COMMENT

STICKS AND STONES: THE ABILITY OF ATTORNEYS TO APPEAL FROM JUDICIAL CRITICISM

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INTRODUCTION

Not all attorneys are angels. During litigation, situations arise where a judge will feel the need to criticize an attorney's conduct. It could be through remarks off the record, through a sanction and fine for something like a Rule 11¹ violation, or any number of methods in between. However, not all federal district court judges are infallible, and criticism, especially on the record or in a published opinion, can have severe repercussions on an attorney's reputation and livelihood. What options for appellate-level review does a chastised attorney currently have? What options should she have?

This Comment explores the circuit split concerning an attorney's ability to appeal on her own behalf from a district court proceeding in which she is not a party. From a strict requirement that the district court actually fine the attorney² to a requirement that the court make findings of misconduct,³ circuits have drawn different lines to limit appellate jurisdiction. The circuits have been split on the issue of when an attorney can bring an appeal on her own behalf for some time,⁴ but the Supreme Court has shown no interest in resolving the issue. As recently as October 2007, the Supreme Court denied certiorari on an appeal from the Seventh Circuit's reaffirmation of its position in *Seymour v. Hug.*⁵ This Comment argues that federal courts should have jurisdiction to hear appeals based on specific findings

¹ Unless otherwise stated, "Rule" in this comment refers to the Federal Rules of Civil Procedure.

² See, e.g., Seymour v. Hug, 485 F.3d 926, 929 (7th Cir. 2007) ("[A]n attorney can bring an appeal on her own behalf when challenging a district court decision imposing monetary sanctions on the attorney, but this rule does not allow an appeal of otherwise critical comments when no monetary sanctions have been imposed."), cert. denied, 128 S. Ct. 302 (2007). The Seventh Circuit alone holds this position.

³ The Fifth, Ninth, Tenth, and D.C. Circuits follow variations of this approach. *See infra* Section II.C.

⁴ Compare Seymour, 485 F.3d at 929 (requiring monetary sanctions), with Williams v. United States (In re Williams), 156 F.3d 86, 92 (1st Cir. 1998) (requiring formal designation of a sanction, though not a monetary fine), and Sullivan v. Comm. on Admissions & Grievances, 395 F.2d 954, 956 (D.C. Cir. 1967) (allowing appeals from mere findings of misconduct, because the "determination plainly reflects adversely on his professional reputation").

⁵ 128 S. Ct. 302 (2007).

that an attorney engaged in misconduct during litigation before the district court, even when monetary fines or other formal sanctions have not been imposed.

Though this circuit split has existed for well over a decade, scholarship addressing it has been limited until recently. Two student comments reviewing the split have been published within the past year, suggesting different resolutions.⁶ One argues for a resolution similar to the resolution endorsed here; this Comment, however, not only discusses and evaluates the rationales and concerns offered by the courts of appeals themselves, but also brings in larger systemic themes from the areas of appellate jurisdiction and review. Allowing appeals from findings of misconduct, from findings that an attorney has violated a specific legal or ethical duty, fits within the general exception for nonparty appeals and has the additional benefits of providing greater appellate control of judges and clarifying proper attorney conduct through increased oversight and opportunity for appellate review. Allowing appeals from findings of misconduct both addresses the concerns raised by the courts of appeals and best serves the larger goals and constraints of the appellate system.

Part I starts with a brief look at the law of appellate jurisdiction and the hurdles that attorneys face in the form of general jurisdictional rules. As this Comment explains, these rules are already subject to many exceptions. Part I also provides important context with which to evaluate the various approaches by the courts of appeals. Part II details the current state of the circuit split, highlighting the rationales and fears that each circuit has raised in deciding the issue. Part III considers what the law should be in light of legal precedent and policy; it extends the discussion beyond the explicit concerns of the cir-

⁶ Compare Carla R. Pasquale, Note, Scolded: Can an Attorney Appeal a District Court's Order Finding Professional Misconduct?, 77 FORDHAM L. REV. 219, 242-43 (2008) (recommending allowing appeals from "sanctions that could damage that attorney's professional reputation"), with Robert B. Tannenbaum, Comment, Misbehaving Attorneys, Angry Judges, and the Need for a Balanced Approach to the Reviewability of Findings of Misconduct, 75 U. Chi. L. Rev. 1857, 1858 (2008) (developing a hybrid rule—"a 'formality/harm' test that emphasizes both content and context when assessing which findings of misconduct constitute a sanction"—based on the principle that courts review judgments, not opinions).

⁷ See Pasquale, supra note 6, at 242-48; infra Part III. While the recommendations of the two pieces are similar, the justifications come from different angles. Pasquale provides policy justifications but largely limits discussion to those concerns raised by the courts themselves. See, e.g., Pasquale, supra note 6, at 244-48. This Comment, however, provides additional policy justifications for the rule—particularly in subsection III B 9.

cuits by placing the debate in the larger context of appellate jurisdiction and appellate review, including the usefulness of promoting uniform attorney conduct in the federal courts and checking abuses by the district courts. Ultimately, it is the rule allowing appeals from explicit findings of attorney misconduct that best serves these larger goals.

I. HURDLES TO APPELLATE JURISDICTION

The appellate courts have framed the issue of attorney appeals as a dispute over the boundaries of federal appellate jurisdiction, with a focus on the statutory requirement of a "final order" and the limits on standing based on judicial interpretations of the Article III "case or controversy" requirement. Both of these jurisdictional grants are filled with intricacy, nuance, and pitfalls. While a comprehensive review of appellate jurisdiction in federal courts is beyond the scope of this Comment, certain general rules are necessary to frame the issues analyzed and discussed in Parts II and III.

A. Nonparties

A fundamental general rule of appellate litigation is that only named parties can appeal a final judgment, even if a nonparty's interests are harmed by it. ¹¹ There are, of course, various exceptions to this

 $^{^8}$ See 28 U.S.C. § 1291 (2006) (granting jurisdiction to all courts of appeals except the Federal Circuit for "appeals from all final decisions of the district courts of the United States"); id. § 1295(a) (providing the comparable statutory grant of jurisdiction for the Federal Circuit).

⁹ U.S. CONST. art. III, § 2, cl. 1.

¹⁰ See generally Adam N. Steinman, Reinventing Appellate Jurisdiction, 48 B.C. L. REV. 1237 (2007) (analyzing appellate jurisdiction over interlocutory orders); Joan Steinman, Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties, 39 GA. L. REV 411, 484-517 (2005) [hereinafter Steinman, Irregulars] (surveying the standing of various classes of nonparty appellants and appellees); Joan Steinman, Shining a Light in a Dim Corner: Standing To Appeal and the Right To Defend a Judgment in the Federal Courts, 38 GA. L. REV. 813 (2004) [hereinafter Steinman, Shining] (comparing and contrasting standing to appeal with standing to sue and other appellate issues).

¹¹ See Marino v. Ortiz, 484 U.S. 301, 304 (1988) (per curiam) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."); Karcher v. May, 484 U.S. 72, 77-78 (1987) (dismissing for lack of jurisdiction an appeal by presiding officers of the state legislature who had intervened on behalf of the legislature but left office prior to the appeal); Ex parte Leaf Tobacco Bd. of Trade, 222 U.S. 578, 581 (1911) (per curiam) ("One who is not a party to a record and judgment is not entitled to appeal therefrom.").

general rule. ¹² Among those nonparties who can appeal orders are those found in contempt, ¹³ witnesses disputing the amount of a fee paid to them, ¹⁴ and attorneys who have been sanctioned and fined. ¹⁵ As explained by the Federal Circuit in *Nisus Corp. v. Perma-Chink Systems, Inc.*, the theory behind exceptions such as these is that they form a side action to the main case, and by rendering judgment against a nonparty, the court has in effect made it a party to that judgment only. ¹⁶ Thus, a necessary step for a chastised attorney will be to show that there was a judicial decision directed by the court specifically against her. A related inquiry, and one that has split the circuits on the issue of attorney appeals, is what exactly counts as a sufficient judicial decision.

