

## APPELLATE SANCTIONS AGAINST LAWYERS

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### I. INTRODUCTION

As a group, trial lawyers tend to be keenly aware of the availability of sanctions for misconduct in litigation. Rules of civil procedure that provide for sanctions are well-known and invoked with unfortunate regularity.<sup>1</sup> Trial courts’ inherent authority to sanction lawyers is widely recognized. In comparison, appellate lawyers are less likely to appreciate the risk of sanctions for alleged misconduct in connection with appeals.

Historically, appellate courts have been reluctant to sanction lawyers for misconduct in prosecuting or defending appeals.<sup>2</sup> This is to some extent

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<sup>1</sup> See, e.g., FED. R. CIV. P. 11(c) (providing that a district court may sanction lawyers who sign pleadings or other court documents that are submitted for an improper purpose or contain frivolous arguments or arguments that have no evidentiary support as set forth in Rule 11(b)).

<sup>2</sup> See, e.g., Gail S. Stephenson, *Sanctions for Frivolous Civil Appeals: Sincerely . . . After 50 Years, Should the Standard Change?*, 63 LA. BAR J., 14, 14 (2015) (“Although sanctions could deter frivolous appeals, Louisiana courts rarely award them . . . . In the past 30 years, sanctions were awarded in less than 10 percent of the cases in which they were sought, or an average of fewer than three per year.” (footnote omitted)); Margaret Grignon & Zareh Jaltorossian, *Three Reasons for Thinking Twice Before Filing a Frivolous Appeal*, ORANGE CNTY. LAW., Apr. 2006, at 34 (stating

understandable; after all, appellate courts are focused on correcting trial courts' claimed errors rather than exploring new or independent issues and engaging in related fact-finding.<sup>3</sup> But appellate lawyers must appreciate the risk of sanctions for at least three reasons. First, appellate courts, whether because of heavy caseloads and resulting pressures, an erosion of collective patience with poor lawyering, or the addition of fresh faces to the bench, seem to be increasingly willing to impose sanctions for frivolous appeals and other forms of misconduct by lawyers.<sup>4</sup> This is not to say that appellate sanctions against lawyers have become routine or that courts have wholly lost their reluctance to sanction either parties or lawyers for misconduct on appeal.<sup>5</sup> It

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that “generally Court of Appeal justices appear to have the patience of Job and rarely exercise their discretion to sanction attorneys appearing before them”); Hon. Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 PACE L. REV. 323, 341 (1999) (stating that “it is a rare case” in which appellate courts “sanction even those who take frivolous appeals”).

<sup>3</sup>*Dilatory or Frivolous: Two Recent Cases Address Appellate Court Sanctions*, REED SMITH CLIENT ALERTS (Oct. 3, 2001), <https://www.reedsmith.com/en/perspectives/2001/10/dilatory-or-frivolous—two-recent-cases-address-ap>; see *In re Efron*, 746 F.3d 30, 38 (1st Cir. 2014) (asserting that appellate courts lack trial courts' fact-finding capability).

<sup>4</sup>See, e.g., *Conboy v. U.S. Small Bus. Admin.*, 992 F.3d 153, 158 (3d Cir. 2021) (imposing sanctions for the lawyer's “copy-and-paste” briefing that “reflect[ed] a dereliction of duty, not an honest mistake”); *Larry E. Parrish, P.C. v. Bennett*, 989 F.3d 452, 457–58 (6th Cir. 2021) (sanctioning the lawyer under FED. R. APP. P. 38 and 28 U.S.C. § 1927); *Pirri v. Cheek*, 851 F. App'x 183, 189 (Fed. Cir. 2021) (sanctioning the plaintiff and his lawyer for an appeal that was “frivolous as argued” and noting that the lawyer distorted the factual and legal bases for the district court's judgment, misrepresented the record on appeal, made “baffling” arguments, and submitted briefs that “far exceed[ed] the bounds of proper decorum”); *Malek Media Grp. LLC v. AXQG Corp.*, 272 Cal. Rptr. 3d 775, 793 (Ct. App. 2020) (assessing a \$10,000 sanction against the appellant and its lawyer jointly and ordering the lawyer to report the sanction to the California Bar); *In re Marriage of Kruss*, No. 3-19-0339, 2021 WL 355739, at \*4 (Ill. App. Ct. Feb. 2, 2021) (sanctioning a lawyer along with his client for filing a frivolous appeal); *Seth Burrill Prods., Inc. v. Rebel Creek Tackle, Inc.*, No. 36899-8-III, 2020 WL 7258651, at \*3 (Wash. Ct. App. Dec. 10, 2020) (sanctioning the appellant and its lawyer for filing a frivolous appeal). *But see Ransom v. Ransom*, 404 P.3d 1187, 1194–95 (Wyo. 2017) (noting the court's reluctance to sanction lawyers for frivolous appeals).

<sup>5</sup>See, e.g., *Saenz v. Kohl's Dep't Stores, Inc.*, 834 F. App'x 153, 160 (6th Cir. 2020) (“Yet absent bad faith, we decline to impose sanctions against this trial attorney whose legal argument on appellate procedure—though flawed—might conceivably be characterized as that of a reasonably zealous advocate.”); *Sun Coast Res., Inc. v. Conrad*, 958 F.3d 396, 398–99 (5th Cir. 2020) (denying the appellee's motion for sanctions on the basis that it had warned the appellant about its behavior and “this [was] a time for grace, not punishment”); *Bank of N.Y. Mellon v. Dodev*, 433 P.3d 549, 560 (Ariz. Ct. App. 2018) (noting that the court will impose sanctions for a frivolous appeal “only ‘with great reservation’” (quoting *Villa de Jardines Ass'n v. Flagstar Bank, FSB*, 253 P.3d 288, 296

is to say, however, that appellate courts' traditional grudging tolerance of all but the most egregious misconduct by those who appear before them is not the buffer it once was. Second, a party monetarily sanctioned as a result of its lawyer's misconduct will likely look to the lawyer to pay the sanction given the lawyer's responsibility for conducting the appeal and presumably superior legal knowledge. If the sanction is sufficiently severe—such as dismissal of the party's appeal—the party may sue the lawyer for alleged professional negligence. Third, an award of sanctions may bruise the lawyer's reputation, impair the lawyer's relationship with the client, materially harm the lawyer financially, or spark professional discipline.<sup>6</sup>

When appellate courts sanction lawyers, they typically do so for frivolous appeals, although that certainly is not the only basis for sanctions.<sup>7</sup> In *Weeki Wachee Springs, LLC v. Southwest Florida Water Management*, for instance, the court sanctioned a lawyer for cheating on line-spacing in a petition for a writ of prohibition in an apparent attempt to circumvent the court's rules on page limits for such documents.<sup>8</sup> In *Tyler v. State*, the Alaska Court of Appeals sanctioned the lawyer for violating his duty of candor to the court by failing to disclose an Alaska Supreme Court case that was directly adverse to his client's position.<sup>9</sup>

In other cases, courts shoehorn lawyers' misconduct into the frivolous appeal category to justify sanctions, as the Seventh Circuit did in

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(Ariz. Ct. App. 2011)); *Aymond v. Citizens Progressive Bank*, 277 So. 3d 477, 498 (La. Ct. App. 2019) (“Appeals are always favored and, unless the appeal is unquestionably frivolous, damages will not be allowed. Damages for frivolous appeal are allowed only when it is obvious that the appeal was taken solely for delay, that the appeal fails to raise a serious legal question or that counsel is not sincere in the view of the law he advocates, even though the court is of the opinion that such view is not meritorious.” (citation omitted)).

<sup>6</sup>See, e.g., *Singh v. Lipworth*, 174 Cal. Rptr. 3d 131, 145–46 (Ct. App. 2014) (holding the lawyer jointly liable with his clients for monetary sanctions of nearly \$15,000 for filing a frivolous appeal and forwarding a copy of the opinion and the appellate hearing transcript to the State Bar of California for possible discipline of the lawyer); *In re Colvin*, 336 P.3d 823, 829–30 (Kan. 2014) (imposing a public censure in disciplinary proceedings initiated after the court of appeals sent a copy of its decision to disciplinary authorities after appellate court awarded \$10,000 sanction of attorneys' fees against the lawyer and his client for a frivolous appeal).

<sup>7</sup>See *Ransmeier v. Mariani*, 718 F.3d 64, 68 (2d Cir. 2013) (“Although perhaps the most common reason for a sanctions award may be the ‘patently frivolous’ nature of an appeal, we also impose sanctions where the conduct of the sanctioned litigant or attorney evinces bad faith or an egregious disrespect for the Court or judicial process.” (citation omitted)).

<sup>8</sup>900 So. 2d 594, 595–96 (Fla. Dist. Ct. App. 2004).

<sup>9</sup>47 P.3d 1095, 1109–10 (Alaska Ct. App. 2001). *Tyler* is discussed in *infra* Part III.

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## APPELLATE SANCTIONS

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*Gorokhovsky v. Stefantsova*.<sup>10</sup> The *Gorokhovsky* court sanctioned the lawyer for multiple false certifications regarding the content and form of his briefs and accompanying filings.<sup>11</sup> In the process, the court described the substance of the lawyer's appellate filings as "wretched," and labeled his performance and conduct "incompetent and dishonest."<sup>12</sup>

Courts may sanction appellate lawyers under various rules and statutes. In federal courts, Rule 38 of the Federal Rules of Appellate Procedure provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."<sup>13</sup> Under 28 U.S.C. § 1912, if the Supreme Court or a court of appeals affirms a judgment, the court has the discretion to award "the prevailing party just damages for his delay, and single or double costs."<sup>14</sup> Under 28 U.S.C. § 1927, courts may impose costs on attorneys personally:

Any attorney . . . admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.<sup>15</sup>

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<sup>10</sup> 825 F. App'x 375 (7th Cir. 2020).

<sup>11</sup> *Id.* at 376–78.

<sup>12</sup> *Id.* at 377.

<sup>13</sup> FED. R. APP. P. 38; *see* *AngioDynamics, Inc. v. Biolitec AG*, 880 F.3d 600, 601 (1st Cir. 2018) (noting that both an appellant and its lawyer may be sanctioned under Rule 38 for a frivolous appeal).

<sup>14</sup> 28 U.S.C. § 1912.

<sup>15</sup> 28 U.S.C. § 1927.

