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Discretion Or Law: Appellate Review of Determinations That Rule 11 Has Been Violated Or That Nonmutual Issue Preclusion Will Be Imposed Offensively

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Two of the most controversial procedural determinations made by trial judges today concern whether an attorney or a party has violated rule 11 and whether to allow offensive use of nonmutual collateral estoppel. Huge sanctions or, particularly in the case of mass torts, damages can be at stake. When the trial judge's determination is appealed, the scope of review itself may determine the outcome. Yet appellate courts typically take a categorical approach to determining the appropriate standard of review. They label the procedural determination as either law or discretion from which either de novo or deferential review follows automatically. Professor Martin B. Louis points out that this categorical approach fails to account for the complex of doctrinal and policy factors that scope of review involves. The determinations often require an application of law to fact or a multifactored analysis, and the decisional advantage is sometimes at the trial level and sometimes at the appellate level. Other concerns, such as mistrust of lone trial judges and overburdened appellate dockets, also bear on the selection of the appropriate scope of review. Professor Louis questions why appellate courts are so eager to avoid these issues by applying labels instead of analysis to scope-of-review determinations. He suggests an approach that examines scope of review in depth and in terms of what promotes optimal judicial decisionmaking. Although Professor Louis' flexible approach would sacrifice simplicity, it would provide a valuable window into the current state of the court system.

I. Introduction

In civil litigation trial judges make all procedural and evidentiary determinations. Although many of these determinations are routine and unimportant,
some may substantially affect the parties and their attorneys or the outcome of the case. Two such important procedural determinations have come to the fore in recent years: (1) whether a party or attorney has violated the truth-insigning requirements of rule 11 of the Federal Rules of Civil Procedure; and (2) whether an issue determined in a prior action will be subject to an offensive application of nonmutual collateral estoppel or issue preclusion. The potentially large adverse consequences of these two determinations on cases, litigants, and attorneys ensure that appellate review often will be sought and that the threshold question of the scope of review will be a matter of some importance. The answer to this threshold question turns on how the determination itself is classified. If the determination is classified as a question of law, the scope of appellate review supposedly will be free, independent, or de novo—that is, the appellate court may substitute its judgment for the judgment of the trial judge. On the other hand, if the determination is classified as discretionary, the scope of appellate review supposedly will be narrow and deferential and will require for reversal a finding that the trial judge abused his or her discretion—that is, the trial judge made a determination that on the relevant facts and law exceeds the limits of reasonable or rational choice.

Appellate courts today are divided in their classification of determinations that rule 11 has been violated or that an issue will be precluded in nonmutual, offensive circumstances. Some courts hold that these determinations are legal

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2. Under Federal Rules of Civil Procedure 11, 26(g), and 37, for example, a variety of sanctions may be imposed on parties and/or their attorneys.


4. For the sake of brevity, and unless the context clearly indicates otherwise, the term "procedural determinations" hereafter will include both procedural and evidentiary determinations.

5. Rule 11 requires that every pleading, motion, and other paper shall be signed by an attorney of record or by a party proceeding pro se and that such signature constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11.


7. State Farm Fire & Casualty Co. v. Century Home Components, Inc., 275 Or. 97, 105, 550 P.2d 1185, 1189 (1976) (on question of law the appellate court "reserves the final word as to where the balance is struck"); Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635, 646 (1971) (mere disagreement a sufficient basis for reversal of trial judge's legal conclusions).

8. Rosenberg, supra note 7, at 636-38 (defining discretionary appellate review). Thus, as one appellate court has noted, "An exercise of discretion by a trial court may be erroneous but still be legal." Brinthurst v. Harkins, 32 Del. 324, 331, 122 A. 783, 787 (1923); accord Pitts v. White, 49 Del. 78, 82, 109 A.2d 786, 788 (1954).
and subject to de novo review; others hold they are discretionary and entitled to substantial appellate deference. This division is not surprising, given the importance of the two determinations and, as detailed below, the inherent difficulties of the choice. What is surprising—and extremely disappointing—is that appellate courts almost never justify their choice. Typically they merely announce that the particular procedural determination before them is a question of law or a discretionary determination—from which conclusion the appropriate scope of review follows automatically—as if the choice were so simple or self-evident that it requires no explanation. Needless to say, the choice often is neither. Such Delphic pronouncements are not the typical fare of American appellate courts, and there is no obvious explanation for their popularity in explicating the law/discretion dichotomy. Their effect, however, is considerable. Although American judges and lawyers are familiar with the distinction between law and discretion and normally apply it without hesitation, they often have great difficulty explaining their choices and sometimes seem to have no idea what the real considerations are.

More is involved here, however, than mere explication of the dichotomy between discretion and law. This dichotomy and the analogous fact/law dichotomy, both of which determine the appellate standard of review, act as surrogates for the system's division of decisional authority between the trial and appellate levels. Whenever a determination is classified as discretion or fact, appellate review thereof is deferential; appeals are discouraged and will succeed less frequently; and the trial level assumes principal responsibility for the determination. Conversely, procedural determinations that are classified as legal are reviewed freely; they are in effect singled out for special appellate attention, which should lead to more appeals and reversals and an enhanced appellate role. Classifying determinations has proved most controversial when they involve the application of law to fact, determinations sometimes called questions of ultimate fact or of mixed fact and law. These classifications, therefore, are most indica-

9. See cases cited infra notes 55-56 (rule 11), notes 158, 162 (issue preclusion).
10. See cases cited infra note 54 (rule 11), notes 155-56 (issue preclusion).
11. See infra note 118 (importance of rule 11 sanctions); text accompanying notes 170-71 (importance of nonmutual, offensive issue preclusion).
12. See infra text accompanying notes 24-50.
13. Louis, supra note 1, at 1004-05 (noting that courts almost never explain or justify their classifications of procedural determinations as either discretion or law).
14. See Rosenberg, supra note 7, at 637 (explaining the definitional linkage between scope of review and the classification of an issue as discretionary).
15. Few of the rule 11 or collateral estoppel cases bother to explain their classification of these determinations as law or discretion. See infra text accompanying notes 67-68 & 157.
16. Louis, supra note 1, at 1003.
18. Id. at 646.
19. Louis, supra note 1, at 1002-05. Because these determinations involve both factual and legal elements, they cannot be characterized rationally as either fact or law. They could have been assigned a separate scope of review, which logically would have fallen somewhere between deference and substitution of judgment, but that middle-ground position would be difficult to define or apply. Hence appellate courts simply classify mixed questions as either fact/discretion or law and then review accordingly. The classification chosen of course reveals only the choice and not the reasons, which must be found in policy. Id. at 1002-03.
tive of how the system divides decisional power between the trial and appellate levels. Not surprisingly, the determination that rule 11 has been violated or that the relitigation of an issue should be precluded requires the application of law to fact. How these two important, mixed procedural determinations are classified should yield valuable insights into current attitudes toward the respective roles of the two adjudicative levels.

The simplicity of the fact/law and discretion/law dichotomies understates the actual complexity of legal decisionmaking. In making procedural determinations, just as in deciding questions going to the merits, trial level decisionmakers typically must find the historical or evidentiary facts, identify the applicable rules or principles of law, apply these rules of law to the historical facts found, and sometimes choose or assess a remedy or sanction. With few exceptions the principles or rules of law are reviewed freely or de novo, and both the findings of fact and the choice of remedy or sanction are reviewed deferentially. The difficult question is whether to review the application of the law to the facts freely or deferentially. Procedural determinations introduce an

20. Id. at 1005-06.
21. The question governing a determination that rule 11 has been violated is whether to the best of the signer's knowledge, information, and belief formed after "reasonable inquiry" the pleading, motion, or other paper in question was well grounded in fact and law and not interposed for any "improper purpose." See generally Rule 11 in transition: the Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 14-25 (American Judicature Society 1989) [hereinafter Task Force Report] (discussing rule 11's certification standard). The terms "reasonable inquiry" and "improper purpose" clearly involve the application of legal principles to particular facts. What the signer of the paper actually believed about its grounding in fact and law is a factual question, but it is often made redundant by a preliminary, objective inquiry into what the signer reasonably might have believed, which is also a mixed determination of fact and law. See infra text accompanying note 94.
22. Issue preclusion determinations typically raise two fundamental questions: (1) whether in a prior action the issue actually was decided and was necessary to the decision; and (2) whether the party to be precluded lacked a full and fair opportunity to contest the issue in the prior action or whether application of the preclusion otherwise would be unfair. E.g., State Farm Fire & Casualty Co. v. Century Home Components, Inc., 275 Or. 97, 104-05, 550 P.2d 1185, 1188-89 (1976). The determinations that the issue actually was decided and necessary, that the party to be precluded lacked a full and fair opportunity to litigate, and that application of the preclusion would be otherwise unfair all require the application of law to fact.
23. In recent years the litigation explosion and a rising inclination to appeal have swollen the dockets of most appellate courts, which understandably have sought ways to decrease their workload, including ways to limit the number of appeals and the scope of their review of those appeals taken. See, e.g., Reynolds & Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. CHI. L. REV. 573 (1981) (generally reviewing congestion in the federal courts of appeals and examining one partial solution—limited publication of appellate decisions and prohibiting citation to unpublished decisions). In the process appellate courts have begun to redefine their role in relation to the trial level. See infra text accompanying notes 41-50.
24. See Robinson v. National Cash Register Co., 808 F.2d 1119, 1125-26 (5th Cir. 1987) (describing and establishing a scope of review for each of these steps in reviewing an order finding and imposing sanctions for a violation of rule 11).
26. I have suggested elsewhere that the separately articulated deferential scopes of review for fact and for discretion are doctrinally so similar and in practice have grown so close together that fact-finding is simply a form of discretion and that the various kinds of discretion together define the essential trial-level function. Louis, supra note 1, at 999.
additional complication. These determinations often require the trial judge first to find two or more ultimate facts and then somehow to weigh them in order to reach the final determination. To determine, for example, whether to allow leave to amend under rule 15(a), the trial judge must consider a range of factors and then somehow weigh them together to reach the ultimate determination. See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE § 4.13, at 211-12 (3d ed. 1985) (reviewing the factors relevant to amendment).

Again the difficult question is whether this final, multifactored determination will be reviewed freely or deferentially. The appellate court is at an obvious decisional disadvantage vis-a-vis the trial-level decisionmaker, who has observed the witnesses. The appellate court is not so disadvantaged in reviewing findings of ultimate fact if the trial-level decisionmaker has made and published its own findings. Indeed, in this situation appellate courts often claim that because they are as qualified to make these final determinations, they should review at least the most important ones de novo. This claim is weak and seldom heard today when juries or administrative agencies employing their collective worldly experience or expertise have found ultimate facts going to the merits.

