDMENTS—IMPROVING THE PRACTICE

The 1993 amendments, properly interpreted and applied within the paradigm of judicial discretion as “skill,” should significantly improve the courts’ sanctions practice. The Advisory Committee was unwilling to abandon their pragmatic strategy and the rule therefore continues to rely upon a broad express delegation of discretion to the courts.413 The Advisory Committee addressed these criticisms in other ways. One was simply to act to improve the courts’ sanctions practice. More importantly, the 1993 amendments emphasize the exclusionary function of Rule 11, and by doing so, the increased importance of developing a cleaner definition of the limits of tolerable advocacy.

A. Defining the Limits of Tolerable Variability in the Courts’ Sanctions Practice

In the Call for Comment,414 the Advisory Committee devoted a substantial portion of its discussion of the need for reform to those criticisms that questioned the Rule’s indeterminacy,415 and the problems

412. Professor Tobias’s “call for context” and the richly detailed analysis it generates argues against attempting to force the courts’ Rule 11 practice into the “legal” paradigm. See, e.g., Tobias, Public Law Litigation, supra note 3, at 345 (urging a “contextual analysis” of the relevant variables pertaining to various rules, including Rule 11, as they are applied to public law litigants). The suggestions outlined above require the courts to acknowledge and address this challenge to the discretionary nature of their sanctions practice on a case by case basis. The appellate courts already engage in a highly deferential review of these opinions.

413. "Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion." Fed. R. Civ. P. 11 advisory committee’s note (1993) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)).

414. See CALL FOR COMMENT, supra note 66, at 6-7; infra notes 537-38 and accompanying text (discussing the Advisory Committee’s Call for Comment on the 1993 amendment to Rule 11).

415. The Committee, unlike its critics, did not view the indeterminacy in the rule as fatal. See Ken Kress, Legal Indeterminacy, 77 CAL. L. REV. 283, 283 (1989) (arguing that “indeterminacy is a much less serious defect in the law than it is often thought to be, and] moderate indeterminacy does not undermine the law’s legitimacy”); Ken Kress, A Preface to Epistemological Indeterminacy, 85 NW. U. L. REV. 134, 138-39 (1990) (exploring the proposition that “radical indeterminacy”
of variability and predictability in its application.\footnote{16} The Advisory Committee recognized these as factors relevant to judging the efficacy of the courts’ sanctions practice,\footnote{17} yet having raised these issues in the Call for Comment, the Advisory Committee did not explicitly follow-up on them in the Advisory Committee Note\footnote{18} after the Rule was redrafted. The Note only makes a general reference to the Committee’s effort to restructure the Rule, and with it, the courts’ discretion.\footnote{19} Viewed in a larger context, the Committee responded in the only way it could.\footnote{20} The critics’ primary concerns were the potential overinclusive application of the rule and the resulting “chill” these sanctions decisions would generate.\footnote{21}

The Committee’s direct response to these criticisms was to seek data to determine whether or not the courts’ sanctions practice was having the adverse effect claimed.\footnote{22} It is not surprising that the Committee’s initial response to these criticisms was to request data,\footnote{23} as the task of descriptively or analytically defining and responding to the problems as jeopardizes the legitimacy of the legal enterprise.\footnote{But see note 166 (discussing the critique of radical indeterminacy and its accompanying rejection of discretionary approaches to decisionmaking).}

\footnote{416. \textit{See} \textit{Call for Comment}, supra note 66, at 4-6.}

\footnote{417. \textit{See} id. at 4-7. Yet indeterminacy, like judicial discretion, is seen by the Advisory Committee as an inevitable element in the rule structure. \textit{Cf.} Thomas Ross, \textit{Modeling and Formalism in Takings Jurisprudence}, 61 NOTRE DAME L. REV. 372, 375 (1986) (positing that the courts’ decisionmaking model includes both express principles and a “carefully staked out . . . element of indeterminacy”); Rachel F. Moran, \textit{Reflections on the Enigma of Indeterminacy in Child-Advocacy Cases}, 74 CAL. L. REV. 603 (1986) (book review) (discussing judicial strategies in child advocacy settings to deal with indeterminacy); Smith, supra note 166, at 439 (noting that “[t]o the more pragmatic lawyer or scholar . . . a certain degree of indeterminacy does not necessarily threaten the basic legitimacy of the legal system; indeed, it may provide desirable flexibility within which a fact-responsive equity has room to operate”).}

\footnote{418. \textit{See} \textit{Fed. R. Civ. P.} 11 advisory committee’s note (1993).}

\footnote{419. The Advisory Committee’s Note states that the new rule “expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule.” \textit{Id.}}

\footnote{420. \textit{See} \textit{Call for Comment}, supra note 66, at 6 (“The Civil Rules have generally favored judicial discretion as a means to secure just results and have avoided procedural rigidity.”); Burbank, supra note 80, at 1937 (noting that the shift in structure of the Federal Rules of Civil Procedure following the reforms of the 1980s increasingly relied upon “the discretion of judges, guided by general directions that usually are not informed by empirical study, to deliver on the promise of equal justice”). The play given jurists’ normative preferences in this process, however, raises concerns about the efficacy of such a strategy. \textit{See} \textit{Call for Comment}, supra note 66, at 6.}

\footnote{421. \textit{See} \textit{Call for Comment}, supra note 66, at 5.}

\footnote{422. \textit{See} sources cited \textit{infra} note 426-27 (including some of the empirical data sources that the Advisory Committee ultimately relied on in arriving at the 1993 amendments).}

\footnote{423. \textit{Call for Comment}, supra note 66, at 1-2.}
posed otherwise was insurmountable.\textsuperscript{424} The empirical response\textsuperscript{425} to Rule 11 has been unprecedented.\textsuperscript{426}