B. Judgments, Not Opinions

Another time-honored axiom of appellate review is that courts review judgments, not opinions.¹⁷ Put another way, appellate courts will not look at the findings of an opinion except as they relate to the ultimate judgment. This prohibition becomes important when attorneys attempt to appeal from findings of misconduct rather than from formal sanction orders.

This also becomes important when a winning party seeks review of otherwise negative findings in a judgment. Generally, a party that is

when a court imposes a sanction on an attorney, it is not adjudicating the legal rights of the parties appearing before it in the underlying case. Instead, the court is exercising its inherent power to regulate the proceedings before it. Once that power to punish is exercised, the matter becomes personal to the sanctioned individual and is treated as a judgment against him.

 $^{^{12}}$ See generally Steinman, Irregulars, supra note 10, at 484-517 (exploring nonparty standing to appeal).

¹³ See U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 74 (1988) (hearing the appeal of a nonparty witness from a finding of civil contempt).

¹⁴ See Demarest v. Manspeaker, 498 U.S. 184, 185 (1991) (hearing an appeal from a prisoner who was denied a witness fee after testifying in another's trial), superseded by statute, Incarcerated Witness Fees Act of 1991, Pub. L. No. 102-417, 106 Stat. 2138 (codified at 28 U.S.C. § 1821(f) (2006)).

¹⁵ See infra Part II (discussing the general acceptance of an attorney's ability to appeal from a money judgment against her).

¹⁶ 497 F.3d 1316, 1319 (Fed. Cir. 2007). As the Federal Circuit explained,

Id. (citations omitted).

See, e.g., Black v. Cutter Labs., 351 U.S. 292, 297-98 (1956) ("This Court... reviews judgments, not statements in opinions.... [I]t is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests." (citations omitted)).

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successful in the judgment is not allowed to appeal.¹⁸ The Supreme Court explored the underpinnings of this policy in Deposit Guaranty National Bank v. Roper. 19 The Court based the rule on the interpretation of the jurisdictional statutes and of historical practice rather than on Article III.²⁰ Because the rule is not constitutionally compelled, the Court acknowledged that in certain cases a successful party may appeal "an adverse ruling collateral to the judgment" if the party still meets other Article III standing requirements.²¹ The important inquiry is whether, despite the successful judgment, the prevailing party retains a sufficient "stake in the appeal." Findings that might have preclusive effect, for example, could give standing for appellate review, notwithstanding the fact that the judgment was in the party's favor.23 These appeals are from findings, and not the judgment itself, and therefore provide an exception to the rule that might be instructive to attorneys appealing findings of misconduct.

C. Injury Sufficient To Give Independent Standing

In addition to the judgment requirement discussed above, courts have interpreted Article III as requiring an appellant to show injury resulting from a court's decision in order to have appellate standing.²⁴ When monetary sanctions are involved, the attorney's personal stake in the appeal is clear. Where no fines have been imposed, however, the issue turns on whether potential injury to a lawyer's reputation is sufficient to grant appellate standing. The Supreme Court has not di-

¹⁸ See Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980) ("Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."); Lindheimer v. Ill. Bell Tel. Co., 292 U.S. 151, 176 (1934) (denying the ability of a party to appeal a favorable judgment in order to have the district court's findings reviewed).

¹⁹ Roper, 445 U.S. at 333-34.

²⁰ *Id.*

²¹ *Id.* at 334.

²² Id.; see also Elec. Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939) (ordering the court of appeals to hear the prevailing party below's appeal and order the district court to reform its decree on the validity of a disputed patent, even "though the [patent] adjudication was immaterial to the disposition of the cause").

See, e.g., Ashley v. Boehringer Ingelheim Pharms. (In re DES Litig.), 7 F.3d 20, 23 (2d Cir. 1993) (acknowledging that findings that have collateral estoppel effect can aggrieve a party such that it is excepted from the general rule preventing appeals by prevailing parties).

²⁴ See generally Steinman, Shining, supra note 10, at 839-44 (discussing the various bases for standing requirements at the appellate level).

rectly addressed this point with respect to lawyers, but it has in the past found that a showing of damage to reputation is sufficient to give standing.²⁵ As Part II will show, most circuits that have explored the issue have found that damage to reputation and the resulting monetary damage through loss of business is likewise sufficient.

II. DIFFERING APPROACHES TO ATTORNEY APPEALS IN THE FEDERAL COURTS OF APPEALS

Before surveying the circuits' various approaches, it is worth discussing a point on which they all agree: the availability of appeal from monetary fines. It seems settled that an attorney can appeal a monetary sanction resulting from Rule 11 or Rule 37 violations and the like. In *Cunningham v. Hamilton County*, for example, the Court was asked to decide whether a Rule 37(a) sanction for misconduct during discovery could be immediately appealed. The discussion centered on whether such a sanction could be considered a "final order" under the collateral order doctrine, which would be sufficient to give the appellate courts jurisdiction under 28 U.S.C. § 1291. No attention was given to the uncontroversial notion that a nonparty attorney could challenge such a sanction on the appellate level. Like a nonparty held in contempt, a fined attorney can seek a second opinion.

²⁵ See, e.g., Meese v. Keene, 481 U.S. 465, 475-76 (1987) (finding that, in the First Amendment context, potential damage to a citizen's reputation for showing a film labeled by the government as "political propaganda" satisfied the injury component of the standing requirement).

²⁶ 527 U.S. 198, 202 (1999).

²⁷ *Id.* at 203-10. The collateral order doctrine provides that one may appeal an order without a final judgment only when the order is "conclusive, . . . resolve[s] important questions separate from the merits, and . . . [is] effectively unreviewable on appeal from the final judgment in the underlying action." *Id.* at 198 (alterations in original) (quoting Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995)).

²⁸ See U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988) ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned.").

Dispute over the ability of fined attorneys to appeal has focused on the procedure of the appeal. *See Cunningham*, 527 U.S. at 200 (finding that sanction for Rule 37(a) (4) violation did not itself constitute a "final decision" allowing for immediate appeal); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (setting the standard of review for Rule 11 sanctions to be abuse of discretion "for all aspects" of the lower court's decision). Various appellate decisions have held that the attorney alone can appeal a sanction, rather than the client, since only the attorney has proper standing. *See* Reynolds v. E. Dyer Dev. Co., 882 F.2d 1249, 1254 (7th Cir. 1989) ("[Plaintiffs] purport to appeal the Rule 11 sanctions They cannot do that. The attorney . . . is the real party in interest, and must appeal in his own name."); Marshak v. Tonetti, 813

identified the common ground uniting the circuits, it is time to explore how, and why, they depart.

A. Most Restrictive: The Seventh Circuit's Approach

Only the Seventh Circuit has refused to extend the availability of appeal for a reproached attorney beyond cases involving monetary sanctions.³⁰ Instead of an appeal, this circuit endorses the availability of a writ of mandamus to compel a district court to strike excessive language.³¹

In *Bolte v. Home Insurance Co.* a district court had found that attorneys for the defendant concealed evidence from the plaintiff.³² In an order granting the plaintiff a new trial, the court went so far as to set a date for a hearing to determine if sanctions were appropriate.³³ The case was dismissed before that date, but the original findings remained on the record. The reproached attorneys appealed, claiming damage to reputation and the possibility of later disciplinary proceedings. The Seventh Circuit was quick to point out that this appeal was from *findings* of a lower court, and not from the actual judgment granting a new trial.³⁴

The court addressed two policy concerns that it felt would be implicated if it were to allow attorneys to appeal unfavorable findings. First, it reasoned that granting such an appeal would vastly expand appellate jurisdiction. Not only lawyers, but also anyone able to show concrete injury resulting from a judicial opinion (not just a judgment) would be able to appeal. The court was unwilling to go this far, citing "congested appellate dockets." Second, it noted concern over the lack of an adversarial nature to the appeal. Since the plaintiff below

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F.2d 13, 21 (1st Cir. 1987) ("Since the award must be paid by [the attorney] alone, plaintiff has no pecuniary or, we think, other sufficient interest in the award to confer standing to appeal.").