The claim is stronger when lone trial judges find such mixed facts or they (or administrative agencies) make procedural determinations, about which appellate courts have equal or greater understanding. Moreover, the jury can cite the seventh amendment as the source of its hegemony over the merits; an agency similarly can cite the organic statute assigning it governance and subject-matter jurisdiction over a particular market or activity. Neither trial judges nor agencies, however, can

27. To determine, for example, whether to allow leave to amend under rule 15(a), the trial judge must consider a range of factors and then somehow weigh them together to reach the ultimate determination. See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE § 4.13, at 211-12 (3d ed. 1985) (reviewing the factors relevant to amendment).

28. See Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985) (noting the familiar rule of deference to findings of fact based on testimonial evidence because the trial judge is in a superior position to determine the credibility of the witness); Orvis v. Higgins, 180 F.2d 537, 539-40 (2d Cir.) (same), cert. denied, 340 U.S. 810 (1950).

29. Federal Rules of Civil Procedure rule 52(a) provides that when the trial judge is the trier of fact he must "find the facts specially." E.g., Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1434 n.3 (7th Cir. 1987) (appellate review of rule 11).


31. For this reason several federal courts of appeals once held that they would review de novo a trial judge's findings of ultimate fact going to the merits. E.g., Mamiye Bros. v. Barber S.S. Lines, 360 F.2d 774, 776-78 (2d Cir.), cert. denied, 385 U.S. 835 (1966). See generally Weiner, The Civil Nonjury Trial and the Law-Fact Distinction, 55 CALIF. L. REV. 1020, 1022-23 (1967) (discussing the split among the federal circuits on this question). The United States Supreme Court now appears to have settled the question in favor of deferential review of such ultimate fact findings. Bose Corp. v. Consumers Union, 466 U.S. 485, 501 (1984) (stating that rule 52(a) "applies to findings of fact, including those described as 'ultimate facts' because they may determine the outcome of litigation"). In Bose, however, the Court reaffirmed its commitment to de novo review of constitutional facts, id. at 510-11, which are ultimate facts deterministic of constitutional rights and arguably too important to have been trusted to the discretion of any trial-level decisionmaker.

32. Louis, supra note 1, at 1040 (surveying the many reasons appellate courts seem to review procedural determinations more closely than substantive ones).

33. See generally id. at 1008-09 (exploring the effect of the constitutional right to trial by jury under the seventh amendment on the classification of ultimate facts as questions of fact for the jury).

34. Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 HARV. L. REV. 70, 95-109 (1944) (contending that statutes authorizing administrative adjudication grant the agency discretionary authority over ultimate facts found in adjudication).
claim any equivalent protection for their procedural determinations.

The foregoing discussion implies that appellate deference to findings of ultimate fact is less likely when the trial-level decisionmaker is a judge or the determination is procedural. Until recently, for example, a trial judge's findings of ultimate fact going to the merits—in contrast to such findings by juries or agencies—often were reviewed independently on appeal, and many important procedural determinations were classified as questions of law. Lately however, the United States Supreme Court has moved decisively to bolster the decisional authority of federal trial judges and now seems to have held that the trial judges' findings of ultimate fact going to the merits are to be reviewed deferentially under the "clearly erroneous" test of rule 52 of the Federal Rules of Civil Procedure. The Supreme Court also now tends to classify as discretionary most ultimate procedural determinations.

This recent trend toward appellate deference to trial-level decisionmakers, particularly trial judges, suggests that a new, as yet unmentioned, factor is at work. That factor is time. Appellate courts today are swamped with cases and of necessity are exploring ways to conserve their overtaxed resources. These courts have two principal functions: (1) they seek to make certain that cases are decided correctly, or at least are not decided very incorrectly (the supervisory function); and (2) they develop the body of the law (the law function). The supervisory function, which includes the direct review of the determinations under consideration in this Article, is now the principal responsibility of intermediate appellate courts, but today even these courts are so overburdened with cases that their discharge of this function somehow must be

36. See generally id. at 99, 110 (asserting that with narrow exceptions law application going to the merits is classified as "fact" for purposes of judge/jury assignment and appellate review of administrative determinations).

37. See supra note 32.

38. See Louis, supra note l, at 1038 & n.334 (asserting that important mixed procedural determinations have often received de novo review).

39. See supra note 32.


41. See supra notes 32 & 40.

42. See generally Reynolds & Richman, supra note 23, at 573 (describing the docket congestion in the federal courts of appeals).

43. In Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985), for example, the Supreme Court stated that the "trial judge's major role is the determination of fact... Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." Accord Pierce, 108 S. Ct. at 2547 (appellate need to review entire trial record a reason not to accord de novo review to a mixed fact/law determination).

44. Louis, supra note 1, at 1006 (defining and describing the supervisory and law functions).
Although de novo appellate review by these courts of all trial-level findings of ultimate fact might help to ensure that a few more cases or motions were decided correctly, it would probably attract more appeals and require a greater, more time-consuming familiarity with the record. The trade-off today between the time needed and the improvement in case results often simply would not be positive.

Although appellate courts perhaps should look harder at appeals of important cases and from unreliable decisionmakers, and in particular at the important determinations of lone trial judges, they need not adhere to an across-the-board de novo standard of review for all findings of ultimate fact. Instead, on an ad hoc basis they may simply look more closely and defer less eagerly when the case is unusually important or the trial-level decisionmaker's ability or objectivity is in question. Perhaps they also should review more carefully when the mixed fact/law determination either is not fact-intensive or the principal historical facts are not in issue and the ultimate determination is not peculiarly within the competence of the trial-level decisionmaker. This last category will often include mixed procedural determinations such as those finding a violation of rule 11 or precluding relitigation of an issue. These procedural determinations, moreover, are usually multifactored, and some of the factors similarly may lend themselves to close scrutiny, even though the ultimate determination is classified as discretionary. Such a classification supposedly requires deferential review of every factor. This inflexible approach is, in this author's opinion, a major source of present appellate disputes over the appropriate standard of review of important procedural determinations. After close examinations of these disputes with respect to determinations that rule 11 has been violated and an issue may be precluded, this Article will propose a more flexible approach that specifically permits the intensity of appellate review to vary from one factor of a determination to another.

II. THE SCOPE OF REVIEW OF RULINGS DETERMINING WHETHER RULE 11 HAS BEEN VIOLATED

In January 1988 the United States Court of Appeals for the Fifth Circuit, in open acknowledgment of the growing importance of rule 11 practice, issued a lengthy en banc opinion in *Thomas v. Capital Security Services, Inc.* dealing

46. Louis, supra note 1, at 1006, 1013 (suggesting that even intermediate appellate courts now see their principal role as preventing egregious results rather than as ensuring correct results).
47. Id. at 1013-15.
48. See supra note 43.
49. Former judicial clerks often admit that the appellate courts for which they labored tended to look harder at important cases and the decisions of untrustworthy trial-level decisionmakers. Louis, supra note 1, at 1016 n.160.
50. Attorneys, particularly those in large cities, often decry the corruption, incompetence, and untrustworthiness of local judges. Howe, Book Review, 215 Sci. Am. 295, 298 (1966). The determinations of local trial judges are subject to their biases and prejudices, unchecked by voting colleagues. Thus, Professor Rosenberg has aptly described the uneasiness engendered by the lone decisionmaker as the "feeling that there is safety in numbers." Rosenberg, supra note 7, at 642.
51. 836 F.2d 866 (5th Cir. 1988) (en banc).
with a variety of rule 11 issues, the first of which was the standard of review. The court began discussion of this issue by noting the existence of two rival standards of review among the Fifth Circuit's own panels, as well as among the circuits. One approach was described as "a single abuse of discretion standard to be applied across-the-board to all of the issues ruled on in Rule 11 cases," The other approach was described as a "three-tiered standard of review" whereby the underlying findings of fact are reviewed under the clearly erroneous standard, the conclusion that a particular set of facts constitutes a rule 11 violation is legal and reviewed de novo, and the amount and type of sanction imposed is examined under the abuse of discretion standard. Having identified these two approaches, as well as certain local variations on the latter de novo approach, the Thomas court then chose the unitary abuse-of-discretion approach because of the fact-intensive nature of the inquiry and the court's conclusion that the trial judge, more so than appellate judges, is in the best posi-

52. Id. at 871-73.
53. Id. at 871-72.
54. Id. (citing from the Fifth Circuit: Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986); Davis v. Veslan Enter., 765 F.2d 494, 498 (5th Cir. 1985); and from other circuits: O'Connell v. Champion Intl' Corp., 812 F.2d 393, 395 (8th Cir. 1987); EBI, Inc. v. Gator Indus., Inc., 807 F.2d 1, 6 (1st Cir. 1986); Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1055, 1060 (4th Cir. 1986); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986)). Other cases adopting this single discretion standard are Kale v. Combined Ins. Co. of Am., 861 F.2d 746, 757-58 (1st Cir. 1988); Herron v. Jupiter Trans. Co., 858 F.2d 332, 337 (6th Cir. 1988); Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988); Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 210 (4th Cir. 1988); Federal Deposit Ins. Corp. v. Tekfen Constr. & Installation Co., 847 F.2d 440, 443 (7th Cir. 1988); Adams v. Pan Am. World Airways, Inc., 828 F.2d 24, 32 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1225 (1988). Perhaps to avoid terminological confusion, these decisions usually fail to mention that the legal principles applied by the trial court will receive plenary or de novo review. See Task Force Report, supra note 21, at 45.
55. Thomas, 836 F.2d at 871-72 (citing from the Fifth Circuit: Robinson v. National Cash Register Co., 808 F.2d 1119, 1125-26 (5th Cir. 1987); and from other circuits: Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1434 (7th Cir. 1987); Zaldiver v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986)). Other cases adopting this standard include In re Hawaii Asbestos Cases, 871 F.2d 891, 896 (9th Cir. 1989); New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1305 (9th Cir. 1989); Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 526 (9th Cir. 1989); and EEOC v. Milavetz & Assocs., 863 F.2d 613, 614 (8th Cir. 1988). Under this standard the legal principles applied by the trial judge of course also are reviewed de novo. See supra note 54.
56. Thomas, 836 F.2d at 872 (citing Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1175 (D.C. Cir. 1985); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985). Other hybrid de novo cases include IBT v. Association of Flight Attendants, 864 F.2d 173, 176 (D.C. Cir. 1988); and United States v. Milam, 855 F.2d 739, 742 (11th Cir. 1988). Generally speaking, these cases hold that only a decision as to whether a pleading or motion was legally sufficient under rule 11 involves a question of law subject to de novo review. Thus, factual or bad-faith reasons to find violations of rule 11 are subject to review for abuse of discretion. See generally Adamson v. Bowen, 855 F.2d 668, 673 n.6 (10th Cir. 1988) (adopting an overall discretion approach, but reviewing the de novo approach cases and their variations).
57. Thomas, 836 F.2d at 872.
58. Id. at 873. A trial judge is often better able to learn precisely what has transpired when an inquiry is fact-intensive. Reviewing appellate judges must often study the record intensively to obtain a comparable level of understanding, and any opinion they render on these precise facts is easily distinguished by trial judges in subsequent cases. Hence, appellate courts tend to see de novo review of such fact-intensive determinations as cost ineffective and to entrust them to the discretion of the trial courts. See generally Rosenberg, supra note 7, at 663 (examining such classification criteria as fact-intensiveness).
tion to review the factual circumstances and to understand "'what is acceptable trial-level practice among litigating members of the bar.'" 59