The statistical data reassured the Committee that variable and inconsistent application of the rule was not perceived as wide spread, or at least was not unduly chilling the filing of meritorious claims.\textsuperscript{427} Whatever comfort the data provided, it could not answer the more difficult normative question: "[H]ave the benefits of amended Rule 11 been worth the costs? While the data reported here provide important information, they do not answer the ultimate normative question about the value of the Rule."\textsuperscript{428} Critics claimed there were problems, but the data indicated that they were not substantial.\textsuperscript{429} Yet how widespread did the problems have to be to warrant a fundamental change in the courts’ sanctions practice? This question was never answered. In light of the Committee’s evaluation of the other options available to it, it is not

\begin{footnotesize}
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\item \textsuperscript{424} See Kritzer et al., \textit{supra} note 85, at 272 ("[A]n examination of the experiences of . . . federal litigators in three circuits strongly suggests that much of the portrayal of the effects of Rule 11 has been unduly influenced by selected anecdotes that tend to emphasize big cases that are not representative of federal litigation."); Lawrence C. Marshall et al., \textit{Public Policy: The Use and Impact of Rule 11}, 86 NW. U. L. REV. 943, 944 (1992).
\item \textsuperscript{425} The Advisory Committee’s empiricism does not address the heuristic bias in the law. While anecdotal or personal experiences and isolated judicial opinions may not be an accurate systemic picture of how Rule 11 is being used throughout the courts, it is more often than not the basis for lawyers and judge’s judgments, at least within the immediate surrounding practice community. \textit{See generally} John A. Paulos, \textit{Innumeracy: Mathematical Illiteracy and Its Consequences} 107-118 (1988) (discussing two basic types of statistical errors, Type I and Type II errors, and the inherent flaws in any supposedly representative sampling or study).
\item \textsuperscript{426} See \textit{Burbank}, \textit{supra} note 285 (outlining research compiled by Third Circuit Task Force formed to determine the implications of Rule 11 in anticipation of the 1993 amendments); \textit{Research Division, Federal Judicial Center, Rule 11: Survey of Federal District Court Judges; Study of Rule 11 Cases in Five Federal District Courts; Review of Published District and Appellate Court Opinions} (1991); Thomas E. Willging, \textit{The Rule 11 Sanctioning Process} (1988) (discussing the results of a recent study on judicial administration undertaken by the Federal Judicial Center); Marshall et al., \textit{supra} note 424, at 743, 748.
\item \textsuperscript{427} But see Willging, \textit{supra} note 426, at 9 ("[T]he threat of sanctions has caused [lawyers] to raise their threshold for handling close cases: They now demand a higher probability of success, limiting access to the courts for more marginal claims."); Kritzer et al., \textit{supra} note 85, at 269-70 (asserting that the American Judicature Society’s study of Rule 11 attempted to document, through self reporting behaviors associated with Rule 11 including personal assessments, whether or not the subjects had modified their behavior in response to Rule 11). The survey lacked baseline data and attempted to measure a “change” in behavior due to Rule 11 by asking attorneys to report the “impact, if any, of the sanctioning provisions of Rule 11 on your practice?” \textit{Id.} at 271 (quoting from the survey used to generate the results in \textit{Burbank}, \textit{supra} note 285).
\item \textsuperscript{428} Marshall et al., \textit{supra} note 424, at 986.
\item \textsuperscript{429} \textit{Id.} at 985-86.
\end{enumerate}
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surprising the decision was made to forge ahead and amend the rule. The 1993 amendments did not alter the fundamental strategy of the Rule—the delegation of discretion to the courts to implement Rule 11. For the Advisory Committee to proceed as it did, it had to be confident that the trial courts would produce decisions that fell within a tolerable range of variability. This was certainly the case with Rule 11. The Committee viewed the problems of indeterminacy, variability, inconsistency, and lack of predictability in the rule as essentially unsolvable from a drafting perspective. They were not willing to impose strict doctrinal limitations on the practice by, for example, reintroducing the element of "bad faith," because the data did not seem to warrant such an extreme move. Nor was there a more specific rule in the offing that would address all of the problems that had been raised. If the Committee's only other choices were to continue with the Rule or completely abandon it, it is not surprising that the Committee did what it did: amend the rule and delegate the problem of filling any interpretive gaps to the courts on a case by case basis. 

B. Improving the Practice and Defining the Tolerable Limits of Variability

The Advisory Committee's restructuring of the Rule has the potential to significantly improve the courts' sanctions practice by ensuring a fit between the practice and the paradigm of discretion as "skill." More importantly, the restructuring emphasizes the importance of the courts' sanctions decisions in defining the limits of tolerable variability.

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430. The Advisory Committee’s response to the criticism that indeterminacy in the Rule created undue judicial discretion is not unprecedented. See supra note 415. 
431. See supra note 417 (discussing the different norms of variability that apply to the paradigm of discretion as "skill" in different institutional contexts).
432. See CALL FOR COMMENT, supra note 66, at 6-7.
433. Can the indeterminacy of the rule be diminished? The Committee would welcome suggestions to make the sanctions rules more explicit in order to enable the judges to be more predictable and even handed in their application if this can be done without causing other perhaps more arbitrary results. At the same time, the Committee is aware of its own inherent limitations; efforts to be more explicit than the subject of the rule will admit are likely to be counterproductive. 
434. See Keeling, supra note 95, at 1095-1102 (commenting on the high threshold sanctions model and its inherent problems).
advocacy. This section examines briefly how the 1993 amendments to the Rule can address the decisional elements of the “skill” paradigm: the need for fact development and preparation of a record; the need for an opinion or order from the court explaining its decision to sanction; the need to develop the doctrinal limits of the Rule, at least in the threshold analysis of “frivolousness”; the need to emphasize an appropriate subject for regulation under the paradigm of discretion as “skill”; and the need to emphasize the exclusionary function of the Rule and the goal of developing a decisional bright line. The amendments should improve the fit between the paradigm and the courts’ practice on each of these points.

In an effort to better define the doctrinal limits of the practice, the Committee undertook to clarify the definition of frivolous litigation. The prefilling investigation requirement was not redrafted, but it was given primacy of place in the new format. The Committee did redraft the threshold requirements defining the legal and factual merits of the case. Unlike the 1983 rule, the 1993 amendments clearly distinguish between the legal and factual merits of the claim, they delete any implication of a “good faith” defense, and for the first time the term “frivolous” is used in the drafting of the Rule. These amendments address the factual dimensions of the claim more explicitly than before, tying evaluation of the factual merits of the claim to formal evidentiary standards and summary judgment procedures. The new standard defining the acceptable legal content of a claim is described in the

436. The Advisory Committee’s Note admonishes litigants not to use Rule 11 motions for “minor, inconsequential violations” of the rule or otherwise abuse the sanction process. Fed. R. Civ. P. 11 advisory committee’s note (1993). The Note outlines a number of unacceptable practices including use of the Rule as a discovery device, a threat to extort settlement, a device to test the legal sufficiency of allegations, to increase the cost of litigation, to intimidate, to create a conflict of interest, or as a means to pierce the attorney-client privilege. Id. One way to achieve this goal is to defer the sanctions ruling to the end of the litigation.


438. Id. 11(b)(1)-(4).

439. Id.


That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient ‘evidentiary support’ for purposes of Rule 11.

... A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

Id.
Advisory Committee Note as an "objective standard, intended to eliminate any 'empty-head pure-heart' justification for patently frivolous arguments." However, the Note also acknowledges the need to avoid chilling imaginative advocacy, recommending that "arguments for a change of law . . . be viewed with greater tolerance under the rule."