³⁰ See Seymour v. Hug, 485 F.3d 926, 929 (7th Cir. 2007), cert. denied, 128 S. Ct. 302 (2007); Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817, 820 (7th Cir. 1992); Bolte v. Home Ins. Co., 744 F.2d 572, 572-73 (7th Cir. 1984).

³¹ See, e.g., Bolte, 744 F.2d at 573 ("If there is any remedy for the wrong that the appellants allege, it is to seek a writ of mandamus against the district judge under 28 U.S.C. § 1651.").

³² *Id*. at 572

 $^{^{33}}$ See id. ("The judge described the lawyers' conduct as reprehensible" (internal quotation marks omitted)).

¹⁴ Id.

³⁵ *Id.* at 573.

 $^{^{36}}$ Id

had not been awarded the revenue from the sanctions, there would be no one with a stake in the outcome to defend the opinion.³⁷

The court discussed two additional points that would prove important to other circuits. First, it seemed to acknowledge, or at least consider, that damage to reputation is sufficient to satisfy the standing requirements of Article III. The court also acknowledged that, in the case before it, the findings of misconduct and the district court's decision to let them stand *did* amount to a kind of sanction for the attorneys. In denying the lawyers' appeal, the court acknowledged that the appellants had standing and did not seem overly concerned that the appeal arose from an opinion, not from a judgment. Instead, it found that pragmatic, prudential reasons (limitations on judicial resources and the nonadversarial nature of the appeal) outweighed the attorneys' claim.

Bolte is still good law in the Seventh Circuit. Quite recently, the Seventh Circuit had the opportunity to review its monetary-sanction requirement in Seymour v. Hug.⁴⁰ While acknowledging the current circuit split, the court reaffirmed its holding in Bolte, adding that the Seventh Circuit favors clear, easily applied, mechanical rules for determining jurisdiction.⁴¹ Again, the court's focus was on practicality.

B. Formalist Middle Ground

A group of circuits have attempted to draw a new line to determine whether an appeal of judicial criticism is allowed. While unwilling to restrict appeals to cases involving monetary fines, the First and Federal Circuits have sought out another firm guideline for appellate jurisdiction: any formal reprimand or sanction, whether or not fines were attached.⁴²

³⁸ See id. (drawing an analogy to defamation).

³⁷ Id

³⁹ See id. ("[A]Ithough sanctions in the usual sense were not imposed, the judge's refusal to vacate his earlier finding of misconduct imposed or confirmed a sanction of sorts, in a realistic though not formal sense, on the lawyers.").

⁴⁰ 485 F.3d 926 (7th Cir. 2007).

Id. at 929 (quoting both *Bolte*, 744 F.2d at 573, and Hoagland *ex rel*. Midwest Transit, Inc. v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 740 (7th Cir. 9004))

⁴² See Nisus Corp. v. Perma-Chink Sys., Inc., 497 F.3d 1316, 1320 (Fed. Cir. 2007) ("We have taken the position that a court's order that criticizes an attorney and that is intended to be a 'formal judicial action' in a disciplinary proceeding is an appealable decision..."); Williams v. United States (*In re* Williams), 156 F.3d 86, 92 (1st Cir. 1998) ("Sanctions are not limited to monetary imposts. Words alone may suffice if

The First Circuit's reasoning in Williams v. United States sets the tone for this line of cases. 43 Two attorneys representing the United States in bankruptcy court were subject to sanctions under Rule 37(b) for failure to timely produce requested discovery documents. 4 The order imposed monetary sanctions and contained harsh findings about the attorneys' conduct. 45 The sanctions were annulled by the district court on technical grounds, but the factual findings relating to the attorneys' conduct were not vacated. The attorneys appealed, arguing that these findings, which were in a published opinion, amounted to sanctions "in the form of a public reprimand," which damaged their reputation.47

In denying the appeal, the court emphasized both the need to appeal from an order or judgment, not findings, and the fact that the court could have expressly reprimanded the attorneys if it chose to. 48 Instead, it imposed sanctions that were later dropped. As to whether a monetary fine was required, however, the court was emphatic: "Let us be perfectly clear. Sanctions are not limited to monetary imposts.

they are expressly identified as a reprimand."). While originally following the First Circuit's reasoning in Williams, the Ninth Circuit has since decided that a specific finding of misconduct in the form of a rules violation, absent monetary sanctions or explicit mention of reprimand, is itself equivalent to a formal reprimand. See United States v. Talao, 222 F.3d 1133, 1137-38 (9th Cir. 2000).

⁴³ 156 F.3d at 91. The Ninth Circuit relied heavily on Williams in setting the standard for its own jurisdiction. See Weissman v. Quail Lodge Inc., 179 F.3d 1194, 1200 (9th Cir. 1999) ("We agree with the holding of Williams that words alone will constitute a sanction only if they are expressly identified as a reprimand." (internal quotation marks omitted)). The Federal Circuit, while not quite as explicitly adopting the Williams position, seems to have come to the same conclusion. See Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003). Precision Specialty quoted both Williams and Weissman extensively, id. at 1351-52, and adopted their language in allowing an appeal from a finding of a Rule 11 violation, despite the lack of monetary sanctions, holding that "[t]he reprimand was explicit and formal, imposed as a sanction." Id. at 1352 (emphasis added). The opinion also rejected appeals for informal criticism, just like the First Circuit: "Nothing in this decision should be taken as suggesting, or even intimating, that other kinds of judicial criticisms of lawyers' actions, whether contained in judicial opinions or comments in the courtroom, are also directly reviewable." Id. at 1353.

Williams, 156 F.3d at 88.

⁴⁵ See id. (quoting the original order, which characterized one of the attorneys' testimony as "pure baloney" and the other's "performance and credibility [as] at about the same level").

Id. at 89.

⁴⁷ *Id.* at 90.

Words alone may suffice if they are expressly identified as a reprimand." 49

Why was the court adamant about requiring an express reprimand, even in the case of extremely critical —and published judicial commentary? The First Circuit shared the Seventh Circuit's concern that if it acknowledged that judicial criticism could amount to a "de facto sanction," it would have no principled way to decide when a statement by a judge was harsh enough to count as a sanction.⁵¹ It rejected an inquiry into whether the trial judge intended the comments to be a sanction, which was the position that the dissent encouraged, as being too subjective.⁵² Relying on damage to reputation as the crucial tipping point that would broaden the right of appeal to nonlawyers who are criticized, like the court in *Bolte*, the First Circuit was unwilling to endorse so broad an extension of appellate jurisdiction.⁵³ Also like the *Bolte* court, the First Circuit in *Williams* raised a concern about the lack of an adversarial position from mere judicial criticism, as the opposing side would have no incentive or reason to defend the opinion.

A more pointed policy objection raised by the court was the possible chilling effect on trial judges of allowing such appeals. Concern over appeals may lead judges to limit their criticism and may reduce their ability to maintain order in the courtroom and "preside effectively over discovery and trials." Analogizing to judicial immunity from defamation liability, the court found that the benefit of promoting judicial candor outweighed the harm from instances of judicial abuse. 56

In allowing appeals in cases where no fines have been assessed, these courts recognize that reputational damage is itself sufficient injury to satisfy Article III's case-or-controversy requirement. As the Federal Circuit stated in *Precision Specialty Metals, Inc. v. United States*, "[a] lawyer's reputation is one of his most important professional as-

⁴⁹ Id. at 99

 $^{^{50}\,}$ The court itself characterized the findings as "unnecessarily strident." $\,\emph{Id.}$ at 93.