States have similar rules or statutes.<sup>16</sup> And, of course, both federal and state appellate courts have the inherent authority or power to sanction lawyers who appear before them.<sup>17</sup>

With that foundation laid, Part II of the Article examines courts' imposition of sanctions against lawyers for frivolous appeals. Sanctions for a frivolous appeal are most often assessed against the lawyer involved rather than the party because it generally is the lawyer who "decides what legal

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<sup>16</sup>See, e.g., CAL. CIV. PROC. CODE § 907 ("When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."); CAL. RULES OF COURT 8.276 ("On motion of a party or its own motion, a Court of Appeal may impose sanctions . . . on a party or an attorney for: (1) Taking a frivolous appeal or appealing solely to cause delay; (2) Including in the record any matter not reasonably material to the appeal's determination; (3) Filing a frivolous motion; or (4) Committing any other unreasonable violation of these rules."); ILL. SUP. CT. R. 375 (providing for sanctions under subpart (a) where a lawyer "wilfully fail[s] to comply with the appeal rules," and under subpart (b) where a lawyer prosecutes a frivolous appeal, or pursues or defends an appeal in bad faith or for an improper purpose, "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); KAN. SUP. CT. R. 7.07(c) ("If an appellate court finds that an appeal has been taken frivolously, or only for the purpose of harassment or delay, it may assess against the appellant or appellant's counsel, or both, the cost of reproduction of the appellee's brief and a reasonable attorney fee for the appellee's counsel."); ME. R. APP. P. 13(f) ("If, after a separately filed motion or a notice from the court and a reasonable opportunity to respond, the Law Court determines that an appeal, motion for reconsideration, argument, or other proceeding before it is frivolous, contumacious, or instituted primarily for the purpose of delay, it may award to the opposing parties or their counsel treble costs and reasonable expenses, including attorney fees, caused by such action."); TEX. R. APP. P. 45 ("If the court of appeals determines that an appeal is frivolous, it may—on motion of any party or on its own initiative, after notice and a reasonable opportunity for response—award each prevailing party just damages.").

<sup>17</sup>See, e.g., *Boyer v. BNSF Ry. Co.*, 832 F.3d 699, 701–02 (7th Cir. 2016) (using the court's inherent authority to sanction the appellant's lawyer "for willfully abusing the judicial process and/or pursuing a bad-faith litigation strategy by initiating this litigation in a patently inappropriate forum"); *Ransmeier v. Mariani*, 718 F.3d 64, 69 (2d Cir. 2013) ("It is well settled that an attorney's conduct on appeal as well as the arguments he makes may expose him to sanctions both under our inherent power and under the proscriptions of 28 U.S.C. § 1927 and Federal Rule of Appellate Procedure 38."); *Wheeler v. Comm'r*, 528 F.3d 773, 782 (10th Cir. 2008) (quoting *Casper v. Comm'r*, 805 F.2d 902, 906 (10th Cir. 1986)); *Bieser v. State*, 283 So. 3d 873, 875 (Fla. Dist. Ct. App. 2019) ("This [c]ourt has the inherent authority to sanction an abusive litigant whose pattern of frivolous and repetitive filings consume scarce judicial resources and delay the resolution of legitimate filings."); *Lee v. Thompson*, 167 So. 3d 170, 180 (Miss. 2014) ("Arguments squarely contradicted by the record may be deemed frivolous and subject to sanctions under this [c]ourt's inherent authority."); *State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 896 P.2d 1148, 1151 (N.M. 1995) (referencing the lower appellate court's decision in the case); *Utz v. McKenzie*, 397 S.W.3d 273, 281 (Tex. App.—Dallas 2013, no pet.) (stating that "this Court has the inherent power to sanction attorneys who engage in misconduct before our Court").

arguments to present on appeal.”<sup>18</sup> Part II addresses sanctions under Rule 38 of the Federal Rules of Appellate Procedure, 28 U.S.C. §§ 1912 and 1927, and federal and state courts’ inherent authority or power. After exploring those bases for sanctions, Part II discusses several illustrative cases. Next, Part III looks at appellate sanctions against lawyers for misconduct apart from participation in frivolous appeals. For example, courts may sanction lawyers for breaching their duty of candor under rules of professional conduct.<sup>19</sup> Finally, Part IV offers five basic recommendations for lawyers to avoid appellate sanctions.

## II. SANCTIONING FRIVOLOUS APPEALS

Appeals may be frivolous as filed or frivolous as argued.<sup>20</sup> An appeal is frivolous as filed when the trial court’s judgment is so clearly correct and the case law or other legal authority adverse to the appellant’s position is so plain that there is no legitimate basis for an appeal.<sup>21</sup> An appeal is frivolous as argued when “‘genuinely appealable issues may exist,’ but ‘the appellant’s contentions in prosecuting the appeal are frivolous.’”<sup>22</sup> An appeal that is frivolous as filed is additionally and necessarily frivolous as argued, because any arguments the lawyer makes in championing the appeal “‘are, by definition, frivolous.’”<sup>23</sup> Courts may impose sanctions for both forms of frivolous appeals under applicable rules and statutes and their inherent authority as outlined below. That said, courts should practice restraint when considering sanctions for frivolous appeals lest they discourage litigants from exercising their right to appeal.<sup>24</sup> Similarly, courts should exercise caution

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<sup>18</sup> *Ampleman v. Scheweppe*, 972 S.W.2d 329, 333 (Mo. Ct. App. 1998).

<sup>19</sup> See MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS’N 2021) (“Candor Toward the Tribunal”).

<sup>20</sup> *Mitchell v. Bank of N.Y. Mellon*, 835 F. App’x 318, 328 (10th Cir. 2020); *Westech Aerosol Corp. v. 3M Co.*, 927 F.3d 1378, 1383 (Fed. Cir. 2019); *Martin v. Essrig*, 277 P.3d 857, 862 (Colo. App. 2011).

<sup>21</sup> *Mitchell*, 835 F. App’x at 328 (quoting *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1579 (Fed. Cir. 1991)); *Martin*, 277 P.3d at 862.

<sup>22</sup> *Mitchell*, 835 F. App’x at 328 (quoting *Finch*, 926 F.2d at 1579).

<sup>23</sup> *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1579 (Fed. Cir. 1991) (quoting *Constant v. U.S.*, 929 F.2d 654, 658 (Fed. Cir. 1991)).

<sup>24</sup> *Alexin, LLC v. Olympic Metals, LLC*, 53 N.E.3d 1184, 1197 (Ind. Ct. App. 2016); *Show and Tell of New Orleans, LLC v. Fellowship Missionary Baptist Church*, 156 So. 3d 1234, 1243 (La. Ct. App. 2014); *Gilleylen v. Sur. Foods, Inc.*, 963 S.W.2d 15, 18 (Mo. Ct. App. 1998).

here to avoid deterring lawyers from pursuing appeals on behalf of clients who are legitimately aggrieved by a trial court's order or judgment.<sup>25</sup>

### A. *Applicable Rules and Statutes*

Courts may impose sanctions for frivolous appeals under Rule 38 of the Federal Rule of Appellate Procedure and state analogs, 28 U.S.C. § 1912, and 28 U.S.C. § 1927.<sup>26</sup> This is a two-step process.<sup>27</sup> First, the court “must decide whether the appeal is, in fact, frivolous.”<sup>28</sup> Second, the court must next determine whether sanctions are justified.<sup>29</sup> As the second step clarifies, the decision whether to impose sanctions is committed to the court's discretion even where the appeal is found to be frivolous.<sup>30</sup>

#### 1. Federal Rule 38 and Section 1912

Again, Rule 38 provides that “[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”<sup>31</sup> Section 1912 similarly states: “Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his

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<sup>25</sup>Even cautious courts that are sensitive to lawyers' rights to reasonably disagree over issues, however, may nonetheless conclude that an appeal is frivolous and that sanctions are therefore justified. *See, e.g.*, *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 844–45 (7th Cir. 2015) (explaining that the court does not award sanctions lightly and noting that reasonable lawyers may disagree over issues, but nonetheless concluding that the lawyer should be sanctioned for a frivolous appeal).

<sup>26</sup>It is impractical to discuss all or even a substantial portion of state rules and statutes under which those courts may impose appellate sanctions. Accordingly, this Part will focus on the federal rule and statutes.

<sup>27</sup>*See Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 331 (7th Cir. 1995) (applying Rule 38); *see also Salata v. Weyerhaeuser Co.*, 757 F.3d 695, 701 (7th Cir. 2014) (identifying the two steps under Rule 38).

<sup>28</sup>*Lorentzen*, 64 F.3d at 331.

<sup>29</sup>*Id.* (citing *Perry v. Pogemiller*, 16 F.3d 138, 139 (7th Cir. 1993)).

<sup>30</sup>*See, e.g.*, *Quincy Bioscience, LLC v. Ellishbooks*, 961 F.3d 938, 941 (7th Cir. 2020) (discussing Rule 38); *Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1008 (9th Cir. 2015) (stating that “a finding of frivolousness does not automatically result in sanctions”).

<sup>31</sup>FED. R. APP. P. 38.

delay, and single or double costs.”<sup>32</sup> “[J]ust damages” under Rule 38 and § 1912 include the prevailing party’s attorneys’ fees.<sup>33</sup>

There are three apparent differences between the rule and the statute: (1) Rule 38 expressly requires an appeal to be frivolous before sanctions will lie, while § 1912 does not; (2) Rule 38 plainly requires the court to afford the offending lawyer or party due process, where § 1912 is silent on the issue; and (3) Rule 38 broadly allows an award of damages and costs to a prevailing party rather than limiting any damages or costs to those attributable to the delay caused by the frivolous appeal, while § 1912 seemingly requires a nexus between the delay and any damage or cost award.<sup>34</sup> The differences, however, are immaterial.<sup>35</sup>

First, “[t]he linchpin of any sanctions decision under [both] Rule 38 and § 1912 is a determination that an appeal is frivolous.”<sup>36</sup> Indeed, if § 1912 was interpreted to permit sanctions based solely on whether the appellant won or lost, the statute would discourage all appeals rather than deterring only frivolous filings.<sup>37</sup> That result would be contrary to the basic duties and purpose of federal appellate courts.<sup>38</sup> Second, a party or lawyer sanctioned under § 1912 is entitled to due process as a matter of law even though the statute does not expressly require it.<sup>39</sup> Third, courts awarding damages and costs under § 1912 or its predecessor statute have tended not to attribute the awards to a period of delay or to a delaying tactic beyond pursuit of the appeal

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<sup>32</sup> 28 U.S.C. § 1912.

<sup>33</sup> GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* § 1(D), at 42-43 (6th ed. 2020).

<sup>34</sup> Compare FED. R. APP. P. 38, with 28 U.S.C. § 1912.

<sup>35</sup> See JOSEPH, *supra* note 33, § 1(D), at 42 (describing Rule 38 and § 1912 as “substantively identical”).

<sup>36</sup> *Id.* § 1(D), at 43.