These amendments accomplish two things. They limit the courts' decision whether or not a claim is legally or factually frivolous by imposing more specific doctrinal guides. Second, the amendments accomplish this goal by bringing into the Rule 11 arena legal standards and case law with which trial courts are already very familiar. These amendments also emphasize the evidentiary dimensions of the case, an arena of acknowledged judicial expertise. While these amendments cannot be said to guarantee less variability and greater predictability in the courts' sanctions practice, they do provide a basis for a more structured analysis of the threshold issue of liability than we have seen in the past.

The restructuring of the Rule focuses the sanctions decision on the conduct of the litigation, as opposed to its content. Rule 11 was amended in 1983 to remove the "bad faith" requirement from the Rule. The goal was to impose a greater obligation upon attorneys to engage in a legal and factual investigation prior to filing their lawsuits. Having done away with the "bad faith" requirement, the drafters went on to make sanctions mandatory upon finding a violation of the threshold requirements of the Rule. Early commentary ana-

442. Id.
443. See Stempel, supra note 12, at 280-81 (discussing the need to harmonize Rule 11 and other pretrial interception procedures and the benefits of such a presumption against sanctions created by such harmonization).
444. See Schwarzer, supra note 84, at 1021-23 (noting the shift from the merits to the adequacy of the prefiling inquiry made by the attorney or pro se litigant). “Courts are beginning to shift their focus from assessing the merits to assessing the adequacy of the prefiling inquiry.” Id. at 1021.
445. See Burbank, supra note 90, at 1003. See generally Donna E. Ostroff, Note, 59 Temp. L.Q. 107 (1986) (discussing the removal of the bad faith standard as explicated in Eastway Construction Corp. v. City of N.Y., 762 F.2d 243 (2d Cir. 1985)).
446. See Fed. R. Civ. P. 11 (1983) ("If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction"); infra Appendix A (outlining the provisions of the 1983 amendments). The Notes to the 1983 amendments, however, did delegate some measure of discretion as far as the sanctions themselves:
And the words "shall impose" . . . 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
lyzed the impact of the rule as its regulatory orientation shifted from the
court of the litigation to a more detailed analysis of its legal con-
tent. At the time of the 1993 amendments, efforts had coalesced to
shift the rule away from the analysis of legal content toward a conduct-
oriented inquiry.\(^4\) After a six-year period that has witnessed some
sharp turns by courts and commentators alike (which have brought more
of them together), there is a conflict between or among circuits on
practically every important question of interpretation and policy under the
Rule . . . .\(^9\) At the time, these conflicting outcomes were thought to
undermine the procedural goal of uniformity and reflect federal judges’
personal normative preferences rather than those of the Rule.\(^4\) According
Professor Burbank, one of the early commentators, these
normative conflicts were a direct result of the courts “giving primacy to
legal products and to a compensatory goal in the interpretation and
implementation of amended Rule 11.”\(^4\) He argued that the determina-
tion whether a paper is “legally frivolous . . . will be as determinate, and
hence as uniform, as the notion of frivolousness itself.”\(^4\)

With the 1993 amendments to Rule 11 the Supreme Court has
returned to a tripartite structure similar to the earlier versions of the
Rule.\(^4\) As with other versions of the Rule, under the 1993 amend-
ments the court must first determine if those facing sanctions have met
the basic requirements regarding the prefiling investigation and the
minimal requirements governing the legal and factual merits of the
claim.\(^4\) With the 1993 amendments the attorney’s certification
sanctions to the particular facts of the case, with which it should be well acquainted.


448. See supra notes 3, 12.

449. In an early article, Judge Schwarzer pointed out that “[s]hifting the focus of rule 11
enforcement from merits to process will not solve all problems.” Schwarzer, supra note 84, at 1024.
He noted, however, that it
should materially reduce subjectivity and inconsistency. Lawyers and judges may not
invariably agree on what constitutes a reasonable inquiry under the circumstances, but it
is reasonable to expect a greater consensus on that question than on whether a claim or
defense is frivolous. The former involves an assessment of prevailing professional
practice; the latter a prognostication of how courts might in the future evaluate a claim
or defense.

Id. at 1024-25.

450. Burbank, supra note 80, at 1930 (footnotes omitted).

451. Id. at 1932-33.

452. Id. at 1932.

453. Id. at 1933.

454. See infra Appendix (illustrating some of the earlier manifestations of Rule 11).

455. See infra Appendix (discussing the 1993 amendments to Rule 11).
regarding the factual and legal sufficiency of the claim does not stand alone. The drafters have attempted to make the prefiling investigation the predicate to a sanctions analysis in an effort to emphasize conduct as a threshold element. If the investigatory requirement is applied in this fashion, a claim that is problematic from a legal or evidentiary perspective would not be deemed frivolous so long as the investigation passed muster.

The ultimate utility of the distinction between content and conduct in the sanctions arena lies in the creation of a buffer zone that demarcates the sanctions decision and the decision on the merits. The Rule prior to the 1983 amendments required only honesty in fact in the filing of pleadings and bad faith for sanctions. The sanctions analysis was bifurcated. Even if there was a determination that the claim was factually or legally frivolous, sanctions were not authorized absent a finding that the claim was brought in “bad faith.” This “bad faith” requirement focused the courts’ attention on the context, conduct, and character of the litigation, not its legal content. In so doing, it created a decisional buffer zone between a merits-based analysis and the courts’ exercise of their sanctions powers. The restructuring of the Rule reintroduced that decisional buffer zone.

Nevertheless, the conduct-content dichotomy does not address one of the fundamental problems of the Rule: How is the court to evaluate

456. See FED. R. CIV. P. 11(b); FED. R. CIV. P. 11 advisory committee’s note (1993) (“The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule.”). The Rule also imposes a duty to “stop and think” with respect to allegations made in the court papers and “emphasizes the duty of candor.” Id. 457. See Tobias, 1993 Revision, supra note 3, at 205 (arguing that these two predicate elements in effect must be construed together, the latter element evaluated primarily in light of the former).

458. See Risinger, supra note 66, at 4-14 (discussing the facial requirements of early Rule 11; that is the version before the 1983 amendments). Risinger cautions against the use of Rule 11 to sanction “improper espousal of a legal position,” id. at 58, or imposing too strict a factual threshold which unduly restricts access to the courts. Id. at 55-56. Risinger finds that the subjective standard of the old rule, the bad faith requirement, was not itself a problem: “The problem arises when the finder of fact is not willing to indulge in the normal process of circumstantial inference concerning the intentional or wilful nature of an act.” Id. at 60. Risinger questions the use of objective standards on the ground that they “take us from the realm of ethical consideration to the realm of negligence.” Id.