⁵¹ *Id.* at 91.

⁵² *Id*.

⁵³ *Id.* The Federal Circuit echoed this reasoning in *Nisus Corp. v. Perma-Chink Systems, Inc.*, 497 F.3d 1316, 1320-21 (Fed. Cir. 2007).

⁵⁴ Williams, 156 F.3d at 91. Given that the court would allow appeals from sanctions involving words alone, it is not clear why this objection has any more weight when applied to de facto sanctions. In neither case would there be a party with an interest in defending the opinion.

id. at 92.

⁵⁶ *Id*.

sets. Indeed, such a reprimand may have a more serious adverse impact upon a lawyer than the imposition of a monetary sanction."⁵⁷

There are, however, variations in the cases as to what is sufficiently formal to warrant an appeal. *Williams* made it seem as if only something explicitly called a reprimand or an actual sanction order would suffice.⁵⁸ The Federal Circuit uses a slightly different wording from the First Circuit's; it requires "a formal judicial action" criticizing an attorney.⁵⁹ When clarifying language from a previous opinion that "sanctions or findings" could be grounds for standing, the Federal Circuit stated that the phrase refers to "formal imposition of the court's inherent power to penalize those who appear before it" and *not* just to findings that an attorney has engaged in misconduct or behaved inappropriately.⁶⁰

C. Findings of Misconduct

The remaining circuits that have weighed in on the issue favor allowing appeals from findings that an attorney engaged in misconduct ("misconduct appeals"). "Misconduct" in these situations would include a violation by an attorney of a legal or ethical duty, such as vio-

⁵⁷ 315 F.3d 1346, 1353 (Fed. Cir. 2003); *see also id.* (allowing an appeal from a formal sanction, even though the opinion was unpublished); *Williams*, 156 F.3d at 90 ("It is trite, but true, that a lawyer's professional reputation is his stock in trade, and blemishes may prove harmful in a myriad of ways.").

⁵⁸ But see Young v. City of Providence ex rel. Napolitano, 404 F.3d 33, 37-38 (1st Cir. 2005) (allowing an appeal from an order finding that three attorneys had violated Rule 11). Even though sanctions were only imposed on two of the three appellants in Young, and though the sanctions were merely censure for one and admonishment for another, all three were allowed to appeal the finding of a Rule 11 violation. Id. Young might signal a softening within the First Circuit of the formalistic stance with which it has become associated. The attorneys in Young, however, were still appealing from an order against them and not just from a finding of misconduct in an opinion. Id.; see also Sterling Consulting Corp. v. IRS (In re Indian Motorcycle Co.), 452 F.3d 25, 28 (1st Cir. 2006) (describing the holding in Williams as "based on the distinction between an order and a finding, and on the principle that courts review findings only so far as they do underpin orders").

Nisus Corp. v. Perma-Chink Sys., Inc., 497 F.3d 1316, 1320 (Fed. Cir. 2007). The standard seems equivalent to the "formal reprimand" of *Williams*, however. 156 F.3d at 91.

⁶⁰ Nisus Corp., 497 F.3d at 1321.

See Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1167-69 (10th Cir. 2003) (holding that orders finding ethical violations are appealable); Walker v. City of Mesquite, 129 F.3d 831, 832-33 (5th Cir. 1997) (allowing appeal of a court's reprimand that found a lawyer guilty of misconduct); Sullivan v. Comm. on Admissions & Grievances, 395 F.2d 954, 954-56 (D.C. Cir. 1967) (discussing the appeal of a "proscribed conduct" finding).

lating a rule of professional conduct or Rule 11. This approach broadens appellate review but still provides a clear standard to guide the lower courts and cabins the ability to appeal.

The Ninth Circuit's jurisprudence is instructive, as the Circuit used to follow the formal-reprimand rule. Now, however, it allows appeals from a formal finding that an attorney has violated a specific rule of conduct, even if no sanctions are imposed and the finding is not expressly called a reprimand. As the court explained in *United States v. Talao*, such a finding itself constitutes a sanction, whether or not the opinion contains a phrase stating that the finding is a formal reprimand:

[T]he district court made a finding and reached a legal conclusion that [the attorney] knowingly and wilfully violated a specific rule of ethical conduct. Such a finding, per se, constitutes a sanction.... [It] bears greater resemblance to a reprimand than to a comment merely critical of inappropriate attorney behavior.... The requisite formality in this case is apparent from the fact that the trial court found a violation of a particular ethical rule, as opposed to generally expressing its disapproval of a lawyer's behavior.

It distinguished its own prior holding in *Weissman* on the ground that in that case the appeal was from disparaging remarks but not a finding of misconduct.⁶⁵ The court found that this expansion of appellate jurisdiction would still prevent the fears raised in *Williams* of reducing judicial candor by providing a clear line to trial judges regarding what can be appealed.⁶⁶ The Ninth Circuit has clearly not flung wide the jurisdictional gates but has shifted what specific items in a judicial

⁶² See Weissman v. Quail Lodge Inc., 179 F.3d 1194, 1200 (9th Cir. 1999).

⁶³ See, e.g., United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000) (allowing an appeal from a formal finding that an attorney had violated a specific state ethics rule). Importantly, in distinguishing the Ninth Circuit from the First and Federal Circuits, the finding at issue in *Talao* was not made as part of a sanction order against the attorney. Instead, the finding of misconduct was made when the court denied a motion to dismiss made by the other side. *Id.* at 1137-38; accord United States v. Ensign, 491 F.3d 1109, 1117 (9th Cir. 2007) ("*Talao* remains the law in this circuit.").

⁶⁴ Talao, 222 F.3d at 1138 (italics omitted) (footnotes omitted).

Id. at 1137-38. Weissman involved an attempted appeal from both an actual sanction order and critical statements in the order as a separate basis for jurisdiction. While the court reversed the order on grounds that the attorney had been denied proper due process, it rejected his argument for jurisdiction based on the critical comments in the order. See Weissman, 179 F.3d at 1199 (concluding that the comments by the district court by themselves were not sanctions but rather "factual findings" supporting the order, and declining to review such findings).

⁶⁶ *Talao*, 222 F.3d at 1138.

opinion can trigger an appeal by an attorney. In fact, by emphasizing the need for a specific rule violation and characterizing such a finding as a "legal conclusion," the Ninth Circuit's jurisprudence retains a flavor of formalism.⁶⁷

In *Butler v. Biocore Medical Technologies, Inc.*, the Tenth Circuit also confronted a case involving an appeal from findings of misconduct without formal sanctions or reprimand. After reviewing the disposition of the circuits at the time, the court addressed the fears raised by *Williams* in allowing appeals from de facto sanctions. After stating that findings of misconduct are sufficiently injurious to reputation to give standing, the court turned to the problems of adversarial proceedings and excessive appellate-court interference with the conduct of trials. It argued that since the appellate court would be reviewing the trial court's order finding misconduct in addition to the appellant's brief, both sides would be represented without the need for an appellee brief. The court also decided that the deferential standard of review given to the imposition of sanctions would still leave the trial court with sufficient discretion to comment on attorneys' conduct.