<sup>37</sup> Sanford Hausler, *Appellate Sanctions: An Appellate Lawyer’s Worst Enemy*, AM. BAR ASS’N (Aug. 28, 2018), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2018/summer2018-appellate-sanctions-an-appellate-lawyers-worst-enemy>.

<sup>38</sup> See *Dolin v. GlaxoSmithKline LLC*, 951 F.3d 882, 887 (7th Cir. 2020) (“[O]ur business is deciding appeals brought by reasonable lawyers and parties who disagree in good faith on the application of law in a particular case. Federal courts exist to decide such disputes, including good-faith efforts to convince the courts to extend, modify, or even reverse existing law.”).

<sup>39</sup> See *Gallegos v. Jicarilla Apache Nation*, 97 F. App’x 806, 814 (10th Cir. 2003) (stating that sanctions for a frivolous appeal first require due process).



itself.<sup>40</sup> Rather, they have interpreted the statute consistently with Rule 38, which recognizes that delay may be a goal or aspect of a frivolous appeal.<sup>41</sup>

Neither Rule 38 nor § 1912 require a finding of bad faith before a court may impose sanctions for a frivolous appeal.<sup>42</sup> The argument for sanctions, however, is strongest in cases involving bad faith, rather than carelessness or incompetence.<sup>43</sup>

Finally, for now, a court may sanction a lawyer under either Rule 38 or § 1912 without also sanctioning the party the lawyer represents.<sup>44</sup> This approach recognizes that frivolous appeals are a judicial management problem and that any solution should be appropriately targeted.<sup>45</sup>

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<sup>40</sup>See, e.g., *Lefebvre v. Comm’r*, 830 F.2d 417, 421 (1st Cir. 1987) (assessing double costs for the appellants’ “meritless appeal” with no mention of a specific period of delay); *Com. Wholesalers, Inc. v. Invs. Com. Corp.*, 172 F.2d 800, 802 (9th Cir. 1949) (applying the predecessor statute to § 1912); *In re Midland United Co.*, 141 F.2d 692, 692 (3d Cir. 1944) (awarding the prevailing party \$1,000 in attorneys’ fees and its printing costs under § 1912’s predecessor statute because the appeal was “wholly frivolous” and aimed at delay).

<sup>41</sup>See *Larry E. Parrish, P.C. v. Bennett*, 989 F.3d 452, 457 (6th Cir. 2021) (“Generally, an appeal is frivolous if ‘it is obviously without merit *and* is prosecuted for delay, harassment, or other improper purposes.’” (quoting *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1212 (6th Cir. 1997))); *Lefebvre*, 830 F.2d at 420 (“The Commissioner asks for sanctions against the taxpayer for bringing a frivolous appeal. This court may impose such sanctions pursuant to Fed. R. App. P. 38, 28 U.S.C. § 1912 and 26 U.S.C. § 7482(c)(4), each of which allows the imposition of damages for delay.”).

<sup>42</sup>See, e.g., *16 Front St., LLC v. Miss. Silicon, LLC*, 886 F.3d 549, 561 (5th Cir. 2018) (referring to sanctions under Rule 38); *Hogan v. Jacobson*, 823 F.3d 872, 886 (6th Cir. 2016) (declining to impose sanctions under Rule 38 and noting that Rule 38 and § 1912 “provide overlapping standards”).

<sup>43</sup>*Sun Coast Res., Inc. v. Conrad*, 958 F.3d 396, 398 (5th Cir. 2020).

<sup>44</sup>See, e.g., *Mitchell v. Bank of N.Y. Mellon*, 835 F. App’x 318, 329 (10th Cir. 2020) (“[W]e conclude that Rule 38 sanctions are warranted solely against [the appellant’s lawyer], because the frivolousness of this appeal stems from his actions alone.”); *Platt v. Jack Cooper Transp., Co.*, 959 F.2d 91, 96–97 (8th Cir. 1992) (“[T]here is no suggestion that Platt was personally involved in his counsel’s ‘vendetta.’ Therefore, we deny Cooper’s motion for sanctions against Platt. We grant Cooper’s motion for sanctions [under Rule 38 and 28 U.S.C. §§ 1912 and 1927] against Platt’s counsel . . .”).

<sup>45</sup>*Mitchell*, 835 F. App’x at 329 (quoting *Braley v. Campbell*, 832 F.2d 1504, 1511 (10th Cir. 1987) (en banc)).

## 2. Section 1927

In addition to possible sanctions under either Rule 38 or § 1912, lawyers who represent clients in frivolous appeals may be sanctioned under 28 U.S.C. § 1927.<sup>46</sup> Section 1927 specifically focuses on lawyers:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.<sup>47</sup>

A lawyer's conduct multiplies proceedings for purposes of the statute when it results in proceedings that would not have occurred otherwise.<sup>48</sup> To be sanctionable under § 1927, a lawyer's conduct must multiply the proceedings "unreasonably and vexatiously."<sup>49</sup> The use of the conjunction "and" is critical. An appeal may be frivolous and therefore unreasonably multiply the proceedings, but unless the lawyer's conduct in pursuing or maintaining the appeal is also vexatious, sanctions under § 1927 are not appropriate.<sup>50</sup> Courts uniformly hold that bad faith conduct satisfies the vexatiousness requirement.<sup>51</sup> Reckless conduct also fulfills the vexatiousness

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<sup>46</sup> See, e.g., *Automation Support, Inc. v. Humble Design, LLC*, 982 F.3d 392, 395 (5th Cir. 2020) (referring to the appellant's "frivolous filings" and "stubborn, bad-faith refusal to recognize" the court's prior decisions); *Darnell v. Arthur*, 782 F. App'x 413, 417–18 (6th Cir. 2019) (sanctioning the appellant and her lawyer under what the court characterized as the overlapping standards of Rule 38, § 1912, and § 1927); *Mys v. Mich. Dep't of State Police*, 736 F. App'x 116, 117–18 (6th Cir. 2018) (sanctioning the appellee's lawyer under § 1927 for factual and legal misrepresentations in her appellate briefing and during her oral argument); *Charyulu v. Cal. Cas. Indem. Exch.*, 523 F. App'x 478, 481 (9th Cir. 2013) (imposing sanctions under § 1927 for frivolous appellate arguments).

<sup>47</sup> 28 U.S.C. § 1927.

<sup>48</sup> *Daniels v. Sodexo, Inc.*, No. 8:10-cv-00375-T-27AEP, 2013 WL 4008744, at \*7 (M.D. Fla. Aug. 5, 2013).

<sup>49</sup> 28 U.S.C. § 1927.

<sup>50</sup> *Stewart v. Courtyard Mgmt. Corp.*, 155 F. App'x 756, 760–61 (5th Cir. 2005).

<sup>51</sup> See, e.g., *Est. of Perry v. Wenzel*, 872 F.3d 439, 463 (7th Cir. 2017) (explaining that both objective and subjective bad faith by a lawyer will support § 1927 sanctions); *Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015) (requiring subjective bad faith for sanctions under § 1927); *In re Prosser*, 777 F.3d 154, 162 (3d Cir. 2015) ("A court imposing § 1927 sanctions must find bad faith, but that finding need not be made explicitly."); *E.E.O.C. v. Great Steaks, Inc.*, 667 F.3d 510, 522 (4th Cir. 2012) ("Bad faith on the part of the attorney is a precondition to imposing fees under § 1927."); *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy*

requirement in many jurisdictions.<sup>52</sup> Lawyers almost certainly satisfy this standard if they pursue claims on appeal that they either know or reasonably should know are frivolous.<sup>53</sup> Negligent conduct, however, will not support sanctions under § 1927.<sup>54</sup>

Courts evaluate a lawyer's alleged bad faith or recklessness against an objective standard.<sup>55</sup> The question for the court is how a reasonable lawyer would have acted in the same circumstances.<sup>56</sup>

Courts are split over whether a law firm, as opposed to an individual lawyer, may be sanctioned under the statute.<sup>57</sup> The statute's reference to "[a]ny attorney or other person admitted to conduct cases in any court"<sup>58</sup> certainly suggests that only individual lawyers and not their law firms may be sanctioned under § 1927.<sup>59</sup> The Sixth,<sup>60</sup> Seventh,<sup>61</sup> and Ninth Circuits<sup>62</sup> have all so concluded. As the Seventh Circuit has noted, "[l]iability under § 1927 is direct, not vicarious."<sup>63</sup> The Fourth Circuit has expressed doubt that

& Sauce Factory, Ltd., 682 F.3d 170, 178–79 (2d Cir. 2012) (requiring bad faith or conduct akin to bad faith for sanctions).

<sup>52</sup> See, e.g., *Laws. Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 871 (5th Cir. 2014) (requiring evidence of bad faith, improper motive, or reckless disregard of the lawyer's duties to the court for sanctions); *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013) (quoting *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184–85 (7th Cir. 1992)); *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008) (explaining that any conduct, viewed objectively, that manifests intentional or reckless disregard of a lawyer's duties to the court, is sanctionable under § 1927); *Braunstein v. Ariz. Dep't of Transp.*, 683 F.3d 1177, 1189 (9th Cir. 2012) (quoting *Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010)).

<sup>53</sup> See *Tareco Props., Inc. v. Morriss*, 321 F.3d 545, 550 (6th Cir. 2003) (explaining that the test for sanctions under § 1927 is met when a lawyer knows or reasonably should know that a claim is frivolous; the appellee does not have to demonstrate that the lawyer or appellant acted in bad faith).

<sup>54</sup> *Kidis v. Reid*, 976 F.3d 708, 723 (6th Cir. 2020); *Morrison v. Walker*, 939 F.3d 633, 637 (5th Cir. 2019).

<sup>55</sup> *Alford v. Consol. Gov't of Columbus, Ga.*, 438 F. App'x 837, 841 (11th Cir. 2011).

<sup>56</sup> *Id.*

<sup>57</sup> See JOSEPH, *supra* note 33, § 21(C)(2), at 465–67 (discussing the split of authority).

<sup>58</sup> 28 U.S.C. § 1927.

<sup>59</sup> See JOSEPH, *supra* note 33, § 21(C)(2), at 466 (“Law firms are not admitted to practice in the federal courts; individual lawyers are.”).

<sup>60</sup> *BDT Prods., Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 751 (6th Cir. 2010).

<sup>61</sup> *Claiborne v. Wisdom*, 414 F.3d 715, 723 (7th Cir. 2005).

<sup>62</sup> *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015).

<sup>63</sup> *FM Indus., Inc. v. Citicorp Credit Servs., Inc.*, 614 F.3d 335, 340 (7th Cir. 2010).