460. See Risinger, supra note 66, at 3-4 (discussing the bad faith element in the original rule and the enforcement difficulties associated with inquiring into the subjective beliefs of attorneys).

461. Cf. Nelken, Chilling, supra note 3, at 1338-39 (discussing the potential overinclusive application of Rule 11 and the potentially adverse impact on zealous advocacy through an overly limited definition of acceptable advocacy).
the legal judgments involved in moving from a prefiling investigation into litigation?\(^62\) An objectively adequate investigation does not guarantee that the analysis of the products of that investigation will be properly handled.\(^63\) Nor is it clear why the professional judgments involved in developing and directing the prefiling investigation should be more amenable to sanctions than those involved in ultimately putting the case together for filing. The same is true of the professional judgments involved in predicting whether evidentiary support will be forthcoming through discovery and the judgments involved in evaluating the factual merits of the claim.\(^64\) Defining "legal" judgments as conduct is a difficult aspect of the current rule. Despite the drafters' efforts to emphasize "conduct" in the sanctions inquiry, nothing in the Advisory Committee's Note or Rule itself prohibits courts from treating as a predicate to sanctions the factual or legal merits of a claim standing alone.\(^65\) At least the 1993 amendments, unlike those of 1983, do not authorize sanctions automatically upon a finding that the threshold requirements have not been met.\(^66\) If the threshold requirements have not been met, the court must then decide if sanctions are warranted by

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463. Analyzing the legal and factual merits of a claim—considered a core skill of the legal profession—is not always a simple matter. "Legal theory," has been defined as a "view of the facts and law—intertwined together—that can justify a decision in the client's favor." Richard K. Neumann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy and Style 247 (1990). To argue that a legal theory is frivolous inevitably involves an act of creative judgment which attempts to evaluate strategic and persuasive dimensions of the theory, as well as the existence of, or argument from, precedent. See generally Sheldon Margulies & Kenneth Lasson, Learning Law: The Mastery of Legal Logic (1993) (explaining the basic legal principles that are involved in virtually all species of legal disputes).

464. See Tobias, 1993 Revision, supra note 3, at 195 (discussing the difficulty of predicting the likelihood of securing evidentiary support for a claim despite having a reasonable belief the claim is correct).

465. A reasonable prefiling investigation standing alone does not discharge the threshold obligations of the Rule. Professor Tobias attempts to resolve this interpretive dilemma by treating the threshold elements as inextricably intertwined. He argues that the lack of legal or factual merit should be measured by reference solely to the prefiling investigation and not as an independent element. See id. at 195-96.

looking explicitly at the conduct of the litigation and the impact of the frivolous claim on the court.\textsuperscript{467} The Advisory Committee’s Note to the 1993 amendments states that “[t]he rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances.”\textsuperscript{468} Having said this, the Committee then lists a series of suggested factors to be considered. Many of the factors suggested in the Note are similar to the factors typically used to determine if a litigant has acted in bad faith under the courts’ inherent power doctrine.\textsuperscript{469} For example, the Advisory Committee’s Note directs the courts to look at factors that reflect on litigants’ intent in bringing the challenged litigation:

Whether the improper conduct was wilful, or negligent; whether it was part of a pattern of activity, or an isolated event; . . . whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; . . . whether the responsible person is trained in the law; what amount . . . is needed to deter that person from repetition in the same case; [and] what amount is needed to deter similar activity by other litigants . . . .\textsuperscript{470}

The Note also directs the courts to look at the impact the frivolous claim has had on the course of the litigation and the court: “[W]hether it infected the entire pleading, or only one particular count or defense; [and] what effect it had on the litigation process in time or expense . . . .”\textsuperscript{471}

The courts’ experiential skills and institutional competence in dealing with attorney conduct is assumed. This conduct-based approach to sanctions is more compatible with the paradigm of discretion as “skill” than a content-oriented approach. This shift in emphasis within the Rule should address some of these concerns by focusing the courts’ discretion as “skill” in areas where it is least problematic. Yet the utility of the

\begin{footnotesize}
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\item \textsuperscript{467} See FED. R. CIV. P. 11 advisory committee’s note (1993).
\item \textsuperscript{468} Id.
\item \textsuperscript{469} See supra note 135 and accompanying text (discussing the inherent powers doctrine as a source of the courts’ sanctioning power and touching upon Chambers v. NASCO, Inc., 501 U.S. 32 (1991), a recent inherent doctrines’ decision addressing the imposition of attorney’s fees as sanctions).
\item \textsuperscript{470} See FED. R. CIV. P. 11 advisory committee’s note (1993).
\item \textsuperscript{471} Id. This shift in the structure of the Rule refocuses the Rule on an element of culpability, rather than wasting time addressing mere mistakes and random acts of inadvertence or negligence which do not seriously threaten the operation of the courts. See id. (“[S]anctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.”).
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dichotomy between an analysis of the content and conduct of a piece of litigation collapses when professional judgments are at issue. In these circumstances, the conduct orientation of the Rule quickly fades into an analysis of the professional and legal judgments that led to its filing. It is inevitable that many of the problems that have plagued the Rule’s application of the paradigm of discretion as “skill” to these essentially “legal” judgments will surface again in these cases.

The other problem is that the content-conduct dichotomy fails to address different dimensions of conduct and how they are to be weighed. It can be difficult drawing the line between conduct that is abusive of the litigation process and undermines the legitimate adjudicative function of the court, and conduct deemed tolerable and within the acceptable scope of the mandate to provide zealous advocacy. There is little doubt that the goals of managerial reform, increasing the efficiency of the courts and reducing attorneys’ abuse of the procedural process, also focus on abusive conduct and conduct deemed unnecessary, inefficient, duplicative, or designed to delay the litigation. But the conduct at issue in Rule 11 cases routinely strays beyond these confines.

While the Advisory Committee’s Note attempts to make this point by referring to conduct that is not merely inefficient or questionable, but conduct that is egregious and adversely impacts the court, the Rule itself does not. Given this lack of clarity how are the courts to define the decisional context and weigh the competing institutional norms? Attempting to objectively evaluate the conduct of litigation standing alone without any reference to context will prove problematic. Context shapes the paradigm of discretion as “skill” and needs to be addressed explicitly in the courts’ sanction analysis.