The two approaches or standards of review identified by the Thomas court are not nearly as far apart as its opinion implies. Both standards correctly holds that review of the trial judge's choice of sanction—amount and type—is discretionary. 60 Both recognize that the general legal principles which are applied to the facts found and which guide and limit the determination that a violation has occurred are reviewed freely or de novo. 61 Finally, both standards for the review of the facts found—abuse of discretion versus the clearly erroneous approach—are essentially the same. Both require deference to the trial court's decision, both are explicated in essentially similar legal terms, 62 and although historically the abuse-of-discretion standard received more appellate deference than the clearly-erroneous standard, today their treatment is coalescing empirically, as well as doctrinally. 63 Indeed it can be argued that factfinding is itself a discretionary exercise and that such exercises, as defined by and within the limits set by law, constitute the essential trial-level function. 64

It follows then that the only difference between the two standards of review is with respect to the determination that a particular set of facts constitutes a violation of rule 11. The discretion standard purports to review this ultimate determination deferentially; the three-tiered standard classifies this ultimate determination as legal and purports to review it freely or de novo. 65 In justification of its choice of discretionary review, the Thomas court began with the recognition that the imposition of sanctions for a rule 11 violation is mandatory and that mandatory sanctions typically result in a broader, usually de novo, scope of appellate review of the determination that a violation has occurred. 66 Nevertheless, the court chose the discretion standard because the determination that a violation has occurred is fact intensive and trial judges have a better sense of what is acceptable litigating practice. 67

The Thomas court is to be applauded for attempting, unlike most of the decisions it cites, to explain and justify its choice of a standard of review. Its

60. Adamson v. Bowen, 855 F.2d 668, 672 n.5 (10th Cir. 1988) (asserting that all circuits agree the trial judge's choice of an appropriate sanction is discretionary).
61. See supra notes 7, 54 & 55.
62. "On appeal, the question [in reviewing fact findings under either the 'discretion' or 'clearly erroneous' standard] is not whether the trial level result is the better or best one but only whether it is a legally permissible one." Louis, supra note 1, at 999.
63. In recent years appellate courts have been more likely than before to find an abuse of procedural discretion, a finding that was once quite rare, and less likely than before to hold that a trial judge's finding of fact is clearly erroneous. Id. at 999-1000. As a result the two doctrines are growing closer empirically, as well as doctrinally.
64. See supra note 26.
65. See supra text accompanying note 55. Recall that some courts of appeals review de novo only the question of whether the pleading or motion was legally well grounded. See supra note 56.
66. Thomas, 836 F.2d at 872. Other courts have mentioned rule 11's mandatory sanctions as a principal reason for de novo review of the determination that a violation has occurred. See, e.g., Robinson v. National Cash Register Co., 808 F.2d 1119, 1126 n.12 (5th Cir. 1987).
67. See supra text accompanying notes 58 & 59.
exploration of the question, however, is incomplete and unsatisfying. Thus, not all fact-intensive procedural determinations are classified as discretionary. Some very important ones—for example, those resolving the legal sufficiency of a party’s evidence—always have been treated as questions of law. Moreover, some determinations that rule 11 has been violated, particularly those turning upon the requirement that the pleading or motion be “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,” are not at all fact intensive. Finally, the determination that rule 11 has been violated usually requires, as do most other ultimate procedural determinations, the application of law to fact and, therefore, generally can be characterized as factual, if not fact intensive. Is the Thomas court saying that procedural law application is, at least presumptively, an exercise of discretion because the process is generally factual and sometimes fact intensive? Such a position, which the United States Supreme Court arguably has embraced already, is not inherently unreasonable today. It would be a departure from the body of federal procedural law, however, and one which the federal courts should, therefore, more candidly acknowledge and justify. Moreover, because there always have been, and presumably will continue to be, exceptions to the presumption that law application will be reviewed deferentially on appeal, and because the determination that rule 11 has been violated arguably merits such an exception, the Thomas court ought to have considered and rejected that possibility.

Finally, it is possible that the Thomas court was suggesting that the rule 11 determination in question is more fact intensive than are other ultimate procedural determinations and that this is at least a significant factor in the classification of the determination as discretionary. Needless to say, it would be very difficult to rank all mixed procedural determinations in this way. There are paradigms, however. For example, the determination that an amendment to a pleading arises out of the same transaction or occurrence as the original pleading and, therefore, will relate back under rule 15 of the Federal Rules of Civil Procedure usually requires nothing more than a comparison of the two pieces of paper. By contrast, some procedural determinations potentially involve a

68. See supra note 3.
69. FED. R. CIV. P. 11. The fact-free nature of this particular determination explains why some circuit courts review only it de novo. See supra note 56.
70. As suggested above, the United States Supreme Court today apparently is inclined to classify most mixed determinations, other than constitutional facts, as fact or discretion and to review them deferentially. See supra note 32 and text accompanying note 40.
71. See supra note 38.
72. Louis, supra note 1, at 1004, 1027-38 (pointing out that traditionally and still today some important mixed determinations going to the merits are classified as legal or as jurisdictional or constitutional facts and reviewed de novo).
73. Rule 15(c) provides in relevant part: “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.” FED. R. CIV. P. 15(c).
74. Because review of this determination is so simple and the grant or denial of relation back can affect the outcome of a case, relation back is classified for appellate review purposes as a question of law. See Tiller v. Atlantic Coast Line R.R., 323 U.S. 574, 580-81 (1945) (affirming an allowance of relation back with no mention of discretion and what seems to be de novo consideration).
much greater range of factual inquiries. The "reasonable inquiry" standard of rule 11, for example, is one of "reasonableness under the circumstances"\textsuperscript{75} and may depend on a number of difficult factual circumstances,\textsuperscript{76} particularly if the attorney whose signature has been challenged chooses to offer evidence that his inquiry was reasonable.\textsuperscript{77} An investigation into whether this attorney believed that the paper was well grounded in fact similarly often could be fact intensive.\textsuperscript{78}

In practice these rule 11 inquiries often are not nearly as factually intensive as logic suggests. Fear of complex satellite litigation over rule 11 has prompted courts to limit most sanction proceedings to the existing record and to permit discovery only in extraordinary circumstances.\textsuperscript{79} Many courts also have converted the seemingly subjective inquiry into the attorney's belief in the legal and factual adequacy of the paper into an objective inquiry,\textsuperscript{80} in part, one suspects, to limit its factual scope.\textsuperscript{81} In a great many rule 11 proceedings, therefore, the

\begin{itemize}
\item \textsuperscript{75} Rule 11, Advisory Committee Note, 97 F.R.D. 165, 198 (1983).
\item \textsuperscript{76} The Advisory Committee Note to rule 11 states as follows:

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

\textit{Id.} at 199. Because such an extended factual inquiry could be costly and time consuming, the Advisory Committee Note also states that to

\begin{itemize}
\item assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record.
\item Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.
\end{itemize}

\textit{Id.} at 201. In conformance with these limitations, district courts were found by a recent survey to have conducted evidentiary hearings in only 2.7% of the rule 11 requests leading to dispositions and to have resolved a majority solely on the papers. \textit{Task Force Report, supra} note 21, at 30. In addition, many federal judges who are persuaded as an objective matter that the pleading or motion was not well grounded in fact or law and that the signer would have so known if the requisite reasonable inquiry had been conducted will tend to discount or ignore the signer's factual representations with respect to the reasonableness of the inquiry or his belief that good factual and legal grounds existed. \textit{E.g.,} Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986) (rejecting the signer's representations that a reasonable inquiry had been conducted in the face of an objective conclusion as to what a reasonable inquiry would have revealed); see \textit{Task Force Report, supra} note 21, at 18 (suggesting that little factual inquiry is required if the signer has failed to conduct "any or an objectively reasonable pre-filing inquiry"). Thus, although the reasonable inquiry requirement of rule 11 would appear to render many rule 11 hearings fact-intensive, many such hearings are resolved on an objective basis or the available record and few require discovery, live testimony, or the extensive acquisition of new facts.

\item \textsuperscript{77} In practice such evidence is offered only infrequently, is usually offered through attorney affidavits rather than live testimony, and is sometimes disregarded or discounted in the face of contrary objective evidence of what was believable or what a reasonable inquiry should have disclosed. \textit{See supra} note 76.
\item \textsuperscript{78} \textit{Task Force Report, supra} note 21, at 27.
\item \textsuperscript{79} \textit{See supra} note 76.
\item \textsuperscript{80} In \textit{Eastway Construction Corp. v. City of New York} Judge Weinstein suggested that "[e]ven the subjective component has objective aspects since as a matter of evidence the judge will rely on what reasonable lawyers would have known or believed under the circumstances in deciding what this lawyer believed." \textit{Eastway Constr. Corp.}, 637 F. Supp. 558, 567 (E.D.N.Y. 1986), modified, 821 F.2d 121 (2d Cir.), \textit{cert. denied}, 108 S. Ct. 269 (1987); \textit{accord Task Force Report, supra} note 21, at 23.
\item \textsuperscript{81} \textit{Task Force Report, supra} note 21, at 22, 27 (asserting the likely existence of a linkage
record is not particularly large and is probably smaller than the record presented by motions challenging the sufficiency of the evidence, which motions, though fact intensive, are reviewed de novo.