⁶⁷ *Id.* ("[A] formal finding of a violation eliminates the need for difficult line drawing in much the same way as a court's explicit pronouncement that its words are intended as a sanction."). Arguably, the Ninth Circuit still belongs in the formalistic camp. *See* Pasquale, *supra* note 6, at 237-41 (placing the Ninth Circuit in the same category as the First and Federal Circuits). However, the Ninth Circuit's acceptance of a per se sanction seems at odds with the First Circuit's formal-sanction requirement and rejection of de facto sanctions in *Williams*. By allowing an appeal from a finding that was not expressly a sanction or part of a sanction order—something the First Circuit would not allow—the Ninth Circuit has potentially opened the door to allowing appeals from any explicit finding of attorney misconduct by the trial court.

⁶⁸ 348 F.3d 1163 (10th Cir. 2003).

⁶⁹ *Id.* at 1167-68. Though it allowed the appeal, the Tenth Circuit, much like the Ninth, was adamant that appellate jurisdiction would not extend to criticism beyond findings of actual misconduct. *Id.* at 1168.

With respect to *Williams* on this point, the court stated that "a rule requiring an explicit label as a reprimand ignores the reality that a finding of misconduct damages an attorney's reputation regardless of whether it is labeled as a reprimand and, instead, trumpets form over substance." *Id.* at 1169. While I agree that *Williams* "trumpets form over substance," I think that *Butler* mischaracterizes the *Williams* view on this point. *Williams* did not base its holding on differences in reputational damage between a formal reprimand and a finding of misconduct. The First Circuit settled on drawing the line at formal reprimands because it thought doing otherwise would result in an unworkable and uncabinable rule of appellate jurisdiction. *See* Williams v. United States (*In re* Williams), 156 F.3d 86, 90-92 (1st Cir. 1998); *supra* Section II.B. It was these concerns that led the *Williams* court to embrace form over substance and not the degree of injury to a lawyer's reputation from one method of criticism or another.

¹¹ Butler, 348 F.3d at 1169.

⁷² See id. (applying abuse of discretion as the standard of review).

While the opinions in *Talao* and *Butler* focus primarily on concerns raised by allowing misconduct appeals, other circuits have developed affirmative rationales for expanding appellate jurisdiction to review findings of misconduct. In the oft-cited case *Walker v. City of Mesquite*,⁷³ the Fifth Circuit stressed both the value of reputation to an attorney⁷⁴ and the systemic utility of reviewing findings regarding attorney conduct.⁷⁵ The court also recognized its duty to monitor and discipline the conduct of attorneys practicing before it, and appellate courts' consequent responsibility to review the use of this disciplinary power.⁷⁶ The D.C. Circuit based its decision to allow appeals from findings of professional misconduct not on policy but on analogy, holding that such a finding "is not unlike that of an accused who is found guilty but with penalties suspended. We conclude this gives [the attorney] standing to appeal."⁷⁷

D. Summary

Even though circuits have varying responses to the question of what to do with judicial criticism of attorneys, there is great uniformity in the types of concerns that the opinions raise. Any attempt to resolve the circuit split will necessarily have to address them.

The first concern, which nearly all circuits addressing the issue have overcome, is whether damage to reputation alone is enough to grant standing.⁷⁸ Second, numerous courts have worried that pro-

Stripped to essentials this proposition would maintain that an attorney has more of a reason and interest in appealing the imposition of a \$100 fine than appealing a finding and declaration by a court that counsel is an unprofessional lawyer prone to engage in blatant misconduct. We reject this proposition out of hand, being persuaded beyond peradventure that one's professional reputation is a lawyer's most important and valuable asset.

Id. at 832. Why the plaintiff-appellee bothered to fight the misconduct finding in the first place is not clear from the opinion, but it calls into question the argument that such appeals will result in a lack of adversarial proceedings.

⁷³ 129 F.3d 831 (5th Cir. 1997).

⁷⁴ Specifically, the court addressed the appellee's argument, based on Seventh Circuit jurisprudence, that a monetary sanction is required to give standing. The court characterized the monetary-sanction requirement:

⁵ *Id*. at 833 n.5.

⁷⁶ *Id*.

⁷⁷ Sullivan v. Comm. on Admissions & Grievances, 395 F.2d 954, 956 (D.C. Cir. 1967).

The Seventh Circuit is alone in finding reputational injury insufficient to grant standing, though it did not completely rule out the possibility. *See supra* Section II.A.

ceedings will not be adversarial if actual (and particularly monetary) sanctions have not been imposed.⁷⁹ Finally, the impact on trial courts⁸⁰ and the potential for excessive expansion of appellate jurisdiction warrant discussion.⁸¹

The next Part examines which approach best resolves these issues and best fits within the general appellate framework discussed in Part I. As Part III demonstrates, the majority position of allowing attorneys to appeal specific findings of misconduct strikes the best balance between equity for the chastised lawyer and the needs (and framework) of the appellate system.

III. ALLOW APPEAL FOR FINDINGS OF MISCONDUCT, BUT NO FURTHER

After reviewing the arguments put forth by the various circuits, the majority view, ⁸² which allows an attorney to appeal a judicial finding that she has engaged in professional misconduct, appears to be the best solution. Exceptions to the general rules of appellate jurisdiction (involving nonparty appeals, review of judgments, and existence of injury) already exist that allow for such a formulation. ⁸³ Policy arguments, as identified by the appellate courts themselves, ⁸⁴ coupled with the weaknesses of other approaches, also recommend allowing appeals from findings of misconduct. These rationales, however, do not support extending appellate jurisdiction to encompass other judicial criticism, no matter how severe.

A. Unsuitability of the Fine-Only and Formal-Reprimand Standards

Before extolling the virtues and defending the vices of misconduct appeals, it is necessary to explain why the two more restrictive views should be rejected.

 $^{^{79}}$ See Williams v. United States (In re Williams), 156 F.3d 86, 91 (1st Cir. 1998); Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984).

⁵⁰ Williams, 156 F.3d at 92.

See Nisus Corp. v. Perma-Chink Sys., Inc., 497 F.3d 1316, 1320-21 (Fed. Cir. 2007); Williams, 156 F.3d at 91; Bolte, 744 F.2d at 573.

That is, the majority of circuits that have had the opportunity to decide the issue. This majority, however, is based on an artificial grouping that the circuits themselves might dispute. With regards to allowing appeals from findings of misconduct, though, it seems that the Fifth, Ninth, Tenth, and D.C. Circuits would allow such an appeal. See supra Section II.C. No other approach has garnered as broad support.

⁸³ See supra Part I.

⁸⁴ See supra Part II.

1. The Fine-Only Standard

The fact that only the Seventh Circuit requires monetary sanctions against an attorney in order to hear an appeal does not mean that the standard can be easily brushed aside. Despite early speculation to the contrary, the Seventh Circuit seems quite attached to its position. Its power derives from its consistency with the general rules of appellate jurisdiction discussed in Part I. It fits into the exception for nonparty appeals from collateral judgments directed against them, since imposition of a monetary sanction certainly is a decision against the lawyer. An appeal from a monetary sanction is an appeal from a judgment, and not from a finding within the judgment. And, unlike potential reputational damage, a monetary fine is also a clear injury to the attorney. Indeed, the Seventh Circuit's position is the common ground from which the other circuits depart.

There are good grounds for those departures, however, and the Seventh Circuit's own justifications for its position are not wholly satisfying. Since the *Bolte* opinion seemed to concede both that damage to reputation might be sufficient to give standing and that formal findings of misconduct realistically amount to a sanction, ⁹² the court wound up, in effect, arguing that jurisdiction should be restricted in spite of the appeal's apparent merit. If the following two arguments,

[W]e can not tell whether [the Seventh Circuit] would apply [the fine-only] principle where the attorney was actually reprimanded for the misconduct. When the Seventh Circuit decided *Clark Equipment* and the earlier *Bolte* case upon which it there relied, it did not have the benefit of the analysis of the subsequent cases from other circuits that we have discussed above.

Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1352 (Fed. Cir. 2003).

⁸⁵ See supra Section II.A.