The Advisory Committee’s virtual withdrawal of compensatory fee shifts from the courts’ sanctions arsenal and its edict to consider deterrence the primary goal in the sanctioning process, reflects the Rule’s narrower, but significant, exclusionary function. In ordering sanctions the courts are encouraged to consider a sliding scale, ordering only those sanctions necessary to achieve deterrence, thereby protecting the courts

472. See supra notes 462-63 and accompanying text (discussing the complex legal judgments involved in preparing a case for trial).
473. See Tobias, 1993 Revision, supra note 3, at 197-200 (discussing the fine line between frivolous and non-frivolous arguments and claims as contributing to the difficulty of the Rule 11 sanctions decision); Vairo, Prologue, supra note 3, at 41-42, 83-87.
474. See supra notes 355-412 (outlining how the “skill” paradigm can accomplish this).
475. See FED. R. CIV. P. 11(c)(2).
with the least adverse possible consequence for the litigants. The shift emphasizing deterrence falls squarely within the pragmatic paradigm of discretion as "skill." Who else but the trial courts are in a position to know what the local practices are like and what it will take to deter other lawyers or litigants similarly situated.

The amendment to the Rule that has received the most comment is the Committee's decision to delete the mandatory "shall" in defining the courts' duty to sanction. In its stead, the Committee substituted the permissive "may." The substitution of "may" for "shall" gives the courts virtually unlimited discretion to withhold sanctions. The 1993 amendments to Rule 11 provide that upon making the determination that there has been a violation of subsection b, the court "may, subject to the conditions stated below [regarding the nature of the sanction to be imposed], impose an appropriate sanction." There are no guidelines in the Rule or the Advisory Committee's Note that restrict the courts' discretion not to sanction. The Rule provides for no review of this decision, rendering it an act of almost pure judicial prerogative and ensuring wide variability. At first blush it is therefore difficult to see how this amendment is designed to improve the courts' sanctions practice.

It helps to look at the opposite result to see the virtues of the new rule. If the court decides to sanction, there are procedural and substantive guidelines with which it must comply. For example, if the court decides to impose sanctions it must prepare a written order "describing the conduct determined to constitute a violation of this rule and explaining the basis for the sanction imposed." There is no

476. While the scale is not formally set out in the Rule, the Advisory Committee's Note and the language of Rule 11 itself are clear on this point. See FED. R. CIV. P. 11(c)(2); FED. R. CIV. P. 11 advisory committee's note (1993).


478. See FED. R. CIV. P. 11(c) ("If . . . the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction . . . ." (emphasis added)).

479. Id.

480. For sources discussing this variability of judicial decisions within the context of the normative structure of the law, see supra note 25.

481. See FED. R. CIV. P. 11(c).

482. Id. 11(c)(3).
comparable requirement for a decision not to sanction: no order is necessary and, by implication, there is no record for appellate review. This is a significant about-face in the structuring of the Rule. Under the 1983 amendments’ mandate to sanction, decisions finding no violation or an insufficient violation to warrant sanctions were scrupulously reviewed and often reversed and remanded on appeal for further development to justify the denial of sanctions.483

How should the courts’ discretion not to sanction be construed?484 Professor Waltz, a commentator who has looked at the issue of broad delegations of discretion, makes the telling point that in attempting to define the scope of judicial discretion “we should pay attention to context.”485 He observes further that “[t]he phrase ‘judicial discretion’ is used but almost never defined in statutes and rule codifications,” and as a result it has become a term used by courts to “shore up verdict-salvaging opinions, but they rarely formulate a definition, a setting of metes and bounds.”486 Discretion such as this is “unheded by any formal constraints or guidelines.”487 The court need not fear appeal or reversal when making these types of decisions.

The reinsertion of the permissive “may” parallels the case law which has construed the courts’ discretion to sanction under the 1983 rule as authorizing de minimis sanctions for de minimis violations.488 The 1993 amendments allow the courts to make a similar decision. A strict interpretation of the threshold requirements might indicate Rule 11 has been violated, but the imposition of sanctions remains within the discretion of the court.489 Some may bemoan the loss of the mandatory “shall,” arguing that courts will return to their earlier bad habits—

483. See, e.g., Knight v. Sharif, 875 F.2d 516, 519 (5th Cir. 1989); Corpus Christi Taxpayer’s Ass’n v. City of Corpus Christi, 858 F.2d 973, 977 (5th Cir. 1988), cert. dismissed, 490 U.S. 1032, cert. denied, 490 U.S. 1065 (1989). See also Armour, supra note 220, at 105 (discussing Fifth Circuit decisions reversing and remanding trial court orders denying sanctions for more development and justification).

484. See Jon R. Waltz, Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence, 79 Nw. U. L. Rev. 1097, 1099 (1984-1985) (discussing the concept of “guided and unguided” discretion, the latter rising to the level of judicial prerogative).

485. Id. at 1099.

486. Id. at 1101.

487. Id. at 1103.

488. See Armour, supra note 220, at 111-14.

489. See Fed. R. Civ. P. 11(c); Fed. R. Civ. P. 11 advisory committee’s note (1993) (asserting that the goal of Rule 11 is deterrence such that the severity of the sanctions imposed should be proportional to the seriousness of the violation); supra notes 444-74 and accompanying text (discussing the emphasis within the Rule on a separate conduct-oriented sanctions analysis under section 11(c)).
tolerating the intolerable—despite the lack of any evidence that federal trial courts will refuse to exercise the sanctions powers delegated to them under Rule 11. From this perspective, the mandatory “shall” of the 1983 amendments codified the managerial activism characteristic of the early amendments to Rule 11. But the Advisory Committee did not simply substitute “may” for “shall” in restructuring the Rule.

This amendment was accompanied by a change in the language of Rule 11 reintroducing consideration of the conduct of the litigation, as distinct from the prefiling investigation, as an essential element in the sanctions analysis. In this context, the substitution of the permissive “may” for the mandatory “shall” in defining the courts’ discretion should be interpreted as a safety valve. This provision allows the courts to explicitly consider whether the challenged advocacy, be it the conduct or content of the litigation, falls outside the scope of the reasonable or tolerable limits of zealous representation. If the court determines that the challenged action should be sanctioned, the procedural restraints incorporated into the Rule, if properly applied, require a structured sanctions decision. This approach to Rule 11 sanctions focuses on drawing bright lines to exclude intolerable behavior and assumes that all other conduct of the litigation falls within the bounds of acceptable advocacy. The Rule defers to the courts on this inclusive definition of zealous advocacy and avoids requiring them to invest significant resources defending their decisions not to sanction.

The Rule requires that “[i]f the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions.” This amendment encourages the courts to focus on the conduct that should be expressly excluded from litigants’ and lawyers’ repertoire. The courts’ sanctions practice no longer involves affirmatively approving of litigation practices. This restructuring emphasizes both the exclusionary function of the Rule and the normative assumption that the skillful exercise of its discretion by the court will generate sanction

490. See supra notes 444-74.

491. Cf. Armour, supra note 220, at 103-05 (discussing numerous appellate court decisions before the 1993 amendments reversing and remanding lower courts' “no-sanction” decisions for further explication and justification on the record).