§ 1927 permits sanctions against law firms, but has not decided the issue.<sup>64</sup> The Second,<sup>65</sup> Third,<sup>66</sup> Eleventh,<sup>67</sup> and District of Columbia<sup>68</sup> Circuits, on the other hand, allow law firms to be sanctioned under § 1927. In fact, there is no need to stretch § 1927 to cover law firms when a court may invoke its inherent power to sanction a law firm for the same type of conduct that lawyers may be punished for.<sup>69</sup>

### B. Courts' Inherent Authority to Sanction

Appellate courts' ability to sanction lawyers and parties for misconduct extends beyond the authority granted by rules and statutes.<sup>70</sup> Like trial courts, appellate courts may sanction lawyers and parties under their inherent power to regulate the conduct of those who appear before them.<sup>71</sup> This is true of federal and state appellate courts alike.<sup>72</sup>

Courts must display caution and restraint when flexing their inherent powers.<sup>73</sup> This certainly is true where a court invokes its inherent power to sanction a lawyer.<sup>74</sup> Inherent power sanctions are typically premised on conduct by the offender that rises to the level of bad faith.<sup>75</sup> Furthermore, the

<sup>64</sup>Blue v. U.S. Dep't of the Army, 914 F.2d 525, 549 (4th Cir. 1990).

<sup>65</sup>Huebner v. Midland Credit Mgmt., Inc., 897 F.3d 42, 55 n.8 (2d Cir. 2018) (citing *Enmon v. Prospect Cap. Corp.*, 675 F.3d 138, 147–48 (2d Cir. 2012)); *Enmon*, 675 F.3d at 147–48.

<sup>66</sup>*See Baker Indus., Inc. v. Cerberus Ltd.*, 764 F.2d 204, 212 (3d Cir. 1985).

<sup>67</sup>*See Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991).

<sup>68</sup>*See LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 907 (D.C. Cir. 1998).

<sup>69</sup>*See, e.g., Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH*, No. 98-cv-01072-RPM, 2008 WL 410413, at \*10 (D. Colo. Feb. 12, 2008) (“In this case, an award [of attorney fees] against the firm is appropriate. . . . If section 1927 does not support an award of fees against [the law firm] as an entity, then such an award is appropriate under the court’s inherent authority.” (citation omitted)).

<sup>70</sup>*See Sciarretta v. Lincoln Nat'l Life Ins. Co.*, 778 F.3d 1205, 1212 (11th Cir. 2015) (“Courts have the inherent power to police themselves and those appearing before them.”).

<sup>71</sup>*Vielma v. Gruler*, 808 F. App'x 872, 884 (11th Cir. 2020); *Sciarretta*, 778 F.3d at 1212; *Ransmeier v. Mariani*, 718 F.3d 64, 68 (2d Cir. 2013); *Landess v. Gardner Turf Grass, Inc.*, 198 P.3d 871, 876 (N.M. Ct. App. 2008); *Utz v. McKenzie*, 397 S.W.3d 273, 281 (Tex. App.—Dallas 2013, no pet.).

<sup>72</sup>*See supra* note 17 and accompanying text.

<sup>73</sup>*Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991).

<sup>74</sup>*In re Pimentel-Soto*, 957 F.3d 82, 87 (1st Cir. 2020) (quoting *U.S. v. Horn*, 29 F.3d 754, 760 (1st Cir. 1994)).

<sup>75</sup>*See, e.g., Shepherd v. Annucci*, 921 F.3d 89, 97 (2d Cir. 2019) (quoting *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995)); *In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016); *In re*

court “must make a specific finding that the attorney acted in bad faith.”<sup>76</sup> A lawyer’s pursuit of a weak argument or a strained theory does not, standing alone, evidence bad faith.<sup>77</sup>

A court may invoke its inherent power to sanction a lawyer or party even where the misconduct is sanctionable under a rule or statute.<sup>78</sup> Where a lawyer’s or party’s misconduct is sanctionable under a rule or statute, however, a court ordinarily should rely on that authority instead of resorting to its inherent power.<sup>79</sup> When a court relies on its inherent power to sanction rather than leaning on a rule or statute, it should explain why resort to its inherent power was appropriate, as *Dana Commercial Credit Corp. v. Ferns & Ferns* illustrates in connection with requested sanctions against a law firm for filing a frivolous appellate motion.<sup>80</sup>

In that case, Dana Commercial Credit Corp. (Dana) sued Ferns & Ferns for legal malpractice and won a judgment of nearly \$160,000.<sup>81</sup> Ferns & Ferns appealed.<sup>82</sup> Dana successfully moved to dismiss the appeal for various procedural violations.<sup>83</sup> Ferns & Ferns then petitioned the California Supreme Court for review and filed two motions in the Court of Appeal in efforts to revive its appeal.<sup>84</sup> All three remedial efforts failed.<sup>85</sup> Dana contended that the second motion was frivolous because it asserted a claim that the California Supreme Court had rejected in denying the law firm’s

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Partington, 463 P.3d 900, 907 (Haw. 2020); *Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 716 (Tex. 2020); see also JOSEPH, *supra* note 33, § 27(A), at 571 (“A finding of bad faith is *sine qua non* to the imposition of inherent power sanctions.”).

<sup>76</sup> See, e.g., *In re Goode*, 821 F.3d at 559; see also *In re Partington*, 463 P.3d at 907 (“[A] court may not invoke its inherent powers to sanction an attorney without a specific finding of bad faith.”).

<sup>77</sup> See, e.g., *Vielma v. Gruler*, 808 F. App’x 872, 885 (11th Cir. 2020) (“Here, while we agree with Defendants that Plaintiffs’ arguments had little chance of success, ‘unpersuasive arguments’ are not synonymous with ‘bad faith.’”).

<sup>78</sup> *Chambers*, 501 U.S. at 50.

<sup>79</sup> *Id.*

<sup>80</sup> See 108 Cal. Rptr. 2d 278, 281–82 (Ct. App. 2001).

<sup>81</sup> *Id.* at 279.

<sup>82</sup> *Id.*

<sup>83</sup> See *id.* (referring to problems with the appellants’ briefing and their failure to procure a transcript).

<sup>84</sup> *Id.* at 280.

<sup>85</sup> *Id.*

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petition for review.<sup>86</sup> Dana sought sanctions in excess of \$13,000 for having to respond to the second motion.<sup>87</sup>

A California rule of procedure permitted appellate courts to award damages for frivolous appeals or appeals taken for the purpose of delay.<sup>88</sup> Similarly, a California court rule authorized courts to impose sanctions for frivolous appeals, for appeals taken solely for the purpose of delay, or for certain violations of rules of appellate procedure.<sup>89</sup> Long story short, all the related authority permitted sanctions for frivolous *appeals* but was silent concerning sanctions for frivolous appellate *motions*.<sup>90</sup> Controlling California case law also spoke only to sanctions for frivolous appeals.<sup>91</sup> There was a California rule that permitted sanctions for frivolous motions in *trial courts*, but that obviously was not the situation at hand.<sup>92</sup> In sum, there was no rule that would permit the court to sanction Ferns & Ferns for its allegedly frivolous motion.

In resolving its dilemma, the *Dana* court noted that it had previously relied on its inherent authority to grant a party a scheduling exception based on trial courts' inherent authority to do likewise.<sup>93</sup> "By a parity of reasoning," and in view of its "inherent power to control its own proceedings," the *Dana* court concluded that its "sanctions authority [was] not limited to frivolous appeals."<sup>94</sup> Rather, it "ha[d] the inherent authority to impose sanctions for the filing of a frivolous *motion* on appeal," and presumably would have done so here had Dana not inexplicably withdrawn its motion for sanctions.<sup>95</sup>

### C. Defining "Frivolous" for Sanctions Purposes

Of course, sanctioning a lawyer for pursuing a frivolous appeal, argument on appeal, or appellate motion requires a court to measure the lawyer's conduct against a standard. In other words, what makes an appeal or

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (quoting the statute).

<sup>89</sup> *Id.* at 280–81.

<sup>90</sup> *Id.* at 281.

<sup>91</sup> *Id.* (citing *In re Marriage of Flaherty*, 646 P.2d 179 (Cal. 1982)).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (discussing and quoting *Warren v. Schechter*, 67 Cal. Rptr. 2d 573, 578–79 (Ct. App. 1997)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 282 & n.8.

argument “frivolous”? Federal courts have variously defined “frivolous” for purposes of appellate sanctions, although the definitions share some common elements—in particular, the requirement of a complete lack of merit. For example, the Eleventh Circuit holds that “a claim is clearly frivolous if it is ‘utterly devoid of merit.’”<sup>96</sup> In the Tenth Circuit, “[a]n appeal may be frivolous if it consists of irrelevant and illogical arguments based on factual misrepresentations and false premises, or when the result is obvious, or the appellant’s arguments of error are wholly without merit.”<sup>97</sup> The Ninth Circuit has stated that “[a]n appeal is frivolous if the result is obvious or if the claims of error are wholly without merit.”<sup>98</sup> The Seventh Circuit has explained that an appeal is frivolous where the party’s claims are wholly without merit or a contrary result should be obvious,<sup>99</sup> the appeal is “cursory, totally undeveloped, or reassert[s] a previously rejected version of the facts,”<sup>100</sup> or the appeal “presents arguments that are so insubstantial that they are guaranteed to lose.”<sup>101</sup> The Fifth Circuit reasons that sanctions for a frivolous appeal are proper only where “the result [of the appeal] is obvious or the arguments of error are wholly without merit and the appeal is taken in the face of clear, unambiguous, dispositive holdings of this and other appellate courts.”<sup>102</sup> Factors that courts consider when deciding whether appeals are frivolous include the failure to acknowledge precedent,<sup>103</sup> “rambling briefs, citation to irrelevant authority, and continued attempts to relitigate matters already concluded.”<sup>104</sup> On the other side of the coin, lawyers’ legitimate efforts to distinguish adverse precedent and presentation

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<sup>96</sup>*Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1371 (11th Cir. 2016) (quoting *Bonfiglio v. Nugent*, 986 F.2d 1391, 1393 (11th Cir. 1993)).

<sup>97</sup>*Wheeler v. Comm’r*, 528 F.3d 773, 782 (10th Cir. 2008) (quoting *Lewis v. Comm’r*, 523 F.3d 1272, 1277–78 (10th Cir. 2008)).

<sup>98</sup>*In re Westwood Plaza N.*, 889 F.3d 975, 977 (9th Cir. 2018) (quoting *Malhiot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1137 (9th Cir. 1984)).

<sup>99</sup>*Dolin v. GlaxoSmithKline LLC*, 951 F.3d 882, 887 (7th Cir. 2020) (quoting *Harris N.A. v. Hershey*, 711 F.3d 794, 801–02 (7th Cir. 2013)).