⁸⁶ As the *Precision Specialty* court noted,

⁸⁷ See Seymour v. Hug, 485 F.3d 926, 929 (7th Cir. 2007) (reaffirming the circuit's commitment to the monetary sanction rule), cert. denied, 128 S. Ct. 302 (2007).

See supra Section I.A.

⁸⁹ See supra Section I.B.

⁹⁰ See supra Section I.C.

⁹¹ See supra Part II.

⁹² See supra Section II.A. While the court in *Bolte* seemed receptive to recognizing damages based on reputation, later opinions in the Seventh Circuit have used less favorable language. See Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817, 820 (7th Cir. 1992) ("[The attorney] has made only general allegations that he may suffer harm in the future. These allegations represent no more than a speculative contingency, insufficiently real and immediate to show an existing controversy." (citation omitted) (internal quotation marks omitted)).

identified by the Seventh Circuit, can be overcome, the rule collapses by its own logic.

First, the Seventh Circuit expressed fear that anything other than a requirement of monetary sanctions would lead to an uncontrollable expansion of appellate jurisdiction, which would further increase the workload of already burdened appellate courts in this "age of congested appellate dockets."94 Expanding appeals to findings of misconduct for litigation behavior, however, does not result in granting appellate review to all individuals criticized in court opinions; it merely changes where the jurisdictional line for an existing exception lies. Further, as discussed in more detail below, there are valid reasons to grant such appeals to attorneys litigating before the court while restricting them for others. As for congested courts, many other circuits have apparently not found the slight expansion in appellate jurisdiction onerous. 55 Since the dispute lies between the appellant and the court record, and since the standard of review is highly deferential, many of these cases likely could be disposed of without oral arguments, further reducing the cost to the judiciary.⁹⁶

The Seventh Circuit's position regarding its second concern—the lack of adversarial proceedings—also seems untenable. On the one hand, a party may, for various reasons, still wish to defend a ruling as an appellee. This scenario actually happened in *Bolte*, despite the court's inability to identify any benefit the appellee might gain from contesting the findings.⁹⁷ More importantly, the adversarial posture the court desires may be lacking even with monetary sanctions. If the fine is payable to the court itself, for example, the opposing party would have no tangible incentive to act as appellee.

The court uses "uncontrollable" to mean that such an expansion could not be limited to just attorneys but would have to be open to all whom a judge might criticize. *See* Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984).

⁹⁴ Id.

⁹⁵ See supra Section II.C (discussing the circuits and cases that have expanded appellate jurisdiction to hear misconduct appeals). The fact that some courts have broadened their jurisdiction does not mean that the Seventh Circuit also has the resources to do so, but it does call into question just how strong the rationale is for denying misconduct appeals.

⁹⁶ For examples of cases decided on their briefs, see *Teaford v. Ford Motor Co.*, 338 F.3d 1179, 1179 n.* (10th Cir. 2003) and *United States v. Gonzales*, 344 F.3d 1036, 1037 n.* (10th Cir. 2003).

⁹⁷ Bolte, 744 F.2d at 573.

2. The Formal-Reprimand Standard

The position taken by the First Circuit in Williams, requiring a formal reprimand if no monetary sanctions are present, 98 has fewer of the fine-only standard's strengths and all of its weaknesses. This rule's crucial departure from that of the Seventh Circuit is the recognition of appeals without monetary sanctions, but the new line it draws to try to cabin the exception seems needlessly formalistic. To be fair, the court was reacting to a suggestion that it acknowledge that judicial criticism could amount to a de facto sanction. 99 In rejecting the de facto sanction, the court raised the same two arguments that the Seventh Circuit had raised and noted its concern that accepting de facto sanctions would have a chilling effect on judicial candor. The problem with the First Circuit's opinion is not that it rejected de facto sanctions¹⁰¹ but that it chose to enshrine a requirement of a formal reprimand. If two attorneys are found to have engaged in misconduct but the court singles out only one to receive a formal reprimand, it is hard to justify why only that one should have the option of appellate review. Just as with the Seventh Circuit's position, concerns of cabining and adversarial proceedings are outweighed by the benefits of appeals from misconduct findings. 102 Nor, as the Ninth Circuit discussed in Talao, would allowing misconduct appeals have a greater chilling effect on judicial candor than requiring a formal reprimand. In short, once one has moved away from monetary sanctions, misconduct findings seem a better stopping point than formal reprimands.

⁹⁸ See supra Section II.B. Even though some recent cases in the First Circuit show a shift toward greater recognition of sanctions even without a statement of formal reprimand, see supra note 58, the importance of the Williams position to the historical development of jurisprudence in this area and its frequent discussion in other circuits merit its review. Of course, if the First Circuit is distancing itself from Williams, that move further undermines its credibility as a jurisdictional rule.

⁹⁹ See Williams v. United States (*In re* Williams), 156 F.3d 86, 91 (1st Cir. 1998) ("Practically speaking, any rule that purports to transform harsh judicial words into a 'de facto sanction' will be almost impossible to cabin.").

¹⁰⁰ *Id*. at 91-92.

The First Circuit's rejection of de facto sanctions is a position with which I agree—and for some of the reasons identified in *Williams. See infra* Section III.B.

 $^{^{102}}$ See supra subsection III.A.1.

¹⁰³ See United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000); supra Section II.C.

B. Findings of Misconduct: The New Jurisdictional Line

While certain flaws in the other approaches help to make the misconduct-findings standard look better, there are also solid arguments in its favor that make it more than just a default winner. Positive arguments emerge for allowing appeals from explicit findings of attorney misconduct when the rule is placed in the larger context of appellate jurisdiction and review.

1. Legal Justification

Allowing appeals from findings of misconduct can readily be reconciled with existing appellate-jurisdiction guidelines and their exceptions. Much like a formal sanction, ¹⁰⁴ a finding of misconduct is directed at the nonparty attorney and not the client. As the Ninth Circuit explained, it is a legal conclusion about that attorney and his conduct. ¹⁰⁵ Such a finding, with its harmful consequences, is sufficient to allow a nonparty to appeal as a collateral action under current appellate procedure jurisprudence. ¹⁰⁶

Also, the fact that the attorney appeals from findings in a judgment, and not a judgment per se, should not raise the usual jurisdictional red flags. The attorney is not challenging mere wording in an opinion or the reasoning behind a judgment, but is instead challenging a finding of misconduct against her. The situation is similar to that of an appeal by a prevailing party over other sufficiently negative rulings in the judgment; the attorney seeks review of an injurious decision even if she is not aggrieved by the actual judgment. As the Supreme Court recognized in *Roper*, it is possible for a potential appellant to take an appeal, even if the judgment itself is not against her interests, as long as she retains a sufficient stake in the appeal. In a misconduct appeal, therefore, an attorney remains aggrieved even though the ultimate judgment in the case (relating to her client) might not be injurious to her.

See supra Section I.A.

See Nisus Corp. v. Perma-Chink Sys., Inc., 497 F.3d 1316, 1319 (Fed. Cir. 2007) (treating sanctions against an attorney as a judgment against the attorney for purposes of an appeal).

¹⁰⁵ Id.

See Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 334 (1980); supra Section I.B. But see Tannenbaum, supra note 6, at 1868-77 (rejecting the allowance of an appeal from any finding of misconduct as not adequately being an exception to the "judgments, not opinions" requirement). Tannenbaum concludes that the exception

through the collateral findings of misconduct directed at the nonparty attorney.