492. Fed. R. Civ. P. 11 advisory committee's note (1993). Rule 11 requires a separate motion and a “reasonable opportunity to respond.” Fed. R. Civ. P. 11(c). The motion must describe the “specific conduct alleged to violate subdivision (b).” Id. 11(c)(1)(A). The Rule further mandates that “[w]hen imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.” Id. 11(c)(3).
decisions that fall within a narrower range of variability than before. Thus, despite the premium placed upon discretion, this amendment should not be construed to contemplate a myriad of conflicting sanction decisions. Making it clear that courts are authorized to impose sanctions as needed to achieve the purposes of the Rule acknowledges the importance of the assumption shared by trial and appellate courts alike that in delegating this matter to the courts’ discretion, there is an expectation that the trial court will “demonstrate that the decision was made skillfully, carefully, and with attention to all the facts.” If these legal decisions can in fact be made correctly, the assumption is that the trial courts’ will attempt to do so.

Finally, the Advisory Committee incorporated procedures into the Rule which require the sanctioning court to explain itself. In early Rule 11 cases the Rule was invoked and at times resolved prior to the final adjudication on the merits without reference to any formal procedures. The explanations and justifications for the courts’ lack of procedures mirrored the early managerial rationales offered for the rule. The decisions had to be made quickly if the Rule was to effectively control and manage the litigation process. Other rules regulating this conduct did not contemplate formal procedures. In addition, the fact sensitive nature of the decision, coupled with the courts’ personal perspective in the application of the Rule, did not lend itself to appellate review warranting an extensive evidentiary record. The new procedural requirements of the Rule clearly convey to the courts the expectation that they will be expected to generate a logical, rational application of the Rule. The express incorporation of the procedural safeguards traditionally associated with the courts’ formal adjudicative decisionmaking into the Rule is significant. It represents the Advisory Committee’s most explicit response to the critique of indeterminacy and critics’ desire to restrain the courts’ exercise of discretion under Rule 11.

This renewed emphasis on procedural restraints and the potential for appellate review raises questions regarding the appellate courts’ continued reliance on the “abuse of discretion” standard. The promise of

493. Yablon, supra note 18, at 268.
494. See Yablon, supra note 18, at 267; cf. supra notes 65-148 and accompanying text (discussing the difference between the courts managerialism and its pragmatic adjudication).
495. See Armour, supra note 220, at 109-10.
496. Cf. supra notes 65-148 and accompanying text (discussing the managerial revolution of the 1980s).
497. See Armour, supra note 220, at 101.
enhanced accountability is illusory unless the appellate courts revisit the issue of appellate review of Rule 11 decisions.498 Courts should be able to justify their sanctions decisions by reference to the elements of the practice outlined above.499 This process of "justification" is essential if the courts' sanctions decisions are to be treated as legitimate exercises of judicial power. Without substituting its judgment for that of the trial court, the appellate courts can develop a process of review that examines the individual sanctions decision to see if the applicable elements of the paradigm of discretion as "skill" are all present; that is, does the practice fit the paradigm?500

C. Problems That Remain

The courts' evolving sanctions practice has moved beyond the point where highly variable outcomes, or idiosyncratic, subjective decisionmaking, are tolerable. The amendments to the Rule, when interpreted within the larger context of the debate that led to their restructuring, reflect the need to develop a sanctions practice that addresses these concerns. The 1993 amendments do this in part by focusing the courts' sanctions practice on the exclusionary function of the Rule and by emphasizing the importance of explication and explanation in the courts' decisionmaking. There is even an intimation in the reformulation of the doctrinal guidelines defining the element of "nonfrivolous" litigation that the courts, when necessary, should emphasize the "legal" paradigm over the "skill" paradigm at the threshold level in a "product" based analysis.501

The amendments cannot fully lay to rest the two major concerns of critics challenging the discretionary nature of the courts' sanctions practice. The first is the potential for bias disguised as the personal, experiential basis of the courts' subjective, intuitive judgments under the paradigm of discretion as "skill." The second is the problem of defining acceptable variability in the application of the Rule in a way that guides

498. See supra notes 138-48 and accompanying text (discussing need for more appellate oversight to impose the necessary judicial restraint and accountability upon trial courts' sanctions decisions).

499. See supra notes 355-412 and accompanying text (discussing the "fit" between the "skill" paradigm and practice and the justification function it serves).

500. See supra notes 337-51 and accompanying text (discussing the elements of the paradigm of discretion as "skill").

501. Cf. Stempel, supra note 12, at 268 (discussing the need to harmonize Rule 11 with other "interception devices" that reflect the courts' exercise of their adjudicative discretion).
or limits the courts’ decisionmaking. These are inevitable by-products of discretionary decisionmaking, particularly when the courts treat the delegation of discretion to them as constrained solely by the paradigm of “discretion” as skill. These problems can only be addressed if the courts approach sanctions decisions with the normative assumption in mind that they are looking for the right answer to the question: Should the limits of tolerable advocacy be drawn at this case? Courts should be willing to critique their exercise of discretion from the perspective of the practice community: Would a skillful jurist or lawyer agree with their decision? More importantly, how will the practice community interpret this decision?

Additionally, concerns about bias or undue subjectivity can only be redressed if the court makes the context of its sanctions analysis explicit. What assumptions regarding the litigation, the litigants, or the claim are being brought to bear? And how does the court view this litigation in the larger institutional context of an open, accessible court system within a democratic society? In its turn, how does the court view this litigation as a breach of the duty of zealous representation? The Rule and Advisory Committee’s Note does not address the elements of context and the situatedness of the decisionmaker explicitly, and yet the perspective the decisionmaker brings to bear on the question of sanctions certainly can be outcome determinative.

These suggestions both build on the courts’ role as conscious decisionmaker, and ask the courts to acknowledge and address on a case by case basis the discretionary nature of their sanctions practice. The courts need to approach their sanctions practice from the perspective that they must produce structured, skillful decisions for which they will be held accountable.

VI. RESTRUCTURING THE COURTS’ SANCTIONS PRACTICE

Had the trial and appellate court adopted this approach in *Jennings v. Joshua Independent School District*, the result—sanctions imposed against an American Civil Liberties Union (“A.C.L.U.”) volunteer attorney and his client—might have been quite different. This case involved a challenge by the A.C.L.U. of a local school district’s use of sniffer dogs. In undertaking this challenge the A.C.L.U. and its volunteer attorney, Mr. Don Gladden, were aware that the precedent in the Fifth

502. *See supra* notes 337-51 and accompanying text.