In sum, not all procedural determinations of mixed fact and law are classified as discretionary and reviewed deferentially. Moreover, determinations that rule 11 has been violated are not always factual and are only sometimes intensely factual. Their classification as discretionary cannot be based, therefore, solely on the argument that they are fact intensive.

The Thomas court's second justification—that trial judges have a better sense of what is acceptable litigating practice—is equally unsatisfactory. Being closer to the realities of practice in general and to the resources available to attorneys in particular communities, perhaps trial judges have a better sense of what is a "reasonable inquiry" and in close cases should be given the benefit of the doubt if they indicate reliance on such local factors. Such local factors should not, however, affect the question whether the attorney believed that the pleading or motion was well grounded in fact and law. Neither the text nor the advisory committee note to rule 11 specifically mentions or endorses any such local variations in these aspects of the rule's requirements. The committee note does describe the standard as one of "reasonableness under the circumstances," which arguably could include local practice variations as well as case peculiarities, but that is a slender thread on which to conclude that the requirements of this particular federal rule, unlike the others, will vary significantly from one district court to another. Local variations inevitably will creep into the application of the Federal Rules, but that is no reason to endorse them formally. Moreover, even if local variation should properly play some role in rule 11 practice, that conclusion does not require an overall discretionary appellate review standard. The majority of locales and situations will fall close enough to the national mean that trial judges of necessity will be guided primarily by gen-

82. See supra note 76.
83. See supra note 3.
84. Wise v. Pea Ridge School Dist. No. 109, 675 F. Supp. 1524, 1532-33 (W.D. Ark. 1987) (in determining whether a reasonable inquiry was conducted a district court should reflect upon equitable considerations such as the experience of the lawyer and whether the area of the law required special expertise); see Albright v. Upjohn Co., 788 F.2d 1217, 1220 (6th Cir. 1986) (in support of their motion for sanctions defendant's attorneys pointed out that plaintiff's attorneys were experienced litigators who had prosecuted similar products liability actions).
85. Hays v. Sony Corp. of Am., 847 F.2d 412, 419 (7th Cir. 1988) (the rule 11 standard, like the negligence standard in tort law, makes no allowance for the particular circumstances of particular practitioners; there is no "locality rule" in legal malpractice); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435, 1439 (7th Cir. 1987) (equitable considerations, though relevant to a choice of sanction, are not relevant to the initial decision to impose sanctions because that is a "question of law," but whether a party is proceeding pro se may be relevant to a finding of violation); cf. Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986) (no special treatment under rule 11 for attorneys who handle unpopular civil rights claims or who represent indigent or minority persons), cert. denied sub nom. County of Suffolk v. Graseck, 480 U.S. 918 (1987).
86. For example, practice under amended rule 11 was concentrated, at least in the beginning, in the large cities. TASK FORCE REPORT, supra note 21, at 62; Nelken, Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 GEO. L.J. 1313, 1326-27 (1986).
eral notions of what rule 11 requires. If and when local variations are helpful in an exceptional situation in resolving what is otherwise a very close call, their effect on the determination should be mentioned by the trial judge with the expectation that a reviewing court might defer if it agreed that the call was otherwise close. In short, even if one agreed with the Fifth Circuit that trial judges sometimes are in a better position to determine what is acceptable trial-level litigating practice, their slight advantage—for surely it is no more than that—should not offset the many reasons one could suggest for denying them such potentially formidable discretionary power to find that rule 11 has been violated.

The discretionary approach has just received a strong endorsement from *The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11*. Its conclusion is strongly influenced, however, by its support for a “conduct” rather than a “product” approach to whether rule 11 has been violated. A conduct approach focuses on the reasonableness of the attorney’s inquiry and his belief in the legal and factual adequacy of the signed paper. The inquiry can be fact intensive and subjective, factors that point toward deferential appellate review. A product approach, however, focuses on whether a reasonable attorney would have concluded on the available evidence that the paper was well founded in fact and law. The inquiry is more objective and normative, factors that point toward de novo appellate review. The report concedes, however, that no circuit has yet clearly adopted a conduct approach, that some circuits appear to favor a product approach, and that the rest clearly mix the two together. The report also concedes that even under the conduct approach it advocates, many of the component determinations are objective in whole or substantial part. Thus, determinations that the inquiry was reasonable and that the paper was well grounded in fact lend themselves, says the report, to objective approaches. Only the attorney’s belief in the legal adequacy of the paper demands a conduct approach, but even here the report recognizes the necessity of measuring the attorney’s professed belief against the objective standard of what a reasonable attorney would have believed. Nevertheless, the report concludes that sanctions should not be imposed on an attorney who, as a result of good faith legal “stupidity,” believes in the legal adequacy of a paper that fails the

87. Although trial judges admittedly have more familiarity with current trial-level litigating practices, they ordinarily should have no difficulty in conveying that familiarity in writing to the reviewing court. Moreover, it does not follow that because trial judges initially know better what the bar is doing, that they are generally in a superior position to decide what a particular attorney in a particular situation should have done.


89. *Id.* at 25, 46.

90. *Id.* at 46. Even here, however, the record is not always as fact intensive as logic would suggest. *See supra* note 76.


93. *Id.* at 18.

94. *Id.* at 19. This conclusion that the question of legal adequacy demands a conduct approach is impliedly rejected by the many courts of appeals that review de novo all rule 11 determinations of violation, or at least those turning on the signed paper’s legal sufficiency. *See* cases cited *supra* notes 55-56.
objective standard. Such behavior, says the report, should not be sanctioned because it cannot be deterred. Some deterrence is possible, however. Attorneys who are too “stupid” to master some arcane area of the law even after reasonable inquiry still may be smart enough to consult or associate with someone who is smarter or more knowledgeable in the area. Imposing sanctions for such stupidity would encourage attorneys to take this step. The fact that a side benefit of such deterrence is compensation to the victims of the stupidity is hardly troubling, even though, as the Task Force Report concludes, compensation is not the principal goal of rule 11. Moreover, preserving an exception for stupidity creates at least the illusion of a bolt hole for attorneys who conduct tactical litigation and are indifferent to the legal adequacy of the papers they sign.

Although the Task Force Report views deferential review as corollary to the conduct approach it favors, it also offers independent justifications for such review. The determination that a violation has occurred, says the report, involves “‘matters of judgment and degree’” and “‘factual questions concerning the actual position the litigant took—questions on which the court of first instance has the leading role.’” Moreover, “because ‘the district court has tasted the flavor of the litigation,’ that court ‘is in the best position to make [the relevant] determinations.’” It also may be aware of things that may not be apparent from a record on appeal. In apparent agreement the United States Court of Appeals for the First Circuit has suggested that the district judge, as a “first hand observer of the proceedings below,” has “the view from the trenches: he sees the shots fired by one party against the other, and he has full knowledge of the circumstances prompting the crossfire . . . [and] ‘a familiarity with the case, parties, and counsel . . . we cannot have.’” Together these arguments seem to say that the determination that a violation has occurred may be fact intensive, a matter already considered, and that in some ways the trial judge, by virtue of her presence on the scene, may have a special understanding of what has happened that cannot be fully conveyed to the reviewing court by the record. This final possibility is not unfamiliar. Often a subjective component of a procedural determination will turn upon the bona fides, motives, or intent of a party

95. TASK FORCE REPORT, supra note 21, at 19.
96. Id.
97. In Hays v. Sony Corp. of America Judge Posner stated that a local attorney lacking expertise relevant to the litigation “must either associate with him a lawyer who has it, or must bone up on the relevant law at every step in the way in recognition that his lack of experience makes him prone to error.” Hays, 847 F.2d 412, 419 (7th Cir. 1988).
98. TASK FORCE REPORT, supra note 21, at 10-12.
99. Id. at 46 (quoting O’Connell v. Champion Int’l Corp., 812 F.2d 393, 395 (8th Cir. 1987)). The report does not explain, however, why such matters render the determination inherently discretionary.
100. Id. at 46-47 (quoting In re Central Ice Cream Co., 836 F.2d 1068, 1072 (7th Cir. 1987)). The report does not explain, however, why the record and the trial court’s findings ordinarily will not reveal to the appellate court what position the litigant took.
101. Id. at 47 (quoting Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985)).
103. See supra text accompanying notes 68-83.
or attorney, matters about which only the trial judge may have the full flavor and which may be conveyed only imperfectly by the record. Whenever an appellate court suffers such a decisional disadvantage, its scope of review tends to be narrow and deferential. Such possibilities for appellate disadvantage seem to arise in rule 11 determinations whenever the trial judge seeks subjective evidence of the reasonableness of the attorney’s inquiry or of his professed belief in the legal and factual sufficiency of the signed paper. The principal sources of this evidence, including the attorney’s own explanatory or exculpatory statements, should appear of record, however. 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. To state the possibility most negatively, a trial judge might regard an attorney’s prior misconduct as relevant to a determination that other, subsequent conduct violates rule 11. Undoubtedly trial judges sometimes do this in close cases, regardless of whether it is legally proper, but they will almost never admit it on the record.

The question is whether appellate courts should defer to the trial judge’s more fully informed judgment because it is or may be based on such nonrecord information.

Perhaps trial judges generally will not misuse evidence of prior attorney misconduct, even though it is a handy way to get back surreptitiously at those who in the past have given offense. The system, however, should not place such temptations in a judge’s path, particularly because many persons, most notably

104. Rosenberg, supra note 7, at 663-65 (reviewing cases in which such record imperfections suggested that the determination should be classified as discretionary). Requests for leave to amend or for other procedural dispensations ordinarily require an examination of the applicant’s excuse for or explanation of the delict that creates the occasion for the request. That examination often must examine the applicant’s motive or intent, a subjective inquiry that the record will not always convey accurately. See Beeck v. Aquaslide ‘N’ Dive Corp., 562 F.2d 537, 540-41 (8th Cir. 1977) (finding no abuse of discretion in trial court’s close examination of defendant’s good faith in its request for leave to amend after the statute of limitations on plaintiff’s claim had run).

105. As mentioned above such statements typically are proffered through affidavits rather than depositions or live testimony. See supra note 77.