<sup>100</sup>*McCurry v. Kenco Logistics Servs., LLC*, 942 F.3d 783, 791 (7th Cir. 2019).

<sup>101</sup>*Id.*

<sup>102</sup>*Miss. Rising Coal. v. City of Ocean Springs, Miss.*, 910 F.3d 191, 194 (5th Cir. 2018) (quoting *Streamline Prod. Sys., Inc. v. Streamline Mfg., Inc.*, 851 F.3d 440, 463 n.12 (5th Cir. 2017)) (alteration in original).

<sup>103</sup>*Wicker v. Bayview Loan Servs., LLC*, 843 F. App’x 117, 119 (10th Cir. 2021).

<sup>104</sup>*Lipin v. Wisheart Springs Inn, Inc.*, 843 F. App’x 103, 109 (10th Cir. 2021), *petition for cert. filed*.

of reasoned legal arguments in support of their clients' positions cut against sanctions.<sup>105</sup>

State courts have also taken different approaches when characterizing appeals as frivolous for sanctions purposes. In *Malek Media Group LLC v. AXQG Corp.*, for instance, a California appellate court explained that when considering sanctions, a court should “look to the merits of the appeal from a reasonable person’s perspective.”<sup>106</sup> The question is not whether the lawyer honestly believed there were grounds for appeal, but whether a reasonable person would agree that the appeal wholly lacked merit and therefore was frivolous.<sup>107</sup> Under Illinois law, “[a]n appeal is frivolous when (1) it is not reasonably well-grounded in fact; (2) it is not warranted by existing law; (3) it is not a good-faith argument for the extension, modification, or reversal of existing law; or (4) a reasonable attorney would not have brought the appeal.”<sup>108</sup> According to the Mississippi Supreme Court, “[a]n appeal is frivolous when the appellant has no hope of success.”<sup>109</sup> New York courts hold that “frivolous conduct can be defined in any of three manners: the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false.”<sup>110</sup> The North Dakota Supreme Court considers an appeal to be frivolous under that state’s version of Rule 38, where “it is flagrantly groundless, devoid of merit, or demonstrates a persistence in the course of litigation which could be seen as evidence of bad faith.”<sup>111</sup> In Texas courts, “[a]n appeal is frivolous when the record, viewed from the perspective of the advocate, does not provide reasonable grounds for the advocate to believe that the case could be reversed.”<sup>112</sup>

However a court may define a frivolous appeal, it is important to understand that “a losing appeal is not synonymous with a frivolous one.”<sup>113</sup>

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<sup>105</sup> 16 Front St., LLC v. Miss. Silicon, LLC, 886 F.3d 549, 561 (5th Cir. 2018).

<sup>106</sup> 272 Cal. Rptr. 3d 775, 790 (Ct. App. 2020).

<sup>107</sup> *Id.*

<sup>108</sup> Enbridge Pipeline (Ill.), LLC v. Hoke, 123 N.E.3d 1271, 1283 (Ill. App. Ct. 2019).

<sup>109</sup> *In re Est. of Cole*, 256 So. 3d 1156, 1160 (Miss. 2018).

<sup>110</sup> *Levy v. Carol Mgmt. Corp.*, 698 N.Y.S.2d 226, 231 (App. Div. 1999).

<sup>111</sup> *Orwig v. Orwig*, 955 N.W.2d 34, 48 (N.D. 2021).

<sup>112</sup> *Ortiz v. St. Teresa Nursing & Rehab. Ctr., LLC*, 579 S.W.3d 696, 708 (Tex. App.—El Paso 2019, pet. denied).

<sup>113</sup> *Brown v. Morehouse Coll.*, 829 F. App’x 942, 946 (11th Cir. 2020); *see also* *Lemus v. Martinez*, 486 P.3d 1000, 1012 (Wyo. 2021) (noting that a party’s loss on appeal was “not determinative” of frivolousness).



For that matter, a weak appeal is not necessarily a frivolous one.<sup>114</sup> As the First Circuit once observed, “An appeal can be weak, indeed almost hopeless, without being frivolous” for sanctions purposes.<sup>115</sup> Certainly, an appeal that presents an issue of first impression for a court should not be considered frivolous,<sup>116</sup> nor should an appeal in which a lawyer argues in good faith for a change, modification, reversal, or expansion of existing law.<sup>117</sup>

#### D. Illustrative Cases

For some lawyers, the instinctive reaction to a trial court loss is an appeal. Although lawyers’ instincts are frequently correct, a decision to appeal should be thoughtfully made upon consideration of the law and the record, rather than “a knee-jerk reaction to [an] unfavorable ruling.”<sup>118</sup> *Jimenez v. Madison Area Technical College* offers a textbook example of a frivolous appeal and resulting Rule 38 sanctions arising out of a lawyer’s knee-jerk reaction to an adverse trial court outcome.<sup>119</sup>

Wisconsin lawyer Willie J. Nunnery represented Elvira Jimenez in connection with a worker’s compensation claim against Madison Area Technical College (MATC) based on Jimenez’s assertion that college administrators had racially and sexually harassed her.<sup>120</sup> Jimenez supported her claim with copies of e-mail messages and letters supposedly written by colleagues and supervisors that contained derogatory racial remarks about her and graphically acknowledged the sexual harassment she allegedly endured.<sup>121</sup> In response, MATC obtained sworn statements from the purported authors in which they denied writing the messages and letters.<sup>122</sup> MATC informed Nunnery of the alleged authors’ denials and asked to inspect the original offending documents.<sup>123</sup> Nunnery did not produce the documents,

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<sup>114</sup>*In re Efron*, 746 F.3d 30, 38 (1st Cir. 2014); *Bi-Lo Foods, Inc. v. Alpine Bank*, Clifton, 955 P.2d 154, 159 (Mont. 1998).

<sup>115</sup>*Lallemand v. Univ. of R.I.*, 9 F.3d 214, 217–18 (1st Cir. 1993).

<sup>116</sup>*Suazo v. NCL (Bah.), Ltd.*, 822 F.3d 543, 556 (11th Cir. 2016); *In re Doe*, 484 P.3d 195, 203 (Idaho 2021).

<sup>117</sup>MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2021).

<sup>118</sup>*Debeikes v. Haw. Airlines, Inc.*, 725 F. App’x 499, 503 (9th Cir. 2018) (quoting *Glanzman v. Uniroyal, Inc.*, 892 F.2d 58, 61 (9th Cir. 1989)).

<sup>119</sup>321 F.3d 652, 658 (7th Cir. 2003).

<sup>120</sup>*Id.* at 653.

<sup>121</sup>*Id.*

<sup>122</sup>*Id.* at 653–54.

<sup>123</sup>*Id.* at 654.

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and MATC subsequently denied Jimenez's worker's comp claim and fired her.<sup>124</sup>

Jimenez then sued MATC for civil rights violations in federal court.<sup>125</sup> In a first amended complaint, Nunnery added the alleged authors of the offending e-mails and letters as defendants.<sup>126</sup> Nunnery later filed a second amended complaint that expanded the factual allegations and specifically referred to the disputed e-mails and letters.<sup>127</sup> The lawyers for MATC and the individual defendants tried to convince Nunnery to dismiss the case on the basis that the documents underlying Jimenez's allegations were frauds.<sup>128</sup> When he refused, the defendants moved for Rule 11 sanctions.<sup>129</sup>

After holding an evidentiary hearing, the district judge dismissed Jimenez's case and ordered Nunnery to pay more than \$16,000 to the defendants for "the most blatant example of a Rule 11 violation that [she had ever] seen."<sup>130</sup> The district court found the purported e-mail messages and letters to be "obviously fraudulent documents" and was plainly unpersuaded by Nunnery's arguments that whether the e-mails and letters were legitimate "was a judgment call" and that he could wait until taking "depositions to test the credibility of the various letters and e-mails."<sup>131</sup>

Jimenez appealed the dismissal of her case as a sanction to the Seventh Circuit.<sup>132</sup> On appeal, the Seventh Circuit determined that the district court's dismissal of Jimenez's case was well within its discretion and further concluded that Jimenez's claim "was so unmeritorious and her behavior so deceptive that [it] amounted to a veritable attack on our system of justice."<sup>133</sup>

The court did not stop there, however, because MATC also sought sanctions for a frivolous appeal under Rule 38.<sup>134</sup> The Seventh Circuit granted MATC's motion and awarded MATC its fees and costs incurred in defending the appeal, with the amount to be set later.<sup>135</sup> In doing so, the *Jimenez* court

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 654–55.

<sup>129</sup> *Id.* at 655.

<sup>130</sup> *Id.* at 656 (quoting the district court's order).

<sup>131</sup> *Id.* at 655.

<sup>132</sup> *Id.* at 656–57. Nunnery did not appeal his sanctions. *Id.* at 653 n.1, 656 n.3.

<sup>133</sup> *Id.* at 657.

<sup>134</sup> *Id.* at 657–58.

<sup>135</sup> *Id.* at 658.

shredded Nunnery's judgment and lawyering skills in prosecuting the appeal.<sup>136</sup> The *Jimenez* court wrote:

The appeal in the instant case is patently frivolous. In spite of the trial judge's finding that they had submitted "obviously fraudulent documents" to the court, and had perpetrated "the most blatant example of a Rule 11 violation that [she had ever] seen," Jimenez and Nunnery had the audacity to file an appeal from the trial court's sanction. The "foreordination" of Jimenez's failure on appeal could not have been more obvious. Not only did Jimenez cite to the wrong legal standard in her brief before this Court, she presented only *one page* of legal argument in her favor.<sup>137</sup>

Nunnery's fortunes worsened from there. The *Jimenez* court ordered that a copy of its opinion be forwarded to the Wisconsin Supreme Court Office of Lawyer Regulation.<sup>138</sup> The Wisconsin Supreme Court subsequently concluded that Nunnery violated his duty of competence in his representation of Jimenez both in the district court and on appeal and consequently suspended him from practice for two months.<sup>139</sup>

Once the decision has been made to appeal, a lawyer's loss of objectivity can lead to the appeal being frivolous as argued. *Pirri v. Cheek* is a recent case in which the court concluded that the appeal was frivolous as argued and held the appellant, Alfred Pirri, and his lawyer, Steven Fairchild, jointly and severally liable for substantial sanctions.<sup>140</sup>

The underlying issue in *Pirri* was whether Pirri and Fairchild could be held liable for attorneys' fees awarded against them by the district court in groundless patent litigation instituted by Pirri against Lori Cheek and other defendants.<sup>141</sup> The *Pirri* court easily affirmed the district court's ruling.<sup>142</sup> The defendants then sought sanctions against Pirri and Fairchild for pursuing a frivolous appeal in violation of Rule 38.<sup>143</sup> The Federal Circuit agreed with the defendants that Pirri's appeal was frivolous as argued:

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<sup>136</sup> *See id.*

<sup>137</sup> *Id.* (footnote omitted) (citation omitted).