Circuit was against them on this point.\textsuperscript{504} In affirming the award of sanctions ordered by the trial court, the Fifth Circuit pointed to the controlling precedent of \textit{Horton v. Goose Creek Independent School District}\textsuperscript{505} and the lack of any "Supreme Court or later authority . . . to suggest that \textit{Horton}'s principles of law might be overturned."\textsuperscript{506} The circuit court found that there were no facts distinguishing \textit{Jennings} from \textit{Horton}, and that \textit{Jennings} could only be construed as directly contrary to existing law\textsuperscript{507}—which is exactly what it was!\textsuperscript{508} In affirming sanctions, the Fifth Circuit pointed out that all of the material facts "were essentially known to Jennings and Gladden at the time the complaint was filed."\textsuperscript{509} And yet that would be the case with a direct challenge to existing precedent: Plaintiff is in effect arguing that the court should rethink its interpretation and application of the rule of law to the given fact paradigm. In their Petition to the United States Supreme Court Plaintiffs continued to pursue their legal arguments on this point.\textsuperscript{510}

In many ways this is not a typical sanctions case, but it is a good case to illustrate the point of this Article. It was not a case involving large sums of money or other facts raising a question about the plaintiff's financial motive in bringing suit. Yet "motive" figured large in the courts' analysis and "reading" of the litigants. This case involved an irate father's challenge to the school district's right to search his daughter's locker and car for drugs.\textsuperscript{511} In its opinion, the Fifth Circuit focused on Mr. Jennings's "strong disapproval of the . . . sniffer-dog search program . . . prior to the events at issue in this case."\textsuperscript{512} At the time of

\textsuperscript{504} \textit{Id.} at 321.
\textsuperscript{505} \textit{Id.} (citing \textit{Horton}, 690 F.2d 470, 477 (5th Cir. 1982), \textit{cert. denied}, 463 U.S. 1207 (1983)).
\textsuperscript{506} \textit{Id.}
\textsuperscript{507} \textit{Id.}
\textsuperscript{509} \textit{Jennings}, 877 F.2d at 321.
\textsuperscript{510} \textit{See} Jennings Cert. Petition, \textit{supra} note 508.
\textsuperscript{511} \textit{Jennings}, 877 F.2d at 315.
\textsuperscript{512} \textit{Id.} at 321.
the search, the court pointed out that Jennings threatened to sue everyone involved and did so despite testimony at trial that "he did not think that his or his daughter’s constitutional rights had been violated by any of the discrete actions of the school officials." There is nothing in the record regarding the “subjective” good faith of Mr. Jennings’ counsel, Mr. Gladden.

What is striking about the case is the way the court handled the involvement of the A.C.L.U. In its opinion the circuit court noted that Mr. Gladden’s representation of Mr. Jennings and his daughter was without compensation. The Fifth Circuit recognized that the A.C.L.U. took the case for the precise purpose of challenging the “alert” of a sniffer-dog as a sufficient basis for probable cause and a search absent evidence of a particularized suspicion of current contraband. The A.C.L.U. makes the point numerous times in their briefs that sniffer dogs are “over-alert,” responding to numerous substances that are not illegal. What is of interest is that both courts, trial and appellate, seem to treat Jennings’ attitude and the A.C.L.U.’s involvement as evidence that this was not a legitimate dispute or use of judicial resources. There is no willingness to address this litigation in a larger context or pose the “opposite” argument. This is not to argue that the A.C.L.U. or other advocacy groups are immune from Rule 11, but there do seem to be relevant contextual factors that were not addressed.

The Fifth Circuit affirmed the award of sanctions, initially holding that “this is a close case with respect to sanctions, and if we had been sitting as district judges we might have arrived at a different conclusion.” But they were not willing to substitute their opinion for that of the trial court. If the trial and appellate court on the initial appeal had adopted the approach to sanctions outlined above, the result would likely have been different. Take for example the element of “subjectivity” and the need to properly define the context of the dispute. The trial court’s response to the A.C.L.U. could be characterized as idiosyncratic.

513. Id.
514. Mr. Gladden was interviewed as part of the research for this Article. The case involved a challenge to Horton and, in his mind, raised new legal theories. Interview with Don Gladden, Esq. (on file with author).
515. Jennings, 877 F.2d at 321.
516. Id.; see also Jennings Cert. Petition, supra note 508, at 6.
518. See supra notes 355-412 and accompanying text (describing the application of the discretion as “skill” paradigm to sanction decisions).
and as not reflecting a larger institutional perspective. While such a response might fairly reflect the trial judge’s personal view of how his limited court resources would be best utilized, what happens if this case is viewed as part of a larger body of jurisprudence defining the limits of tolerable advocacy and the exclusionary function of the Rule? The trial judge should be required to address these factual elements in greater detail.

The appellate judge on the initial review also went to great lengths to make the point that the Fifth Circuit precedent was clear. Yet in both its brief to the Fifth Circuit and to the United States Supreme Court, Plaintiff consistently pointed out the nature of his challenge to the existing precedent. Even adopting the strictest definition of candor, this case does not seem ripe for sanction on those grounds. There was at least a cognizable argument to be made on behalf of counsel that this was a legitimate challenge aimed at changing the law.

In addition, this element of the case seems to fall outside of the paradigm of discretion as “skill.” Nothing indicates why the circuit court did not feel comfortable exercising their adjudicative skills to evaluate the “objective” reasonableness of the challenge to their law. To argue that the trial court looked at the frivolousness of the claim as a “fact intensive” issue because of the Plaintiff’s trial testimony ignores substantial Rule 11 precedent which holds that there can be no improper motive in bringing a suit if the underlying claim has merit. Mr. Jennings’s temper aside, the real issue was whether Mr. Gladden and the A.C.L.U. had properly pursued their challenge to Horton. The fact that there was no intervening Supreme Court precedent or other authority offered should not be dispositive of the issue. Someone has to be the first one to make the challenge. Once more, using the “posed opposite” would have been helpful: Could the court make an argument that a reasonable, zealous advocate, would have pursued this case?

The Fifth Circuit pointed out that it would have ruled differently on

519. See Tobias, 1993 Revision, supra note 3, at 27-28, 40, 56 (discussing need for courts to be sensitive to the role played by civil rights litigation and advocacy groups in the larger political context).
520. Jennings, 869 F.2d at 877-88.
521. See supra note 507-08 and accompanying text.
522. See supra notes 201-60 and accompanying text (discussing focus of “legal” paradigm on doctrinal analysis, elaboration, and development).
523. See Armour, supra note 220, at 106-09, 124-25.
the question of sanctions but deferred to the trial court. The reasons for its appellate deference were grounded in its view that the trial court was simply in a better position to address these issues. From the perspective of the paradigm of discretion as “skill” this automatic deference is troubling. If the circuit does not agree with the ruling, that is some evidence that reasonably competent jurists might question whether the decision is a “skillful” one. In such a situation the appellate court should review the lower court opinion for the elements of skill discussed above, not merely defer to a highly subjective, albeit “hands on” approach.