Finally, a finding of misconduct does seem injurious to an attorney's reputation even if no additional monetary fines are imposed. Reputation is sufficient to grant standing for appeal given both the appellate courts' position on the subject 109 and the holdings of the Supreme Court in other areas of law. 110 Nor should it generally matter whether an opinion is officially published or unpublished, since in an era of Westlaw, LexisNexis, and internet searches even an unpublished opinion can cause significant reputational damage. 111 As the Federal Circuit noted in *Precision Specialty*, "Unpublished opinions, although not then reprinted in the West Publishing Company reports, may be, and frequently are, reported elsewhere." 112

in *Electrical Fittings Corp. v. Thomas & Betts Co.* (which *Roper* builds upon) does not apply because "findings of misconduct involving nonparty attorneys do not qualify as a ruling on one of the issues litigated in the underlying case." *Id.* at 1871. It is true that *Roper* and *Electrical Fittings* described the findings that they are allowed to review as "adjudication[s] of one of the issues litigated." *Roper*, 445 U.S. at 336; Elec. Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939). Neither opinion, however, held this language out as a requirement for appeal, and the situation is distinguishable from nonparty-attorney appeals. Both *Roper* and *Electrical Fittings* involved appeals by parties to the litigation, and both involved issues that were at stake in the underlying case. A nonparty-attorney appeal coming from a collateral action against that attorney, on the other hand, is already distinct from the underlying litigation, so a requirement that an attorney could only appeal from one of the "issues litigated" in the case is inapplicable in this context.

109 See, e.g., Walker v. City of Mesquite, 129 F.3d 831, 832 (5th Cir. 1997) (finding that the possibility of reputational damage is great enough to warrant permitting misconduct appeals); see also Williams v. United States (In re Williams), 156 F.3d 86, 90-91 (1st Cir. 1998) (concluding that while judicial criticism that merely "offends a lawyer's sensibilities" and formal sanctions may both negatively impact an attorney's reputation, only the latter are appealable). But see Sterling Consulting Corp. v. IRS (In re Indian Motorcycle Co.), 452 F.3d 25, 29 (1st Cir. 2006) ("Reputational interests can be cognizable; that is what defamation and expungement of record cases are about. But merely to refer to reputation does not in this case denote a concrete threat, as it might if a lawyer were sanctioned and bar discipline was in prospect." (footnote omitted)).

See supra Section I.C (discussing First Amendment cases).

There may be circumstances, though, where a misconduct finding is not widely available enough to create the reputational damage needed for standing. An order or opinion which is not reported to Westlaw or LexisNexis, or is only available on PACER, might be insufficient depending on the facts of the case.

112 315 F.3d 1346, 1353 (Fed. Cir. 2003). The court noted further that "[a]lthough the opinion that contained the reprimand was unpublished, that fact should not insulate the trial court's action from judicial review." *Id.*

2. Appellate-Policy Rationale

The policies of appellate review that the misconduct-findings rule promotes provide the strongest support for the rule's adoption. In addition to improving equity by allowing an unfairly maligned attorney to seek relief, this jurisdictional limit serves important goals of the appellate system better than either of the fine-only or formal reprimand standards. Judge Hufstedler, formerly of the Ninth Circuit, identified two roles that appellate systems play: reviewing for errors in a particular case and serving broader institutional functions. Appellate courts perform these institutional functions by hearing cases in which they interpret the law authoritatively, set policy, and supervise the lower courts.

The function of reviewing for errors in decisions is clearly best served by hearing appeals from misconduct findings. These are legal conclusions, and they often form the basis for more formal sanctions like monetary fines. A review of a formal sanction would have to look at the correctness of the findings of misconduct in any case. It makes more sense to allow appellate courts to review these findings for errors by the trial court directly than it does to require that the trial judge choose a particular method of punishment before allowing review of the findings. As noted by the Fifth Circuit in *Walker*, the true damage to a lawyer comes from these findings of misconduct and not from the "\$100 fine."

Reviewing findings of attorney misconduct also furthers several important institutional goals. First, it provides attorneys with clearer expectations of what conduct is acceptable. As the *Walker* court emphasized, "we have a strong interest in hearing cases such as this because of our duty to assure that lawyers, as officers of the court, live up to their ethical responsibilities." While an appellate court applies an "abuse-of-discretion standard in reviewing all aspects of a district

¹¹³ *Cf.* Pasquale, *supra* note 6, at 242-48 (describing different rationales for a similar jurisdictional limit on appeals from judicial criticism).

Based on the appropriately deferential abuse-of-discretion standard of review, the attorney would still face a difficult burden in overcoming the trial court's findings. An attorney may also risk making the damage worse by seeking appellate review, which would further publicize his alleged misdeeds.

Shirley M. Hufstedler, New Blocks for Old Pyramids: Reshaping the Judicial System, 44 S. CAL. L. REV. 901, 910 (1971).

¹¹⁶ Id.

¹¹⁷ Walker v. City of Mesquite, 129 F.3d 831, 832 (5th Cir. 1997).

¹¹⁸ *Id.* at 833 n.5.

court's Rule 11 determination," allowing review of a misconduct finding, even under a deferential review standard, would still provide the court with an opportunity to discuss the conduct and relevant legal standards. As the Supreme Court acknowledged in Cooter & Gell v. Hartmarx Corp., which set the abuse of discretion standard for at least Rule 11 sanctions, "this standard would not preclude the appellate court's correction of a district court's legal errors" since a court abuses its discretion "if it based its ruling on an erroneous view of the law" Since findings of misconduct will often involve interpreting ethical rules, a court of appeals can still engage in substantial discussion of how those standards should be interpreted. 121 The more restrictive approaches would hamper this institutional function in two ways: they result in fewer cases and therefore create fewer opinions to guide both attorneys and courts, 122 and they are too narrowly focused on the imposition of a fine or formal sanction rather than the attorney's actual conduct.

Second, appellate review acts as a check on potential excess by trial courts, which wield vast discretion in this area and which could otherwise avoid review by stopping short of formal sanctions. The reputational harm to a sanctioned attorney can be severe (even if sanctioned informally) and appellate review is necessary to make sure that, in the particular case, censure is appropriate. ¹²³

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). The *Cooter & Gell* court rejected the use of a "three-tiered standard of review" based on whether a question of fact, law, or mixed question of law and fact was being reviewed. *Id.*

¹²⁰ Id. at 402, 405.

¹²¹ See, e.g., Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163 (10th Cir. 2003) (referencing *Cooter & Gell* for the abuse of discretion standard it said it was applying, but reviewing de novo the trial court's interpretation of the ethical rules involved in its findings of misconduct).

One potential, but self imposed, obstacle to courts of appeals providing greater clarity on attorney conduct is the fact that they make about 80% of their opinions nonprecedential. See Sarah E. Ricks, The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine In One Circuit, 81 WASH. L. REV. 217, 223 (2006). This trend has ramifications well beyond the topic of this Comment. However, even if courts of appeals issue few precedential opinions reviewing misconduct findings, their unpublished opinions can still provide guidance. Presumably an opinion by a court of appeals that certain actions constitute misconduct would influence the prudent attorney whether the opinion is published or unpublished.

¹²³ See 1-10 Indus. Assocs. v. United States, 528 F.3d 859, 861 (Fed. Cir. 2008) ("Just as it is the duty of the court imposing sanctions to do so only when truly warranted, it is our duty on appeal to review the facts of such a case with great care to determine whether a sanction has been properly imposed."). While the court was reviewing a Rule 11 violation, the logic should also apply to misconduct findings generally.

Moreover, as the Ninth Circuit concluded in *Talao*, hearing misconduct rulings will not result in a chilling effect on judicial candor, as the *Williams* court worried, ¹²⁴ because doing so still provides a clear rule for the kind of judicial findings that trigger an appeal. ¹²⁵ Nor, as the Tenth Circuit pointed out in *Butler*, would hearing misconduct appeals lead to "excessive appeals." ¹²⁶ The deferential standard of review, particularly for factual and credibility findings, coupled with the increased damage to an attorney's reputation from a loss at the appellate level, would act to keep the level of frivolous appeals to a minimum and allow the district court to continue to maintain order. ¹²⁷ In fact, by hearing these appeals, the appellate courts would also provide useful feedback to the district courts regarding what constitutes attorney misconduct and district court abuse of discretion. ¹²⁸

Expanding appellate review beyond monetary sanctions or formal reprimand both feeds the appellate courts more opportunities to set law and focuses review directly on what conduct is allowed, which has institutional value, rather than on whether the punishment was appropriate, which has limited value beyond the facts of that particular case.