<sup>138</sup> *Id.*

<sup>139</sup> *In re Disciplinary Proc. Against Nunnery*, 725 N.W.2d 613, 624–26 (Wis. 2007).

<sup>140</sup> 851 F. App'x 183, 192 (Fed. Cir. 2021).

<sup>141</sup> *Id.* at 187.

<sup>142</sup> *Id.* at 188.

<sup>143</sup> *Id.*

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Through his counsel, Mr. Pirri distort[ed] the factual and legal bases for the district court's fee award. He characterize[d] the district court as ruling on issues never raised or addressed below. And he leverage[d] inapposite legal doctrines to make arguments that [could] only be described as baffling. Put simply, Mr. Pirri's merits briefing far exceed[ed] the bounds of proper decorum.<sup>144</sup>

The court recited examples from Pirri's merits briefing where he mischaracterized the district court's rulings to manufacture frivolous arguments for reversal.<sup>145</sup> Fairchild authored the frivolous arguments.<sup>146</sup> In short, Pirri's merits briefing was obviously sanctionable.<sup>147</sup>

Pirri and Fairchild's conduct deteriorated further.<sup>148</sup> They made arguments on appeal that they never raised in the district court, and they launched unfounded personal attacks on the defendants and their lawyer, Lawrence Goodwin.<sup>149</sup> For example, Pirri's brief opposing Rule 38 sanctions asserted that Goodwin "file[d] frivolous sanctions motions as regularly as other people drink coffee"; repeatedly accused Goodwin and Cheek of "cheating" and "cheating to win" in the district court; accused Goodwin of lying about the reasons for his introduction of a piece of evidence in the case below; asserted that Goodwin was guilty of exceptional gamesmanship; and impugned the quality of the defendants' briefing.<sup>150</sup> These intemperate and baseless accusations offended the court, which considered them to "have no place in our judicial system."<sup>151</sup>

While noting that it did not "award sanctions lightly," the *Pirri* court concluded that "Pirri's conduct, effected through his counsel, [was] egregious."<sup>152</sup> As such, it warranted "exceptional sanctions" in the form of the defendants' attorneys' fees and double costs.<sup>153</sup> Because Fairchild was

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<sup>144</sup> *Id.* at 189.

<sup>145</sup> *Id.* at 189–90.

<sup>146</sup> *Id.* at 190.

<sup>147</sup> *Id.* at 191.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 192.

<sup>153</sup> *Id.*

the conduit for Pirri's vexatious conduct, the court held him jointly and severally liable for the sanctions.<sup>154</sup>

Courts have also expanded the scope of Rule 38 "to reach beyond frivolousness simpliciter,"<sup>155</sup> as in *In re Simply Media, Inc.*<sup>156</sup> That case was the second appeal arising out of the bankruptcy of David Brown and his company, Simply Media, Inc., and involved fraudulent transfers of property to Christina Brown to keep them out of the bankruptcy estate.<sup>157</sup> This time the Browns appealed a district court order affirming the bankruptcy court's rulings concerning two parcels of land.<sup>158</sup> The First Circuit refused to consider the Browns' appeal because of their fatally flawed briefing.<sup>159</sup> As the court explained:

The Federal Rules of Appellate Procedure require that an appellant's brief provide "a statement of facts relevant to the issues submitted for review with appropriate references to the record" and an argument "with citations to the authorities and parts of the record on which the appellant relies." The Browns' briefing does not meet either requirement, and it does not adequately present any issue for our review.

Despite its length, the Browns' opening brief leaves unclear what claims are being advanced and what facts bear on what claims. Although many of its arguments turn on legal propositions, it cites only three cases not connected to this appeal, and does not seriously engage with any of the precedents that might bear on any issue in this appeal. Despite numerous factual assertions, the brief rarely provides citations to the record. The occasional quotations from portions of the trial transcript do not provide support for the bulk of the brief's factual assertions.

The deficiencies in the appellants' brief are unsurprising because much has been taken verbatim from Christina Brown's brief in the prior appeal. This borrowing might not

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<sup>154</sup> *Id.*

<sup>155</sup> *In re Efron*, 746 F.3d 30, 37 (1st Cir. 2014).

<sup>156</sup> 583 F.3d 55, 56–57 (1st Cir. 2009).

<sup>157</sup> *Id.* at 56.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

be surprising because the two appeals involve some similar facts and issues; as we previously found the prior brief inadequate, borrowing merely perpetuates that inadequacy. Strikingly, the most prominent arguments in the present appeal are ones that this court already found to be inadequate on the prior appeal . . . .<sup>160</sup>

Given the shortcomings of the Browns' brief, the *In re Simply Media* court dismissed their appeal.<sup>161</sup> The court further ordered the Browns' lawyer to show cause why it should not make him pay the appellees' attorneys' fees, double costs, or both as a sanction for submitting a brief that rendered his clients' appeal frivolous.<sup>162</sup>

*Conboy v. U.S. Small Business Administration* is a more recent case in which a lawyer's grossly deficient briefing earned him Rule 38 sanctions.<sup>163</sup> In imposing sanctions, the *Conboy* court sought to re-emphasize what it considered to be two longstanding truths: "that '[a]n appeal is not just the procedural next step in every lawsuit,' and the decision to challenge 'an order of the District Court is not a matter to be taken lightly.'"<sup>164</sup>

*Conboy* arose out of Desmond Conboy and Dennis Gilsenan's inability to repay a Small Business Administration (SBA) loan.<sup>165</sup> When the SBA could not collect the debt, it assigned the debt to a collection agency, CBE Group (CBE).<sup>166</sup> Conboy and Gilsenan responded by suing the SBA, CBE, and others for allegedly violating several federal and state statutes, as well as for various common law causes of action.<sup>167</sup>

The defendants moved for summary judgment and CBE additionally moved for sanctions against Conboy and Gilsenan under Rules 11 and 37 of the Federal Rules of Civil Procedure.<sup>168</sup> The district court awarded the defendants summary judgment but denied CBE's sanctions motion.<sup>169</sup> Conboy and Gilsenan appealed the district court's summary judgment ruling

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<sup>160</sup> *Id.* at 56–57 (citation omitted).

<sup>161</sup> *Id.* at 57.

<sup>162</sup> *Id.*

<sup>163</sup> 992 F.3d 153, 158 (3d Cir. 2021).

<sup>164</sup> *Id.* at 155 (quoting *Beam v. Bauer*, 383 F.3d 106, 108 (3d Cir. 2004)).

<sup>165</sup> *Id.* at 155–56.

<sup>166</sup> *Id.* at 156.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

to the Third Circuit.<sup>170</sup> The men were represented in the district court and on appeal by lawyer Joshua Thomas.<sup>171</sup>

Conboy and Gilsenan's opening brief started off on the right path but soon went astray.<sup>172</sup> The Third Circuit detailed its concerns with the brief:

Conboy and Gilsenan's opening brief begins with a proper introductory sentence . . . . But it quickly goes awry in the next paragraph: "The district court has subject-matter jurisdiction over this case . . . ." One could readily assume that the sentence included a typographical error, using "has" instead of "had." But just two sentences later, the brief declares: "Venue is appropriately laid in the District Court of New Jersey . . . ." This second use of the present tense, denoting the wrong trial court, presages what comes after, which belies the notion of an honest mistake.

In the first sentence of his legal argument, counsel describes the summary judgment standard. Two pages later, he argues that "summary judgment should be denied. . . ." In the next section of his argument, counsel again writes as if the case remains in the District Court, claiming "there is no reason to grant summary judgment based on jurisdictional reasons for either party." Apart from these unusual (and inappropriate) references to the case pending in the District Court, counsel's fifteen pages of "argument" do not mention how the District Court erred.<sup>173</sup>

As the *Conboy* court suspected, Thomas "took the summary judgment section of his District Court brief and copied and pasted it into his appellate brief, with minor changes such as swapping 'Defendant' for 'Appellee.'"<sup>174</sup> To illustrate the extent of Thomas's cutting-and-pasting, the court appended to its opinion: (a) a copy of Conboy and Gilsenan's memorandum in opposition to the defendants' motion for summary judgment and CBE's motion for sanctions; and (b) a red-lined version of their opening brief on

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<sup>170</sup> *See id.*

<sup>171</sup> *Id.* at 157, 165.

<sup>172</sup> *Id.* at 156–57.

<sup>173</sup> *Id.* at 156–157 (citations to the brief omitted).

<sup>174</sup> *Id.* at 157.

appeal.<sup>175</sup> Obviously, Thomas's attempt to repackage his summary judgment briefing in the district court was "not proper appellate advocacy."<sup>176</sup>

As perhaps might have been expected, CBE moved for damages under Rule 38.<sup>177</sup> In response, Thomas filed "yet another copy-and-paste job."<sup>178</sup> Rather than addressing CBE's arguments for Rule 38 damages, Thomas "copied Conboy and Gilsenan's previous opposition to sanctions in the District Court under *Civil Rules 11 and 37*—with only insignificant alterations and additions."<sup>179</sup>

Thomas's mindless copying made this a crystal-clear case for Rule 38 damages.<sup>180</sup> Although a court may assess such damages against a party, here responsibility for any award properly rested with Thomas.<sup>181</sup> It was Thomas's duty to determine whether his clients' appeal had merit,<sup>182</sup> and it would have been unfair to tag Conboy and Gilsenan with responsibility for paying CBE's Rule 38 damages when they had relied on Thomas's expertise.<sup>183</sup>

In conclusion, the *Conboy* court observed that becoming a lawyer is difficult.<sup>184</sup> "The practice of law is challenging, and even the best lawyers make mistakes from time to time."<sup>185</sup> For these reasons, the court tended to give lawyers the benefit of the doubt in borderline cases.<sup>186</sup> But this case was not a close call.<sup>187</sup> Thomas's "copy-and-paste jobs" evidenced "a dereliction of duty, not an honest mistake."<sup>188</sup> The court thus stated that it would grant CBE's motion for Rule 38 sanctions after the company's lawyers filed a petition for fees and Thomas had an opportunity to respond.<sup>189</sup>

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<sup>175</sup> *Id.* at 158–59, 165.

<sup>176</sup> *Id.* at 157.

<sup>177</sup> *See id.* at 158.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See id.* ("Conboy and Gilsenan's counsel filed a copy-and-paste appeal without bothering to explain what the District Court did wrong. It is hard to imagine a clearer case for Rule 38 damages.").

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (quoting *Hilmon Co. (V.I.) v. Hyatt Int'l*, 899 F.2d 250, 254 (3d Cir. 1990)).