106. I have found no rule 11 decision admitting such judicial behavior. Courts, however, will consider prior misconduct as a factor in the discretionary choice of sanctions. Cf. Link v. Wabash R.R., 370 U.S. 626, 633 (1962) (discretionary dismissal for attorney’s failure to attend a pretrial conference properly based in part on attorney’s previous pattern of delay); Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1439 (7th Cir. 1987) (“equitable considerations,” though relevant to a choice of sanction, are not relevant to the determination that rule 11 has been violated). One recent case does suggest, however, that an attorney’s prior misconduct did influence a finding that he violated rule 11. In International Shipping Co. v. Hydra Offshore, Inc., 675 F. Supp. 146 (S.D.N.Y. 1987), aff’d, 875 F.2d 388 (2d Cir. 1989), plaintiff’s controversial attorney, see Taylor, The New Roy Cohn: Ninja Lawyer Richard Golub is a Killer in Court, NEW YORK MAGAZINE, Aug. 7, 1989, at 18, was subjected to a sanction of $10,000 for bringing an action that was immediately dismissed for lack of diversity jurisdiction. The trial judge who imposed the sanction plainly was annoyed by this attorney’s previous misconduct, which is carefully described in the opinion. Int'l Shipping, 675 F. Supp. at 148-49 (alleging that the attorney had served on defendants a nonconforming copy of an order to show cause from which the judge had deleted a temporary restraining order). Moreover, a dissenting opinion in the court of appeals noted that in an earlier case involving the same jurisdictional error, no violation of rule 11 was found. Int'l Shipping, 875 F.2d at 395 (Pratt, J., dissenting) (citing Chok v. S. & W. Berisford, PLC, 624 F. Supp. 440, 443 (S.D.N.Y. 1985)). Previously this dissenting opinion had stated rather emphatically that the attorney’s previous misconduct with respect to the order to show cause was not the subject of this rule 11 proceeding. Id. at 393 (Pratt, J., dissenting). Thus the dissenting opinion seems to imply that the earlier misconduct of plaintiff’s attorney was a factor in the subsequent determination that he had violated rule 11.

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civil rights plaintiffs and their attorneys, already have raised troubling questions about the current objectivity of rule 11's administration by the federal trial bench. For these reasons this author rejects any contention that the scope of review of rule 11 determinations should accommodate the possible use of evidence of prior attorney misconduct, which remains relevant to the trial judge's discretionary choice of a sanction once a violation has been found.

Although the definitive case for discretionary review of determinations that rule 11 has been violated perhaps has not yet been made, its component parts certainly have been revealed. The determination ordinarily requires the application of law to fact and sometimes to a multitude of special facts. De novo appellate review of such fact-intensive determinations demands close familiarity with the factual record and, therefore, substantial appellate effort. The question is whether such substantial effort by already overburdened appellate courts will be worth the marginal improvement in the overall quality of rule 11 practice.

Appellate courts arguably have no special insight into rule 11 problems and perhaps cannot achieve substantially better results overall. Their promise of de novo review, however, would probably attract additional appeals, but their control of the practice still might not be substantial because rule 11 cases are fact-specific and easily distinguished. Moreover, in some cases the trial judge's intimate knowledge of the parties and attorneys and the local situation may inform her judgment in ways that the record cannot or will not convey to the appellate court. In short, determining initially whether rule 11 has been violated is analytically very much like determining initially whether a criminal or regulatory statute has been violated. If the latter type of determination going to the merits typically is accorded appellate deference, then why not the former procedural one?

The obvious answer is that appellate deference to procedural determinations is not automatically required by constitution, statute, or an inherent decisional disadvantage. Moreover, in the judicial system such determinations are made by lone trial judges, whose decisions—both substantive and procedural—traditionally have received less deference than those of other trial-level decisionmakers. The net result is that many important procedural determinations are classified as questions of law, and the determination that rule 11 has been violated arguably also merits this classification. Two paradigm members of this legal group are motions testing the sufficiency of a party's evidence and

107. Task Force Report, supra note 21, at 68-72 (reporting data showing that civil rights plaintiffs are disproportionately subject to rule 11 sanctions); Nelken, supra note 86, at 1340 (same as to plaintiffs in general and as to civil rights litigants in particular).

108. See supra note 84 & 106.


110. See supra text accompanying notes 31-35.

111. See supra note 32.

112. See supra note 38.

113. See supra note 3.
determinations that an amendment will relate back. Although motions testing the sufficiency of the evidence are ordinarily fact intensive and, therefore, seem to be candidates for discretionary review, they always have been classified as questions of law. The principal policy reason for this result is our general lack of confidence in the trustworthiness of lone trial judges and the attendant reluctance to accord them discretionary power to determine the merits of cases. For similar but even more compelling reasons, criminal procedural determinations involving the Bill of Rights are classified as constitutional facts and reviewed de novo. Such rights are regarded as simply too important to be entrusted to the discretion of local trial judges, many of whom are also thought to be less than sympathetic to some of these rights.

Rule 11 arguably has this kind of importance. Substantial rule 11 sanctions may seriously affect an attorney’s finances, reputation, attitudes, and self-esteem. Many attorneys already generally mistrust the trial bench and doubtlessly are now quite fearful of its power to impose such sanctions, particularly if this power is classified as discretionary. Such fears should deepen as state trial courts adopt and begin to enforce equivalent provisions. Meanwhile, the supposedly higher average quality of the federal trial bench has not eliminated such fears. Pointing to the higher incidence of rule 11 sanctions upon plaintiffs, particularly those asserting civil rights claims, the rule’s critics assert

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114. See supra note 74.

115. Louis, supra note 1, at 1014, 1040 n.345 (exploring the system’s traditional fear of the determinations of lone trial judges, particularly with respect to determinations affecting the merits or the outcome of cases). The sufficiency of the evidence, which is a concept setting boundaries or limits to the factfinder’s discretionary power over the facts, arguably must be classified as legal. Otherwise the trial judge’s power to grant a directed verdict or its equivalent would occupy a zone of discretion bordering the factfinder’s own zone of discretion, and, therefore, appellate review of the ruling would involve double discretion. Although appellate review of discretion on discretion is not unknown—e.g., the review of a trial judge’s grant or denial of a new trial because the jury’s award of damages is excessive or inadequate—the concept always has been troubling, see F. James & G. Hazard, supra note 27, § 7.21, at 390-91, and ought not to be extended willingly to other areas.

116. Louis, supra note 1, at 1030-32, 1034 (arguing that the doctrine’s application, which is somewhat selective, is most likely when the affected constitutional rights are so important that any wrong, though reasonable, results are regarded as intolerable). See generally Strong, The Persistent Doctrine of “Constitutional Fact,” 46 N.C.L. Rev. 223, 244-61 (1968) (reviewing cases applying the doctrine to determinations involving the right to counsel, coerced confessions, illegal search and seizure, and arrest procedures).

117. Louis, supra note 1, at 1032.

118. When imposed, rule 11 sanctions are usually monetary and often quite substantial, e.g., Harris v. Marsh, 123 F.R.D. 204, 208 (E.D.N.C. 1988) (reviewing assessment of almost $100,000 in sanctions against prominent civil rights attorneys), even though courts do not always fully shift attorney fees. Task Force Report, supra note 21, at 36-38. Moreover, many persons believe that sanctions presumptively should be imposed only on the attorney, leaving reallocation between attorney and client to private ordering. Id. at 30-31, 41-43. Rule 11 sanctions also may affect an attorney’s professional reputation and livelihood; cause loss of business, personal chagrin, and humiliation; chill aggressive or innovative legal behavior; and poison relations between attorneys and their clients, other attorneys, and the judiciary. Id. at 22, 27, 29, 84-88.

119. “I have too often heard practicing lawyers from our large cities insist that one reason—and that a compelling one—for preserving jury trial is that it is our best safeguard against the corruption of judges.” Howe, supra note 50, at 295. In North Carolina, this author often has heard practicing attorneys question the ability and objectivity, but not the honesty, of local trial judges.

120. Task Force Report, supra note 21, at 65-68 (reporting empirical evidence that plaintiffs and their attorneys are sanctioned far more often than defendants and their attorneys); Nelken, supra note 86, at 1327-28 (same).
that in the hands of an increasingly conservative federal trial bench, it is—for
the time being at least—an antiplaintiff measure.122 These critics obviously pre-
fer that federal courts of appeals keep a tight rein on trial-level determinations
that rule 11 has been violated. Indeed, had the courts of appeals not been so
assiduous to date in reversing doubtful trial-level determinations that rule 11
had been violated,123 opposition by the bar to rule 11 already might be
widespread.

Interestingly almost none of the appellate decisions discussing the standard
of review of trial-level determinations that rule 11 has been violated even men-
tion these concerns about the scope of the power or the objectivity of the trial
judges who will exercise it, even though such concerns traditionally have been
the principal reason for de novo appellate review of mixed trial-level determina-
tions.124 Even those courts favoring de novo review do not mention this con-
cern. They emphasize instead the mandatory nature of the sanctions and the
objective nature of the determination,125 which appellate courts are in as good a
position as the trial judge to make. The objective character of the determination
is the source of the second paradigm mentioned above—the classification as
legal of determinations that an amendment will relate
back.126 Deciding under
rule 15(c) whether an amendment arises out of the conduct, transaction, or oc-
currence set forth in the original pleading normally requires nothing more than
a side-by-side comparison of two pieces of paper. In making this comparison,
the appellate court is not at a decisional disadvantage, the determination may
affect the outcome of the case, and the additional effort required for de novo
review is minimal.127

Although not all determinations that rule 11 has been violated fit this objec-
tive model, many do. Thus, some courts assert that the question of the legal
sufficiency of a pleading or motion fits this model and will be reviewed de novo,
even though other factual or subjective rule 11 determinations are reviewed

121. TASK FORCE REPORT, supra note 21, at 68-72 (reporting empirical evidence that civil rights
plaintiffs and their attorneys are subject to a disproportionate number of rule 11 sanctions); Nelken,
supra note 86, at 1327-28 (evidence as to plaintiffs in general and as to civil rights litigants in
particular).

122. TASK FORCE REPORT, supra note 21, at 71-72. I have previously suggested that the
proliferation of spurious civil rights claims was an obvious cause of and target for amended rule 11.
Nevertheless, there is still insufficient evidence that civil rights attorneys and their clients generally
are being unfairly targeted or that over time the admittedly high initial incidence of such targeting
will not decrease. Louis, Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary
View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil

587, 591 n.17 (1987) (suggesting that appellate courts have been quick to reverse questionable sanc-
tions, citing Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986), cert. denied sub nom.
F.2d 1531, 1539-40 (9th Cir. 1987)).