This Article is not recommending that a court of appeals merely substitute its judgment for that of the trial court. However, the policy of deferring to the trial court’s skills should adhere to the logic of the skill paradigm. Accordingly, the court of appeals should scrutinize the trial court’s decisions to sanction for the elements of skill discussed above. Were the facts developed? Does the court’s selection of a context reflect the underlying normative and legal issues involved in the sanctions? Has the court adequately outlined applicable doctrine and any other factors on which it relied? And has the court defined the specialized skill and institutional perspective brought to bear? Courts should no longer rely on a peculiarly personal or self-referring definition of their discretion; nor should they hide behind a highly fact specific analysis. Having to explain the decision is one way to make the trial courts accountable and ensure that the rule is properly interpreted and applied. Having something more than a perfunctory appellate review of the sanction decision is another way. The appellate court should determine if the decision is one with which other skilled practitioners would agree. In addition, the appellate court should determine if the trial court has constructed an opinion that adequately addresses the important legal question: Do the practices at issue in the particular case exceed the bounds of acceptable advocacy?

525. See Jennings v. Joshua Indep. Sch. Dist., 869 F.2d 870, 879 (5th Cir. 1989), amended and superseded by 877 F.2d 313 (5th Cir. 1989), cert. denied, 496 U.S. 935 (1990). Yet on rehearing en banc, the Fifth Circuit spent more time analyzing the law. The court did not disclose why, but it may have been because of the attention given the case. See Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313, 320-22 (5th Cir. 1989), cert. denied, 496 U.S. 935 (1990).

526. See supra notes 355-412 (discussing the “skill” paradigm as applied to discretionary decisionmaking).

527. I realize that this example is subject to criticism as one of the cosmic anecdotes that has fueled the movement to reform the rule, but even a cosmic anecdote helps define the law. See Kritzer et al., supra note 85, at 272 (“[A]n examination of the experiences of randomly selected federal litigators in three circuits strongly suggests that much of the portrayal of the effects of Rule 11 has been unduly influenced by selected anecdotes that tend to emphasize big cases that are not
VII. CONCLUSION

The paradigm of discretion as “skill” applied to the courts’ sanctions practice is not a static paradigm. The courts’ sanctions practice has evolved and changed. It will continue to do so as the courts gain experience with the Rule. Over ten years have passed since the original amendment in 1983 and the courts have gained expertise. By now they should be able to predict the impact their decisions will have on the courts’ public adjudicative function and the role of attorneys as zealous advocates. Judicial decisionmakers faced with this type of decision should not hide behind their discretion. They should act as self-conscious decisionmakers and clearly address the contextual and subjective elements of their sanction decisions. The courts’ sanctions practice is evolving in ways that will hopefully ensure more accountability and consistency if the courts are to be held to a minimal duty of “justifying” the exercise of their discretion as “skill.” This is one way to ensure the fit between the “practice” and the “paradigm.”

528. See Wells, supra note 61, at 1745-46 (discussing the need for judicial decisionmakers to become aware of their “situatedness”). Wells argues further that “[i]f our judgment is inevitably limited by our perspective, then consideration of the character of that perspective is the beginning of rational inquiry” Id. at 1746. By specifically addressing the types of reasons and structured analyses that are “pragmatically appropriate to a particular decision” the court can ensure that a highly contextual approach generates a fair normative decision. Id.; cf Minow & Spelman, supra note 183, at 1629 (arguing that legal decisionmaking involves a “[p]rincipled [c]hoice of [c]ontexts”—selecting the context that best reflects the normative contours of the underlying legal debate).
APPENDIX

Original Rule 11 provided as follows:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information and belief there is a 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. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent material is inserted. 529

In June of 1981 proposed amendments to the original Rule 11 were published:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and it is not interposed for delay 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 primarily for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a pleading is not signed, it shall not be accepted for filing, 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. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If a pleading 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, including a reasonable attorney's fee. 530

The proposed amendments were adopted after a few minor changes. The Advisory Committee's Note to the 1983 amendments states that the "new language is intended to reduce the reluctance of courts to impose sanctions." 531 The Note further states that the amended rule expands the courts' powers to award attorneys fees "to a litigant whose opponent acts in bad faith in instituting or conducting litigation." 532

Commentary at the time questioned this effort to expand the courts' sanctioning powers under the umbrella of the Rules Enabling Act. 533 Drafted and adopted pursuant to the Rules Enabling Act, 28 U.S.C. § 2071 (1966), the 1983 amendments proposed to remove the requirement of a "wilful" violation as a predicate to sanctions, effectively destroying any "good faith" defense. 534 In addition to removing the requirement of bad faith, the 1983 amendments made sanctions mandatory if the court found the threshold requirements of the Rule had not been met. 535 As stated in the Advisory Committee's Note the new "standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation." 536 The 1983 amendments caused a flurry of commentary and less than ten years after their enactment a general Call for Comments was issued prefatory to amendment. 537 The 1993 amendments were quite

530. See 1981 PRELIMINARY DRAFT, supra note 65, at 6-7.
532. Id.
533. See Burbank, supra note 90, at 998-1000.
534. Fed. R. Civ. P. 11 advisory committee's note (1983) ("The reference in the former text to willfulness as a prerequisite to disciplinary action has been deleted.").
535. Fed. R. Civ. P. 11 (1983) ("If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction . . . .").
537. CALL FOR COMMENT, supra note 66.
extensive, but one in particular caused comment: the substitution of the permissive “may” for the mandatory “shall” in the sanctions provisions. At the time of the submission of the packet of rule reforms to Congress, Justices Scalia and Thomas objected to the amendments. Specifically, they disagreed with deleting the mandatory “shall” from the Rule and limiting the availability of compensatory fee awards as sanctions, stating that “the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation.” In their dissent from the Supreme Court’s approval of the rules, Justices Scalia and Thomas opined that “there appears to be general agreement . . . that Rule 11, as written, basically works.” They did not note or address commentary to the contrary.

The 1993 amendments became effective on Dec. 1, 1993. However, Congress’s response was not overwhelmingly favorable and action was taken to negate much of the drafters’ work. This included proposing a provision in the “Attorney Accountability Act of 1995” (H.R. 988) that would restore the mandatory sanction provision and compensatory fee awards to Rule 11. Similar language attempting to reinstate the mandatory sanction language of the 1983 rule was included in the “Lawsuit Reform Act of 1995” (S. 300).

Ultimately, the Rule was extensively amended. The 1993 amendments to Rule 11 provide as follows:

Rule 11: Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney’s individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer’s address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO COURT. By presenting to the court
whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for
violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37. 543