<sup>183</sup> *Id.* (quoting *Beam v. Bauer*, 383 F.3d 106, 108 (3d Cir. 2004)).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *See id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*



State courts have also found appeals to be frivolous based on serious problems with a party's briefing,<sup>190</sup> as the North Carolina Court of Appeals recently did in *Ramsey v. Ramsey*.<sup>191</sup> The *Ramsey* court found that the plaintiff's "gross and substantial noncompliance with the North Carolina Rules of Appellate Procedure" prevented it from meaningfully reviewing the trial court's decision.<sup>192</sup> More to the point, the plaintiff's brief violated "at least seven mandatory [appellate] rules."<sup>193</sup> Accordingly, and as the court explained in frustration:

Quite frankly, this Court was left dumbfounded as to the pertinent facts and issues of the instant case even after a complete and thorough reading of Plaintiff's brief. Plaintiff has completely failed to provide meaningful procedural and factual background information, leaving this Court to make its own "voyage of discovery through the record" in order to glean for ourselves the relevant circumstances underlying his appeal. This we will not do. Nor will we accept the additional delegation of Plaintiff's responsibility to research his grounds for appellate review and, assuming that such grounds exist, the standards of review that apply. Of particular implicit concern in the appellate rules is a regard for the already exhaustive catalog of responsibilities that this Court must necessarily undertake. And where not flagrant by virtue of their substance, Plaintiff's remaining violations of the appellate rules supplant the overall egregiousness by virtue of their quantity. We have considered sanctions . . . other than dismissal. However, in a case such as this, and in order to ensure better compliance with the appellate rules, we conclude that dismissal is appropriate and justified.<sup>194</sup>

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<sup>190</sup> See, e.g., *Dep't of Fin., Sec. Bureau v. Zarinegar*, 474 P.3d 683, 705 (Idaho 2020) ("Zarinegar submitted briefing to this Court that was significantly astray of the arguments made below and lacked any meaningful reference to the record. Thus, we order Zarinegar to pay to the Department the amount of the reasonable expenses incurred in responding to the frivolous filing of Zarinegar's appellate brief.").

<sup>191</sup> See 826 S.E.2d 459, 464 (N.C. Ct. App. 2019).

<sup>192</sup> *Id.* at 460–61.

<sup>193</sup> *Id.* at 462.

<sup>194</sup> *Id.* at 464 (citation omitted).

Interestingly, the *Ramsey* court never called out the plaintiff's lawyer, who was surely responsible for the gross and substantial rules violations that led to the dismissal of his client's appeal.<sup>195</sup> A dissenting judge reasoned that the plaintiff's rules violations did not prevent the court from deciding his appeal.<sup>196</sup> If the dissenting judge was correct, it would have made more sense and would have been fairer to sanction the lawyer through a fine or an award of attorneys' fees and costs to the other party rather than penalizing the plaintiff.

### III. SANCTIONING OTHER FORMS OF MISCONDUCT ON APPEAL

As noted earlier, lawyers may be sanctioned by appellate courts for misconduct beyond frivolous appeals.<sup>197</sup> Appellate courts plainly have the inherent authority to sanction a wide range of bad faith conduct by lawyers, and specific rules and statutes may likewise make a range of misconduct sanctionable.<sup>198</sup> In *Kim v. Westmoore Partners, Inc.*, for example, the court sanctioned the lawyer for dishonesty in combination with sloppy briefing.<sup>199</sup>

In *Kim*, Timothy Donahue, who represented respondent Gil Kim, requested an extension of time to respond to the appellants' opening brief.<sup>200</sup> In his request, Donahue stated "under penalty of perjury" that he needed "additional time . . . to file the brief because of the many 'complex issues raised' by appellants and his '[n]eed [for] more time to research cases & finalize [his] brief . . . ." He also cited "other time commitments of counsel."<sup>201</sup> The court granted the requested extension.<sup>202</sup>

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<sup>195</sup> See, e.g., *id.* at 462 (referring to the offending brief's author only as "Plaintiff").

<sup>196</sup> *Id.* at 465 (Dillon, J., dissenting).

<sup>197</sup> See *supra* notes 7–12 and accompanying text.

<sup>198</sup> See, e.g., 28 U.S.C. § 1927 ("Any attorney . . . admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."); N.C. R. APP. P. 25(b) ("A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these rules . . . . The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.").

<sup>199</sup> See 133 Cal. Rptr. 3d 774, 797 (Ct. App. 2011).

<sup>200</sup> *Id.* at 793.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

When Donahue filed his brief, however, it was apparent that he had performed no material research concerning Kim's case, and it was equally clear that he had needed no additional time to finalize the brief.<sup>203</sup> As it turned out, Donahue's brief was "an almost verbatim duplicate of another brief" he had filed in another case.<sup>204</sup> Indeed, as the *Kim* court observed, both briefs included "an identical—and we mean word-for-word identical—assertion that the appeal [was] frivolous, and a request for sanctions in the amount of \$20,000."<sup>205</sup> This assertion was impossible to reconcile with Donahue's claim, when seeking more time to file his brief, that the appellants in this case had raised complex issues that required substantial research.<sup>206</sup> As the court saw things, "[f]rivolous claims, by their nature, do not require significant research to rebut."<sup>207</sup>

When the court figured out what Donahue had done,<sup>208</sup> it notified him that it was considering sanctions against him for unreasonably violating two California Rules of Court that governed requests for extensions of time and a third rule that governed the contents of briefs.<sup>209</sup> In response, Donahue submitted a dismissive letter brief.<sup>210</sup> In his letter brief, he "defended his decision to simply copy his brief from the earlier case, stating, 'I have the right to modify my own work product.'"<sup>211</sup> He flippantly summarized his appellate "strategy as '[s]ame issue, same brief, should be the same ruling.'"<sup>212</sup> He also accused the court of being confused about the proper target of potential sanctions given that, in his view, it was the appellants and not him who should be sanctioned for pursuing a frivolous appeal.<sup>213</sup>

Donahue's cursory defense was unavailing. The court concluded that he violated both court rules related to requests for extension of time.<sup>214</sup> As the court explained:

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 794 (emphasis omitted).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (emphasis omitted).

<sup>208</sup> *See id.* (explaining that after Donahue "filed the boilerplate brief," the appellants asked the court to take judicial notice of the brief in the other case).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 795.

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## APPELLATE SANCTIONS

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Donahue is certainly not the only counsel to stint on detail in support of a request for extension of time. . . . [W]e try to accommodate such requests, even when the technical requirements of the request are not fully satisfied, especially when the opposing party registers no objection. It is simply more efficient, and generally more fair to the parties, for us to do so. Consequently, not every violation of these rules rises to the level of sanctionable conduct.

However, what distinguishes this case from the run-of-the-mill violation, is that Donahue’s subsequent filing of what is essentially a copy of a brief he filed in an earlier case—and one which does not, in fact, address any of the “complex” issues actually raised in this appeal—demonstrates that the justifications offered for his extension request were not merely cursory, but prevaricative. The brief Donahue ultimately filed herein did not reflect any research of complex issues, and its preparation simply could not have claimed any significant amount of his time. His conclusory claims to the contrary, in support of his extension request, were—not to put too fine a point on it—untrue.

We cannot overlook such conduct. It is critical to both the bench and the bar that we be able to rely on the honesty of counsel. The term “officer of the court,” with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance. While some might find these to be only “little” lies, we feel the distinction between little lies and big ones is difficult to delineate and dangerous to draw. The corrosive effect of little lies differs from the corrosive effect of big lies only in the time it takes for the damage to become irreversible. Donahue’s violations of the . . . California Rules of Court governing extension requests meet the standard of unreasonableness, and warrant the imposition of sanctions.<sup>215</sup>

Donahue fared no better when the court considered his violation of the court rule concerning the contents of briefs.<sup>216</sup> The court was plainly

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<sup>215</sup> *Id.* at 795–96 (emphasis omitted) (citation omitted).

<sup>216</sup> *See id.* at 796 (sanctioning Donahue again for the content of the brief).

exasperated by his baseless claim that the appellants deserved to be sanctioned for a frivolous appeal.<sup>217</sup> The court wrote:

The same conclusion applies to Donahue's violation of . . . [R]ule 8.204(a)(1) . . . . [It] requires that briefs must "support each point by argument and, if possible, by citation of authority . . . ." In this case, Donahue's brief fails to meet that standard . . . . First, it includes a separately-captioned argument asserting this appeal is frivolous and seeking an award of sanctions, but without including therein any discussion of either the facts of the case, or the law pertaining to sanctions. And second, the brief includes a separately-captioned argument asserting that appellants have "falsely argue[d] the case," again without including any meaningful analysis—either factual or legal—to justify that accusation in the context of this case. And what makes these violations *unreasonable* is the clear evidence that Donahue simply copied these arguments from the earlier brief he submitted in the [other] case. The circumstances suggest he did not even pause to consider whether they were appropriate points to make in response to this appeal.

In fact, a comparison of his . . . two briefs reveals that Donahue constructed the argument in this case by simply *redacting the facts* recited in the earlier brief, and reproducing the bellicose rhetoric without any reference to anything that actually happened here. In other words, Donahue reduced this misconduct accusation to boilerplate.

It is difficult for us to express how wrong that is. Sanctions are serious business. They deserve more thought than the choice of a salad dressing. "I'll have the sanctions, please. No, on second thought, bring me the balsamic; I'm trying to lose a few pounds." A request for sanctions can *never* be so lightly considered as to be copied word for word from another brief—much less copied in reliance on facts from another case that do not obtain in the present one.<sup>218</sup>

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<sup>217</sup> *See id.*

<sup>218</sup> *Id.* (citation omitted).

The *Kim* court lamented what it considered to be the lack of civility, courtesy, and respect between lawyers.<sup>219</sup> It observed that courts and lawyers alike have long paid lip service to civility but done little to command it.<sup>220</sup> The court reluctantly concluded that it was time to replace lip service with teeth in the form of sanctions.<sup>221</sup> In reaching this conclusion, the court was mindful that the practice of law can be hard and that appellate lawyers often wrestle with complicated and arcane issues.<sup>222</sup> Those things being so, lawyers normally should not face sanctions “for mistakes or missteps.”<sup>223</sup> But where, as here, a lawyer is guilty of “serious and significant departures from the standard of practice,” sanctions are justified.<sup>224</sup>

The court decided to sanction Donahue in the amount of \$10,000.<sup>225</sup> In settling on that figure, the court considered typical sanctions awards in cases involving frivolous appeals and additionally factored in Donahue’s dishonesty, lack of remorse, and at best reluctant cooperation with the court once his misconduct was exposed.<sup>226</sup> The court also referred him to the State Bar of California for possible professional discipline.<sup>227</sup>

As *Kim* exemplifies, lawyers’ duty of candor to courts is an imperative aspect of advocacy.<sup>228</sup> *Tyler v. State* is another case in which an appellate lawyer was sanctioned for his lack of candor, although in more typical and understandable circumstances.<sup>229</sup>

In that case, David Tyler was convicted on a felony charge of driving while intoxicated (DWI), rather than a misdemeanor charge for the same offense, based on his two prior DWI convictions in the preceding five years.<sup>230</sup> Represented by lawyer Eugene Cyrus, Tyler argued that his two prior DWI convictions were invalid because he had not knowingly waived

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<sup>219</sup> *Id.*

<sup>220</sup> *See id.* (“For decades, our profession has given lip service to civility. All we have gotten from it is tired lips.”).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 797.