124. Levin, supra note 1, at 1032.

125. E.g., Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1434 n.3 (7th Cir. 1987);
Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985), on remand, 637

126. See supra text accompanying note 114.
127. See supra note 74.
deferentially. One court argues that even when the inquiry considers whether the pleading or motion is well grounded in fact, "the initial focus of the district court should be on whether an objectively reasonable evidentiary basis for the claim was demonstrated in pretrial proceedings or at trial." Moreover, if the trial court finds no objectively reasonable factual basis, it then examines the "objective reasonableness of the attorney's pre-filing inquiry." In making these objective examinations, the appellate court is in a good position to determine whether the pleading was groundless and "need not defer to the lower court's opinion." Moreover, as Judge Weinstein has noted, "Even the subjective component has objective aspects since, as a matter of evidence, the judge will rely on what reasonable lawyers would have known or believed under the circumstances in deciding what this lawyer believed."

Although this objective approach to the determination that rule 11 has been violated has its critics, its hold on the judiciary appears to be very strong. Unlike the subjective approach, it would rarely require such distasteful attributes as extended hearings, live testimony, discovery, examinations of the lawyer's files, and the need to reject directly an attorney's protestations of good faith and reasonableness. This is not the time to rehash the disagreement, already considered above, between those who favor a more subjective, conduct approach to rule 11 and those who favor an objective, product approach. It is enough that the objective approach, which has so many adherents, lends itself to the de novo review of determinations that rule 11 has been violated because the necessary inquiry is more limited and the trial judge enjoys no special decisional advantage over the appellate court. Indeed those courts supporting the discretionary approach because the trial judge has tasted the "flavor of the litigation" and has "the view from the trenches" should perhaps reconsider how often such perspectives or insights will be relevant to what is an increasingly dominant objective approach. Moreover, if subjective inquiries are undertaken only when the objective approach fails to yield a clear result, then adopting

128. See cases cited supra note 56.
130. Id.
131. Id.
133. See supra text accompanying notes 88-94.
134. TASK FORCE REPORT, supra note 21, at 22, 30-31 (strongly endorsing a more subjective "conduct" approach to rule 11 and denying that the objective approach will often require extended satellite hearings involving these "distasteful attributes").
135. See supra text accompanying notes 88-98.
136. TASK FORCE REPORT, supra note 21, at 22.
137. See cases cited supra note 125.
138. TASK FORCE REPORT, supra note 21, at 47; see supra text accompanying note 101.
139. Kale v. Combined Ins. Co. of Am., 861 F.2d 746, 758 (1st Cir. 1988); see supra text accompanying note 102.
140. Courts favoring the objective approach appear to employ it initially and, only if it fails to yield a result, to fall back on subjective considerations. See 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, 110 S. Ct. 456 (1989).
an overall discretionary review standard because of this contingency would amount to permitting the tail to wag the dog.

Although the case for the discretionary standard is not overwhelming, it is an odds-on favorite to succeed eventually in the United States Supreme Court, which in the past decade has consistently counseled deference to the determinations of trial judges, and in the process has routinely classified most mixed procedural determinations as discretionary. The philosophical sources of this bias are also known. In a speech in 1984, Justice Rehnquist stated that "we have an obsessive concern that the result reached in a particular case be the right one." Concluding that the cost "in terms of lawyers' time, speedy disposition and finality" is too large, Justice Rehnquist urged that "perhaps, speaking of the federal system, the time has come to abolish appeal as a matter of right from the district courts to the courts of appeals, and allow such review only when it is granted in the discretion of a panel of the appellate court." Others who urge the abolition of appeal-as-of-right argue that the decisions of a court of appeals are not inherently more likely to be right than those of the district court. These arguments simply ignore the fears expressed by so many attorneys about the reliability of trial judges, particularly at the state and local level. Thus, state supreme courts certainly should question any present inclina-

141. On October 2, 1989, the Supreme Court declined to review a case squarely presenting this question of the standard of review. Chapman & Cole v. Itel Container Int'l B.V., 865 F.2d 676 (5th Cir.), cert. denied sub nom. Urquhart & Hassell v. Chapman & Cole, 110 S. Ct. 201 (1989). Justice White dissented from the denial of certiorari on the ground that the Court should resolve the conflict among the circuits on this question. Urquhart & Hassell v. Chapman & Cole, 58 U.S.L.W. 3238 (Oct. 10, 1989) (White, J., dissenting from the denial of certiorari). On October 16, 1989, the Court granted certiorari in Danik, Inc. v. Hartmarx Corp., 875 F.2d 890 (D.C. Cir. 1989), cert. granted sub nom. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 275 (1989). The grant of certiorari in this case listed three questions presented, the second of which was as follows: "(2) Is review of Rule 11 sanctions under 'abuse of discretion' standard appropriate?" Summary of Orders, 58 U.S.L.W. 3252 (Oct. 17, 1989). Although this language seems to raise the question of the standard of review, the opinion of the court of appeals does not. In affirming in no uncertain terms the district court's finding that rule 11 had been violated, the court of appeals' opinion makes no mention of the standard of review, Danik, Inc. v. Hartmarx Corp., 875 F.2d 890, 895-96 (D.C. Cir. 1989), cert. granted sub nom. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 275 (1989), but implies it would have affirmed under any standard. Thereafter, however, in reviewing an assertion that the district court had abused its discretion with respect to the amount of legal fees awarded as a sanction, the opinion states that on this question the trial court "exercises a virtually untrammelled discretion." Id. at 896-97. In sum the opinion of the court of appeals never addressed the question of the standard of review of a finding that rule 11 has been violated. Although it did review the sanction imposed under an abuse of discretion standard, that choice is conceded by everyone, including appellants, to be the correct one.

Thus, although the grant of certiorari in the Danik case was itself broad enough to include the question of the standard of review of a finding that rule 11 has been violated and the Supreme Court is keenly aware of the division among the circuits on this question, the question was not considered in the opinion of the court of appeals. It remains to be seen whether the parties will brief this question and whether the Supreme Court will address it.

142. See cases cited supra note 40.


144. Id.

145. Id.

tion on their part blindly to follow federal decisions classifying as discretionary such important procedural determinations as the two in issue here.\textsuperscript{147} Moreover, in view of the present liberal/conservative rift in the federal system between plaintiffs and judges,\textsuperscript{148} many attorneys already uncomfortable with the deference that federal appeals courts must accord trial level decisionmakers doubtlessly would rebel at any proposal to make the right of appeal discretionary. Although discretionary appeal is perhaps still far away, another change already has arrived. The traditional classification of important, objective procedural determinations as legal is either going or already gone in the federal system.\textsuperscript{149} Perhaps the Supreme Court would not be bold enough to reverse existing precedent—for example, with respect to motions testing the sufficiency of the evidence—but in many other procedural areas it may well begin to speak of discretion overall. Thus, except for constitutional facts and a few well-established exceptions in both the substantive and procedural area, the process of law application will now be located even more firmly within the discretionary powers of the trial level.\textsuperscript{150}

III. THE SCOPE OF APPELLATE REVIEW OF RULINGS DETERMINING WHETHER ISSUE PRECLUSION WILL BE IMPOSED OFFENSIVELY

In \textit{Parklane Hosiery Co. v. Shore}\textsuperscript{151} the United States Supreme Court, having already approved the defensive use of nonmutual issue preclusion,\textsuperscript{152} went all the way and approved its offensive use,\textsuperscript{153} at least for judgments based on causes of action arising under federal law.\textsuperscript{154} Noting, however, that such offensive use could promote judicial diseconomy and also occasionally be unfair, the

\textsuperscript{147} The Supreme Court of North Carolina has recently chosen to give de novo review to determinations that the state version of rule 11 has been violated. Turner v. Duke University, 325 N.C. 152, 164-65, 381 S.E.2d 706, 713-14 (1989).

\textsuperscript{148} See supra text accompanying note 122.

\textsuperscript{149} See supra note 40 and accompanying text.

\textsuperscript{150} See supra text accompanying notes 19-23.

\textsuperscript{151} 439 U.S. 322 (1979).

\textsuperscript{152} Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-29 (1971), approved the defensive use of nonmutual issue preclusion. \textit{Blonder-Tongue} was subsequently described by the United States Supreme Court as abandoning the mutuality requirement “at least in cases where a patentee seeks to relitigate the validity of the patent after a federal court in a previous lawsuit has already declared it invalid.” \textit{Parklane}, 439 U.S. at 327. \textit{Parklane} goes on to suggest that \textit{Blonder-Tongue} also had strongly suggested a negative answer to the “broader question” of whether the doctrine of mutuality retained general validity. \textit{Id.} at 327-28. Today all would agree that this “strong suggestion” is now the rule in federal court.

\textsuperscript{153} Parklane, 439 U.S. at 331.

\textsuperscript{154} In \textit{Parklane}, which involved a federal statutory cause of action, the Court said that its approach was “for dealing with these problems in the federal courts.” \textit{Id.} at 331. Although this language is linguistically broad enough to include state-created causes of action litigated to judgment in federal court, it does not clearly go that far or purport to answer the thorny question whether the \textit{Erie} doctrine, see \textit{Erie R.R. v. Tomkins}, 304 U.S. 64 (1938), and the Rules of Decision Act, 28 U.S.C. § 1652 (1982), require a federal district court entering judgment on a state-created cause of action to give this judgment no broader scope than the state court would give it. See Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 337 (5th Cir. 1982) (federal law governs applicability of nonmutual issue preclusion to judgment entered by federal court on state-created cause of action, even though state law still requires mutuality of estoppel). See generally Burbank, \textit{Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach}, 71 \textit{Cornell L. Rev.} 733, 795 (1986) (examining the many circumstances in which state or federal law might govern
Court "concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."\textsuperscript{155} In making this reference to discretion, the Court was apparently trying to emphasize the flexibility of the doctrine’s application rather than to establish the scope of appellate review. Nevertheless the reference seems, not surprisingly, to have settled the latter question, not only in the federal courts but also in a myriad of state courts, which, in adopting nonmutual offensive collateral estoppel for themselves, invariably quote this language or cite the opinion.\textsuperscript{156} The net result is that a majority of appellate courts that have addressed the question will apparently accord deferential review to a trial judge’s determination that the doctrine will, or will not, be applied offensively. None of these courts, however, has yet to consider specifically whether that is the desirable standard of review.\textsuperscript{157}

The dissonant voice in this discretionary chorus is the Supreme Court of Oregon. In \textit{State Farm Fire & Casualty Co. v. Century Home Components, Inc.},\textsuperscript{158} a decision handed down before \textit{Parklane}, this court initially noted that the doctrine of collateral estoppel involves a two-step process. In the first step the party asserting the estoppel must establish that in a prior action the issue actually was decided and was necessary to the judgment.\textsuperscript{159} The trial court’s ruling on these questions is not entitled to any special deference on appeal, however. "Whether the issues are identical and whether a particular matter was actually decided are questions of law for the court. Consequently, the question on review is whether the evidence is sufficient as a matter of law to establish the elements of collateral estoppel."\textsuperscript{160} Once the burden upon the party asserting estoppel is discharged, the burden shifts to the party against whom the estoppel such an interjurisdictional conflict and suggesting that in this particular one state law should govern).