3. Non- and Prior-Litigation Misconduct

Not all findings by a court that an attorney has engaged in misconduct should be per se reviewable. It may happen that an attorney who is not a party and who does not represent the party before the court still receives an adverse finding. The justifications for allowing an attorney, and only an attorney, to appeal for a misconduct finding are weakened when the conduct involved did not arise during the current litigation. This was precisely the scenario faced by the Federal Circuit in Nisus Corp. v. Perma-Chink Systems, Inc., where an attorney was found to have engaged in misconduct during the filing of a patent

 $^{^{124}}$ See United States v. Williams (In re Williams), 156 F.3d 86, 91-92 (1st Cir. 1998) ("The net result would be tantamount to declaring open season on trial judges.").

¹²⁵ See United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000) (arguing that judicial candor will not be compromised because judges would likely be aware of the bright line appealability of formal findings); see also Pasquale, supra note 6, at 245-47 (arguing that judicial candor would not be compromised under such a similar scheme).

¹²⁶ Butler, 348 F.3d at 1169.

¹²⁷ *Id*.

See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS, 53 (1981) ("The 'questions of law' passed on to the appeals courts are in reality requests for uniform rules of social conduct and indicators of what range of case-by-case deviation from the rules is permissible by first-line controllers.").

application. The only role that the attorney played during the trial, however, was as a witness. It is difficult to justify allowing an attorney to appeal from such a situation, but not allow an appeal by other witnesses or third parties who have findings of misconduct against them. A court's interest in controlling the courtroom, and the appellate court's interest in reviewing the conduct of attorneys appearing before it, is not as heavily implicated here as it is where an attorney is sanctioned for his conduct directly before the court. In these cases, attorneys must remain in the same position as other third parties.

C. Further Expansion Is Also Unworkable

The de facto sanction option, which the *Williams* court rejected, has not been adopted by any circuit. One could imagine a jurisdictional rule that would look at the aggregate of judicial criticism and weigh whether it amounted to (or was intended to be) a sanction or not. It also seems plausible that criticism alone could reach the level of a sanction, at least in terms of intent and impact on the attorney. Take, for example, the somewhat extreme case of *Bradshaw v. Unity Marine Corp.* ¹³⁴ In the opinion, the district judge called attorneys for both parties "amateurish" and said that their pleadings were "child-

¹²⁹ 497 F.3d 1316, 1318 (Fed. Cir. 2007).

¹³⁰ *Id.* at 1321.

One illustrative example of the attorney as a true third party, pointed out to me by Judge Louis Pollak, of the Eastern District of Pennsylvania, is the ineffective assistance of counsel claim. In order to succeed, the defendant must show that her attorney's conduct was not just deficient, but so deficient that it violated the defendant's Sixth Amendment right to counsel. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984). The attorney, while often a key witness in the proceedings, is not a party to them. *See* Harrelson v. United States, 967 F. Supp. 909 (W.D. Tex. 1997) (denying prior counsel's request to intervene in ineffective assistance of counsel proceedings despite possible harm to counsel's reputation). Even though the attorney's conduct is the central point of inquiry, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." *Strickland*, 466 U.S. at 689. The *Strickland* court declined to adopt explicit guidelines for evaluating attorney conduct.

¹³² If, for example, the attorney has a sufficient interest in a civil proceeding, she could always attempt to intervene in the litigation to protect her rights. *See* FED. R. CIV. P. 24.

¹³³ Williams v. United States (*In re* Williams), 156 F.3d 86, 91 (1st Cir. 1998).

¹³⁴ 147 F. Supp. 2d 668 (S.D. Tex. 2001).

like."¹³⁵ The opinion continues in that tone, leaving no doubt as to the judge's opinion of their professional competence. If criticism alone could rise to the level of public reprimand, this opinion would be the prime example. Assuming for the sake of argument that the attorneys' conduct was unfairly mischaracterized, does it make sense to grant them appellate review?

In such a case, the issues of vast expansion of appellate jurisdiction and negative effects on judicial candor would become relevant. While one could try to limit the exception to lawyers based on their role as officers of the court and the court's role in regulating their behavior, this policy rationale has less force since it is not based on actual misconduct. Why should a lawyer be allowed to appeal from a finding that her testimony is "pure baloney," but an ordinary witness not? Especially if that witness were an expert witness, her reputational concerns could be just as great as a lawyer's if the opinion was critical enough. Since there can be no clear guidance to a trial judge as to when criticism goes so far as to constitute a sanction, there is a much greater chance that judges would pull their punches to avoid getting involved in appeals, with the result that their ability to control the courtroom and criticize worthy targets would be hindered. Such a standard seems unworkable in practice.

In addition, once an appellate court departs from actual findings of misconduct, it also largely departs from its ability to review meaningfully the lower court's opinion. What standard should—or could—an appellate court apply to a statement, for example, that an attorney should avoid running with sharp objects? It clearly implicates the attorney's professional ability; but such criticism, lacking an allegation of specific objectionable conduct, may be effectively unreviewable.

¹³⁵ *Id.* at 670. After observing that both attorneys had "draft[ed] their pleadings entirely in crayon on the back sides of gravy-stained paper place mats," the court expressed its displeasure at the pleadings' "utter dearth of legal authorities." *Id.*

On its face, appeals from de facto sanctions (or simple criticisms) would seem at greatest odds with the general jurisdictional rules of Part I, since they would be appeals from pure judicial criticism. But if one accepts that a criticism rises to a level such that it actually counts as a sanction, then it fits within those rules at least as well as actual findings of misconduct, much as misconduct findings are de jure sanctions. The problem is less with the general jurisdictional rules than with the inherent vagueness of how much criticism is too much.

¹³⁷ Williams, 156 F.3d at 88.

¹³⁸ See Bradshaw, 147 F. Supp. 2d at 672 n.4.

The possibility of obtaining a writ of mandamus, however, is an option that even the restrictive Seventh Circuit would allow. *See* Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984) (recognizing mandamus as the proper remedy, but noting

CONCLUSION

The circuits are split on what kind of judicial criticism is sufficient to provide appellate jurisdiction. All agree that imposition of monetary sanctions is appealable. The Seventh Circuit chooses to go no further. An attorney who was found to have engaged in misconduct would be able to appeal those findings in most circuits that have considered the issue, but not in circuits following the reasoning in *Williams*. No circuit would allow an appeal by an attorney criticized but not found to have engaged in misconduct, or by an attorney found to have engaged in misconduct, but not in actions before the court.

Of these approaches, the one allowing appellate jurisdiction over findings of misconduct does the best job of mitigating legitimate concerns—not being able to cabin appellate jurisdiction and unduly limiting judicial candor—while still providing the policy benefits from appellate review of attorney conduct. It provides a clear standard of appellate jurisdiction for district courts writing opinions, attorneys contemplating appeals, and appellate courts facing crowded dockets. For these reasons, appellate courts that have yet to consider the issue would do well to adopt this standard and the minority circuits ought to start moving towards it.

that such a prior request for such a writ was properly refused). But see Pasquale, supra note 6, at 247-48 (finding writs of mandamus to be insufficient remedies).

⁴⁰ See supra Part II.

See supra Section II.A.

See supra Section II.C.

¹⁴³ See supra Section II.B.