<sup>226</sup> *See id.*

<sup>227</sup> *Id.*

<sup>228</sup> *See id.* at 795.

<sup>229</sup> 47 P.3d 1095, 1110 (Alaska Ct. App. 2001).

<sup>230</sup> *Id.* at 1097.

his right to counsel before he pled no contest in those cases.<sup>231</sup> Cyrus contended that Tyler's prior convictions should therefore be vacated and that his current DWI offense should be reduced to a misdemeanor.<sup>232</sup> The State disputed the effect of Tyler's no contest pleas and argued that even if they were invalid, that would not change the outcome in the case at hand.<sup>233</sup> The treatment of Tyler's pleas in all three DWI cases thus became the critical issue on appeal.<sup>234</sup> Lurking in the background was an Alaska Supreme Court case, *McGhee v. State*,<sup>235</sup> in which the supreme court "addressed this very issue in a slightly different setting."<sup>236</sup> The *McGhee* court resolved the issue against the driver there, which obviously had negative implications for Tyler.<sup>237</sup> Curiously, though, neither Cyrus nor the prosecutor cited *McGhee* in their briefs; the *Tyler* court located the case on its own.<sup>238</sup> Unlike the prosecutor, however, Cyrus could not claim that he was unaware of *McGhee* because he had represented McGhee before the Alaska Supreme Court.<sup>239</sup>

Cyrus's failure to cite *McGhee* was a problem because then-Rule 3.3(a)(3) of the Alaska Rules of Professional Conduct stated that a lawyer "shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."<sup>240</sup> Cyrus explained that he had not cited *McGhee* because he believed that it did not control Tyler's case.<sup>241</sup> He argued that *McGhee* was factually distinguishable and that the court was wrong to rely on *McGhee* to rule against Tyler because the cases arose in different contexts.<sup>242</sup> In short, Cyrus argued that because

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 1098.

<sup>234</sup> *Id.* at 1098–99.

<sup>235</sup> 951 P.2d 1215 (Alaska 1998).

<sup>236</sup> *Tyler*, 47 P.3d at 1099.

<sup>237</sup> *See id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 1102.

<sup>240</sup> *See* ALASKA RULES OF PRO. CONDUCT r. 3.3(a)(2) (2021) (setting forth the rule that previously appeared in subpart (a)(3) of Alaska's Rule 3.3); ALASKA RULES OF PRO. CONDUCT r. 3.3(a)(3) (2001) (amended 2015).

<sup>241</sup> *Tyler*, 47 P.3d at 1102.

<sup>242</sup> *Id.* at 1102–03.

*McGhee* was not “controlling authority” in Tyler’s case, Rule 3.3 did not require him to reveal it.<sup>243</sup>

The *Tyler* court rejected Cyrus’s arguments.<sup>244</sup> *McGhee*, as an Alaska Supreme Court decision, was clearly authority in the controlling jurisdiction.<sup>245</sup> Critically, Cyrus’s duty of disclosure applied to directly adverse authority in the “controlling jurisdiction,” not just to “controlling authority.”<sup>246</sup> As for whether *McGhee* was directly adverse to Tyler’s position, the court stated:

[A] court decision can be “directly adverse” to a lawyer’s position even though the lawyer reasonably believes that the decision is factually distinguishable from the current case or the lawyer reasonably believes that, for some other reason, the court will ultimately conclude that the decision does not control the current case.<sup>247</sup>

At bottom, Cyrus was obligated to call *McGhee* to the court’s attention even if he reasonably believed the case to be inapposite.<sup>248</sup> The *Tyler* court concluded that Cyrus violated Rule 3.3 by failing to reveal *McGhee* in his briefing, but because the court determined that he did not act in bad faith, it fined him a mere \$250.<sup>249</sup> The court rested the sanction on Alaska Rule of Appellate Procedure 510(c),<sup>250</sup> which authorized an appellate court to fine a lawyer up to \$500 for a failure to comply with the rules of appellate procedure “or any other rules promulgated by the [Alaska] Supreme Court.”<sup>251</sup> The Alaska Rules of Professional Conduct obviously constituted such other rules.

Although a \$250 fine is a featherweight sanction, Cyrus could have avoided any sanction by citing *McGhee* and then arguing why, in his view, the case did not govern Tyler’s situation. He plainly was prepared to do that as he demonstrated in his response to the *Tyler* court’s show cause order.<sup>252</sup> Cyrus certainly had a good faith reason to believe that *McGhee* did not

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<sup>243</sup> *Id.* at 1104.

<sup>244</sup> *Id.* at 1109.

<sup>245</sup> *Id.* at 1104.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 1105–06.

<sup>248</sup> *Id.* at 1108.

<sup>249</sup> *Id.* at 1110.

<sup>250</sup> *Id.*

<sup>251</sup> ALASKA RULES APP. P. 510(c) (2001) (amended 2015).

<sup>252</sup> *Tyler*, 47 P.3d at 1103.



dispose of Tyler's case because just a few months before he prepared his brief in *Tyler*, a trial court judge in one of his cases ruled that *McGhee* did not govern an analogous situation.<sup>253</sup> For that matter, a citation to *McGhee* in the relevant section of Tyler's brief introduced by a "*but see*" signal would have satisfied Cyrus's duty to disclose directly adverse authority in the controlling jurisdiction and therefore allowed him to avoid sanctions.<sup>254</sup> The one thing Cyrus could not do was ignore the holding in *McGhee* altogether.

#### IV. RECOMMENDATIONS FOR LAWYERS

Lawyers can take a few basic measures that should allow them to avoid appellate sanctions. First, a lawyer must recognize "that '[a]n appeal is not just the procedural next step in every lawsuit.'" <sup>255</sup> A lawyer should carefully consider the trial court record and the applicable law before agreeing to pursue an appeal on a client's behalf. In some cases, there simply is no legitimate basis for an appeal. The lawyer must be prepared to so inform the client. Beyond the lawyer's self-interest, the client needs to understand that an appeal is likely to fail and that there will be additional consequences if it is determined to be frivolous.<sup>256</sup> If, in such a case, the client is frustrated by the lawyer's stance and seeks a new lawyer to appeal on its behalf, the lawyer must be comfortable with that result.

Second, some cases are an uphill struggle against unfavorable precedent. Such cases may be meritorious nonetheless. Fortunately, a lawyer prosecuting an appeal is entitled to make "a good faith argument for an extension, modification or reversal of existing law."<sup>257</sup> An argument of this sort is not frivolous.<sup>258</sup> The lawyer should, however, make clear to the court that she is asking it to change, extend, or retreat from existing law and candidly address any directly adverse authority in the controlling jurisdiction.<sup>259</sup>

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<sup>253</sup> *Id.* at 1102.

<sup>254</sup> See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(c), at 63 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) (explaining signals that indicate contradictions).

<sup>255</sup> *Conboy v. U.S. Small Bus. Admin.*, 992 F.3d 153, 155 (3d Cir. 2021) (quoting *Beam v. Bauer*, 383 F.3d 106, 108 (3d Cir. 2004)).

<sup>256</sup> See MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2021) (governing lawyers' duty to communicate with clients).

<sup>257</sup> *Id.* r. 3.1.

<sup>258</sup> *Id.*

<sup>259</sup> *Frank v. Good Samaritan Hosp. of Cincinnati, LLC*, 848 F. App'x 191, 192 (6th Cir. 2021) (quoting *Waeschle v. Dragovic*, 687 F.3d 292, 296 (6th Cir. 2012)).

Third, a lawyer should study the jurisdiction's rules of appellate procedure. The failure to comply with jurisdictional requirements may doom an appeal, but even lesser rule violations may have material repercussions.<sup>260</sup>

Fourth, as *In re Simply Media*,<sup>261</sup> *Conboy*,<sup>262</sup> and *Kim*<sup>263</sup> reflect, lawyers must resist the temptation to simply cut-and-paste portions of their briefs from other documents in the case or from briefs or documents in other cases as a means of achieving efficiency. All cases are different even though they may involve some common legal issues. Although it certainly is permissible for a lawyer writing a brief to draw on other briefs or documents that she or her colleagues prepared, any argument or factual recitation must be carefully tailored to the case at hand. Moreover, any adapted argument or statement of fact must fit the stage of the proceeding.<sup>264</sup>

Fifth, lawyers who are not regular appellate advocates should consider engaging or involving an appellate specialist—whether from within their firms or without—in any appeals they handle. This is true regardless of whether they are representing an appellant or an appellee, although the need for assistance by a lawyer who concentrates on appeals is arguably greater where an appellant's representation is concerned. At the very least, an experienced appellate lawyer is unlikely to make serious procedural errors and offers some assurance that the case will be well-briefed.

## V. CONCLUSION

Lawyers cannot afford to be sanguine about the prospect of appellate sanctions. For whatever reason or constellation of reasons, appellate courts seem to be increasingly willing to sanction lawyers for frivolous appeals and other forms of misconduct during appeals. Appellate courts' traditional tolerance of all but the most egregious misconduct by lawyers who appear before them has not entirely disappeared, but it certainly has eroded. Fortunately for appellate lawyers, a handful of essential precautions should help them avoid sanctions in most cases.

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<sup>260</sup> See, e.g., *Lee v. Cook Cnty., Ill.*, 635 F.3d 969, 973–74 (7th Cir. 2011) (sanctioning the lawyer for his multiple violations of court rules governing appellate docketing and briefing).

<sup>261</sup> See *supra* notes 156–162 and accompanying text.

<sup>262</sup> See *supra* notes 163–189 and accompanying text.

<sup>263</sup> See *supra* notes 199–227 and accompanying text.

<sup>264</sup> See, e.g., *Conboy v. U.S. Small Bus. Admin.*, 992 F.3d 153, 156–57 (3d Cir. 2021) (sanctioning a lawyer who cut-and-pasted portions of his summary judgment briefing in the district court into his appellate brief).