\textsuperscript{155} \textit{Parklane}, 439 U.S. at 331 (emphasis added).


\textsuperscript{157} An occasional opinion states that the trial judge is in the best position to decide whether a party against whom an estoppel is asserted previously had a full and fair opportunity to litigate the issue. \textit{E.g.}, \textit{Silva}, 106 N.M. at 476, 745 P.2d at 384. That would be true if the trial judge ruling on the estoppel also happened to have presided at the prior trial that decided the issue in question. Otherwise—and this is the more likely scenario—the trial judge ruling on the estoppel must decide on the basis of the record from the previous trial and, therefore, is in no better decisional position than any subsequent reviewing court. Perhaps some persons would contend that trial judges by definition are better able to know, even on the basis of a paper record, whether a party had a full and fair opportunity to litigate at trial. Others, of course, would say that the collective judgment, wisdom, and greater freedom from bias of a panel of appellate judges is to be preferred.

\textsuperscript{158} 275 Or. 97, 550 P.2d 1185 (1976).

\textsuperscript{159} \textit{Id.} at 104-05, 550 P.2d at 1188-89.

\textsuperscript{160} \textit{Id.}
is sought. This party must now bring to the court's attention circumstances indicating the absence of a full and fair opportunity to contest the issue in the first action or other considerations that would make the application of preclusion unfair. The court then stated the following:

Whether the proffered circumstances and considerations warrant a conclusion that the litigant lacked a "full and fair" opportunity to litigate the issue and that it would be otherwise "unfair" to preclude him from contesting the issue again are likewise questions of law. Collateral estoppel involves a policy judgment balancing the interests of an individual litigant against the interests of the administration of justice, and this court reserves the final word as to where the balance is struck in any given case. It is therefore our duty to determine independently whether the circumstances revealed by the evidence justify the conclusion that it would be inequitable to estop defendant in these cases.

Like so many other attempted judicial explications of the line between law and discretion, this one is less than complete. The court's only argument—that collateral estoppel involves a balancing of competing interests—is applicable to all of law application, much of which is nevertheless classified as discretionary. Much stronger arguments for the court's classification of issue preclusion determinations as legal are available, however. First, the trial judge who initially decides whether to preclude relitigation of an issue typically did not preside at the initial trial, must decide primarily from a paper record, and, therefore, ordinarily enjoys no decisional advantage over a reviewing court. Second, although the determination is multifactored and factual, conditions that suggest deferential review, all of its relevant factors are objective and ordinarily

161. Id. at 105, 550 P.2d at 1189.
162. Id.; see also Kichefski v. American Family Mut. Ins. Co., 132 Wis. 2d 74, 78, 390 N.W.2d 76, 78 (1986) ("[w]hether collateral estoppel applies under a given set of facts is essentially a question of law").
163. See supra note 157.
164. The basic factors are whether the party against whom the estoppel would be applied had a full and fair opportunity to contest the issue in the prior action and whether other considerations would make the application of preclusion unfair. See supra text accompanying note 161. A more complex breakdown of eight possible circumstances under which collateral estoppel would not be applied is found in Restatement (Second) of Judgments § 29 (1982). These are:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
it can be resolved on the basis of the existing record. Third, because the factors or grounds for denying issue preclusion are ordinarily not interdependent, they result in a series of separate—and, therefore, separately reviewable—determinations, rather than a single ultimate determination based upon a weighing of several subfactors. Finally, the party who would be subject to the estoppel bears the burden of showing that its application would be unjust or unfair. Because the party's assumption of this burden ordinarily is subject to the requirements of rule 11, he prudently may choose to limit the number of grounds raised. Thus, an appellate court reviewing the preclusion determination ordinarily will face a small decisional burden and no decisional disadvantage. Moreover, its disposition of each factor raised by the party opposing preclusion, though cabined by the facts of the case, is less easily distinguished than a determination in which the separate factors are weighed together to reach the ultimate determination.

In sum, appellate courts readily can review de novo the special factors applicable to a nonmutual, offensive collateral estoppel determination. Because of the novelty, importance, and huge potential financial impact of these determinations, appellate courts also may justifiably be fearful of entrusting them to the discretion of lone trial judges. For example, assume that a single trial judge of questionable ability, dedication, or objectivity has determined that a deep-pocketed corporate defendant that suffered an initial adverse jury verdict in a mass disaster situation will be estopped to deny its negligence in hundreds of subsequent actions involving hundreds of millions of dollars in damage claims. Assume further that the reviewing court is persuaded that this determination, though not unreasonable, is wrong. Under Parklane, this court supposedly may not substitute its judgment for that of the trial judge. The pressures to do so here are very great, however, and a variety of means are available. The reviewing court simply can reverse without mentioning that a manifest abuse of discretion must be and has been found. It may "discover" that the trial judge committed an error of law while exercising her discretion. Finally, it may create a variety of legal rules or presumptions to limit or direct the discretion's

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Id. 165. The factors listed in note 164, supra, normally will require an application of law to fact. None of them, however, seems to involve subjective questions or state of mind inquiries or to depend upon evidence ordinarily found outside the record. Thus, these mixed questions frequently will turn on undisputed historical facts and rarely will be intensely factual, like some rule 11 determinations. See supra text accompanying notes 75-78.

166. See supra note 165.

167. For example, the possibility that the prior determination was based upon a compromise verdict or finding ordinarily will have no bearing on whether it was based on a question of law or inconsistent with another determination of the same issue. See supra text accompanying note 161.

168. Whether issue preclusion is pleaded or asserted by motion, the pleading or motion is specifically covered by rule 11. Although oral opposition to an assertion of issue preclusion might not be covered by rule 11, the filing of any signed papers in support of that opposition again presumably would be covered.

170. See supra notes 50 & 119.
exercise.\textsuperscript{171}

Ironically then, one of the best arguments for Parklane's discretion standard is that it probably can be finessed when necessary. For the many cases that are routine, the Parklane standard serves to discourage doubtful appeals.\textsuperscript{172} In short, although the brief for appellate deference here is not nearly as strong as it was for determinations that rule 11 has been violated, it is probably sufficient for those who would like to eliminate all civil appeals of right and who for the moment seek to discourage most appeals from determinations of fact or of mixed fact and law.\textsuperscript{173} Why so many state appellate courts routinely adopt Parklane's discretion standard is another question. Few of them are as openly determined as some federal judges to discourage appeals or to surrender so much of their decisional authority to the trial level, and most have greater reason to doubt their trial benches,\textsuperscript{174} particularly with respect to these novel and potentially "big bucks" issue preclusion determinations. For aught that appears in their opinions, these state appellate courts are not independently selecting a scope of review but are simply quoting popular and otherwise quite sensible language from a famous decision of the United States Supreme Court.

IV. A Proposal for a Less Monolithic, More Flexible Approach to Scope of Review

Appellate reversals of trial-level discretionary determinations once were quite rare.\textsuperscript{175} Their number increased under the Federal Rules of Civil Procedure, which gave to trial judges many new avenues of discretionary power.\textsuperscript{176} Today reversals of determinations that rule 11 has been violated or that a non-

\textsuperscript{171} See, e.g., Foman v. Davis, 371 U.S. 178, 182 (1962) (discretionary denial of leave to amend without offering a reason therefor is a presumptive abuse of discretion); Shepard Claims Serv., Inc. v. William Darrah & Assocs., 796 F.2d 190, 193 (6th Cir. 1986) (although trial judges may in their discretion refuse to set aside an entry of default under Federal Rules of Civil Procedure rule 55(c), the preference for trial on the merits creates a narrower scope of review—arguably a presumption of error unless the grounds are very clear—for this refusal).

\textsuperscript{172} As previously indicated, one of the strongest reasons for entrusting law application to the discretion of the trial level is that it discourages appeals from the determination. See supra text accompanying notes 41-48. Robert Stern suggests that appellate courts sometimes must show deference to trial-level determinations, even when they face no decisional disadvantage or constitutional or statutory prohibition against de novo review, "perhaps because of the desirability from the standpoint of general judicial administration of preventing the appellate courts from being overburdened with factual matters on which they are unlikely to reverse and of discouraging frivolous appeals." Stern, supra note 35, at 83.

\textsuperscript{173} This appears to represent the current view of a majority of the Justices of the United States Supreme Court. See supra text accompanying notes 141-46.

\textsuperscript{174} See supra note 119 and accompanying text.

\textsuperscript{175} Louis, Civil Procedure (Pleading and Parties), Annual Survey of North Carolina Case Law, 45 N.C.L. REV. 823, 836-38 (1967) (criticizing an appellate court's refusal to find an abuse of discretion in the trial court's denial of leave to amend, and asserting that such cases cannot be found in North Carolina).

\textsuperscript{176} Federal Rules of Civil Procedure rule 41(a), for example, gives a trial judge discretion to allow a plaintiff to take a voluntary dismissal after defendant has answered or filed a motion for summary judgment, to state the terms and conditions of the dismissal, and to specify that the dismissal is with prejudice. Rule 41(b) grants wide discretion to dismiss a plaintiff involuntarily for failure to prosecute or to comply with the federal rules or orders of court but to specify that the dismissal does not operate as an adjudication on the merits. Rule 50, as interpreted, gives the trial judge discretion to relieve a party from the res judicata consequences of a directed verdict or judgment
mutual offensive collateral estoppel will be imposed are not uncommon,177 des- pite the fact that these determinations usually are classified as discretionary. But for that classification the frequency of these reversals—or of affirmations only after very close scrutiny—would not be surprising. These determinations are new, controversial, and potent and demand firm and frequent appellate inter- vention. Under a discretionary standard of review, such intervention supposedly must be based on the conclusion that the discretion was abused or that in exercising it the trial judge committed an error of law.178 Discretionary power is defined by and must be exercised within the limits set by law, and appellate courts are always free to change or refine the definition or to reset the limits.179 To uncover legal errors, however, the appellate court somehow must ascertain what legal principles the trial judge purported to apply. Such ascertainment may not be difficult if the trial judge issued an opinion, which federal—and some state—trial judges occasionally prepare. Moreover, for rule 11 determinations federal judges are under some compulsion to disclose at least “an adequate ex- planation . . . for the decision.”180

The alternative route to reversal of a discretionary determination is a finding that the discretion has been abused, a pejorative finding that appellate courts ordinarily are reluctant to make openly.181 Consequently these courts talk about abuse of discretion primarily in its absence; in its presence they tend to ignore the concept and to speak only of error.182 Some recent reversals under rule 11183 and nonmutual collateral estoppel,184 however, did not seem to in- volve plainly unreasonable trial-level results. Instead the appellate court ap-

177. See supra note 123 and accompanying text (asserting that doubtful impositions of rule 11 sanctions are often reversed on appeal). Trial-level reluctance to find a violation of rule 11 also has often been the target of reversals. E.g., Albright v. Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986); Turner v. Duke Univ., 325 N.C. 152, 166-71, 381 S.E.2d 706, 714-18 (1989) (based on a de novo review). Reversals of determinations that offensive issue preclusion will apply are also not uncom- mon. E.g., Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 338-39, 345-46 (5th Cir. 1982) (reversing on several different grounds a trial-level determination that offensive nonmutual issue preclusion would apply).

178. E.g., Robbins v. Jordan, 181 F.2d 793, 794-95 (D.C. Cir. 1950) (trial court erred as a matter of law in denying leave to amend because of a nonprejudicial delay).

179. Louis, supra note 1, at 1019-27 (surveying the variety of ways that law may be announced, changed, or refined to control or limit discretion).

180. TASK FORCE REPORT, supra note 21, at 36 (arguing that trial judges should explain their action whenever a rule 11 violation is found and sanctions are imposed and at least sometimes—usually when the decision is close—when no violation is found).

181. Louis, supra note 175, at 837 n.72 (speculating as to whether the infrequency of specific findings of an abuse of discretion is attributable to the fact that such a finding is regarded as an affront to the integrity or ability of the trial judge).

182. But see Albright v. Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986) (clear, unequivocal finding of abuse of discretion in trial court's finding that rule 11 had not been violated).

183. Id. at 1222 (Guy, J., dissenting) (arguing that the appellate court lacks sufficient evidence to conclude that an abuse of discretion occurred and openly implying that the appellate court is mak- ing an independent determination).

184. E.g., Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 337 (5th Cir. 1982) (finding an abuse of discretion in a trial judge's application of offensive nonmutual collateral estoppel; in reality reversing on several different grounds because on the undisputed facts the trial judge's conclusions were erroneous, rather than unreasonable or outrageous).
peared to have substituted its judgment for that of the trial judge. That is not surprising, even though the purported scope of review was deferential. Appellate courts are known to look longer and harder at appeals of important matters such as these or from trial judges with bad reputations.\textsuperscript{185} Having taken a hard look, an appellate court probably would not hesitate to reverse a determination with which it strongly disagreed (particularly if the determination was based on undisputed facts and the trial judge did not otherwise enjoy a decisional advantage), even though the error could not fairly be characterized as amounting to a manifest abuse of discretion. Indeed this “hard look” exception may constitute a necessary safety valve if important procedural determinations are routinely classified as discretionary.

Appellate courts employing a de novo standard of review similarly may appear to deviate from it by according deference to some trial-level determinations, particularly if these determinations are routine or the work product of a respected trial judge. To some critics all these exceptions establish the notion that scope of review is a hollow concept to which appellate courts pay only lip service.\textsuperscript{186} For a hollow concept it receives a surprising amount of attention. Attorneys defending a discretionary determination on appeal usually emphasize that for reversal an abuse of discretion must be found; attorneys challenging the determination often conveniently fail to mention that discretion was involved or seek desperately to establish an error of law.\textsuperscript{187} Finally, appellate courts that reverse often decline to find specifically that an abuse of discretion has occurred.

In sum, scope of review is not a neglected concept. It is, however, a rigid, inflexible one. The traditional monolithic, either/or approach to the scope of review of procedural determinations always has been too rigid a device for the necessities of the situation—namely, a way to maintain sufficient appellate oversight of important procedural determinations without inviting appeals of all such matters and squandering scarce appellate resources. Although appellate courts pay lip service to the monolithic approach and its rigidities, in practice they must be, and arguably always have been, more flexible. Indeed such flexibility may be the principal explanation for what some commentators perceive to be appellate indifference to the scope of review.

In this author’s opinion, much of the current controversy over the scope of review could be eliminated or narrowed if appellate courts began to articulate the standard of review in more flexible terms. Perhaps they need not admit specifically, or at least too loudly, that important matters and untrustworthy decisionmakers often are subject to closer scrutiny. They should downplay or abandon monolithic classifications, however, in favor of a flexible approach responsive to the various component factors of the ultimate determination under appellate scrutiny. For example, a ruling on a request for leave to amend is

\textsuperscript{185} 5A J. Moore, Moore’s Federal Practice § 52.03[1], at 52-27 (1982).

\textsuperscript{186} Gellhorn & Robinson, Perspectives on Administrative Law, 75 Colum. L. Rev. 771, 780 (1975) (suggesting that reviewing courts do as they please and that the “rules governing judicial review have no more substance at the core than a seedless grape”).

\textsuperscript{187} See generally A.D. Hornstein, Appellate Advocacy in a Nutshell § 3-2, at 31-36 (1984) (generally considering the effect of scope of review on the approach to appellate argument).
regarded as a discretionary determination. One factor in this determination is whether the party offering the amendment behaved honorably and diligently, usually a factual inquiry that may touch upon the party's intent or state of mind and for which the trial judge usually has a decisional advantage.\textsuperscript{188} Another factor—whether the amendment would prejudice the opposing party—normally requires a simple application of legal principles to a limited number of record facts,\textsuperscript{189} a mixed determination that appellate courts understandably would be less hesitant to reverse. Under the present monolithic approach, leave to amend is properly classified as discretionary and all component findings thereof, as well as the ultimate determination, are supposed to be reviewed deferentially. Under the proposed flexible approach, appellate courts could apply whatever standard of review is appropriate to the component part of the determination under challenge.\textsuperscript{190}

A recent case further demonstrates the potential benefits of greater flexibility. In \textit{Pierce v. Underwood}\textsuperscript{191} the Supreme Court held that appellate review of a trial level finding that the litigating position of the United States was "substantially justified" under the Equal Access to Justice Act\textsuperscript{192} would be deferential, despite concessions that the determination could result in a substantial governmental financial liability\textsuperscript{193} and could "involve a judgment ultimately based upon evaluation of the purely legal issue governing the litigation."\textsuperscript{194} Large financial liabilities and purely legal questions probably would tend to receive a harder appellate look or closer scrutiny anyway, despite the Court's monolithic classification of the ultimate determination as discretionary. Surely it is better to admit that tendency and to accord it doctrinal validity.

The application of this more flexible approach to determinations that rule 11 has been violated would be helpful immediately. When the principal basis of a trial judge's determination is subjective or intensely factual—for example, a detailed inquiry into the reasonableness of the signer's investigation or belief, it should receive the necessary deference; when the basis is objective—for example,

\begin{footnotesize}
\textsuperscript{188}. See supra note 104.
\textsuperscript{189}. See generally F. James & G. Hazard, supra note 27, § 4.12, at 210-11 (generally examining the effect of prejudice on leave to amend).
\textsuperscript{190}. See generally Louis, supra note 1, at 1044-45 (noting the existence of other complex procedural determinations that are divided into components subject to varying scopes of review). In Anderson v. City of Bessemer City, 470 U.S. 564 (1985), the United States Supreme Court, while holding that findings of fact not based on credibility determinations were nevertheless subject to the "clearly erroneous" test of Federal Rules of Civil Procedure rule 52(a), conceded that the deference due a finding based on credibility was somewhat greater. Anderson, 470 U.S. at 575. If such flexibility within a single statutory standard of review is permitted, then some flexibility with respect to the component parts of complex procedural determinations should not be rejected automatically.
\textsuperscript{191}. 108 S. Ct. 2541 (1988).
\textsuperscript{192}. The Equal Access to Justice Act provides:

\begin{itemize}
  \item Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action ... brought by or against the United States ... unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
\end{itemize}

\textsuperscript{193}. \textit{Pierce}, 108 S. Ct. at 2549.
\textsuperscript{194}. \textit{Id.} at 2547.
\end{footnotesize}
an inquiry into whether the signer’s investigation or belief was objectively reasonable, it may be reviewed de novo or at least more closely. Thus, there is no need to fret endlessly, as was done above, over which basis is generally the more dominant or important and should, therefore, determine the correct standard of review for every component of every rule 11 determination. Curiously the hybrid approach currently employed by some appellate courts in the review of rule 11 determinations employs just such a flexible approach. Application of this flexible approach to issue preclusion determinations would be similarly helpful. Many of the possible reasons why it would be unfair to impose an estoppel are relatively simple and objective and lend themselves to close appellate scrutiny; others that are fact-intensive or involve matters for which the day-to-day experience of trial judges is useful or informative could be reviewed somewhat more deferentially.

V. CONCLUSION

The proposed, more flexible approach to the scope of appellate review admittedly would be less predictable, would require greater mental effort, and might confuse simple minds. Undoubtedly some appellate judges—and many attorneys—would like to avoid the necessity of choosing an appropriate scope of review for every component part of every procedural determination cited as error on appeal. These judges would probably prefer simply to run up the law or the discretion banner as before, and then without any further admission or explanation to vary the scope of review as they see fit. The end products of such undisclosed flexibility probably would not be significantly different, but the judicial burden of explication would be reduced and the banner chosen would serve as a general message to attorneys that appeals from these types of determinations are or are not generally welcome. That of course is what appellate courts appear to do today (and perhaps have always done). The objection to such undisclosed flexibility is that it is false, confusing, and misunderstood. It is bad enough that most appellate courts will not admit what they actually do and generally do not even bother to justify even their monolithic classifications. It is worse that many attorneys are apparently taken in by this charade and are likewise prone to toss off their own classifications with as little apparent thought or understanding. Finally, it is unforgivable that under the current, misleading approach there is so much evidence to support the widely held belief that scope of review has “no more substance at the core than a seedless grape.”

195. See supra text accompanying notes 88-98.
196. See cases cited supra note 56.
197. See supra note 164 (listing eight factors offered by the Restatement (Second) of Judgments as grounds for denying issue preclusion).
198. Gellhorn & Robinson, supra note 186, at 780.