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Keeping Courts Afloat in a Rising Sea of Litigation: An Objective Approach to Imposing Rule 38 Sanctions for Frivolous Appeals

Scott A. Martin
University of Michigan Law School

NOTE

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INTRODUCTION

As their dockets swell, federal judges' tolerance for attorney misconduct wears thin.[1] More than ever, judges are willing to impose sanctions for abuses of federal court processes, including frivolous appeals.[2] As one judge explained, "[w]ith courts struggling to remain

1. Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1203 (7th Cir. 1987) (explaining that, "[a]s should be evident to any regular reader of federal court decisions, the frequency with which federal judges are imposing sanctions for abuse of federal court process has increased markedly in recent years").

2. *See, e.g.*, Eltech Sys. Corp. v. PPG Indus., Inc., 903 F.2d 805, 811-12 (Fed. Cir. 1990) (awarding attorney fees and double costs):

> This is another in what appears to be a gradually increasing number of frivolous appeals to this court . . . . [Appellant] has based its appeal on baseless arguments and an attempt to retry its case, employing baseless arguments and misstatements of the record. That it found those practices necessary should have told it this appeal was frivolous.

afloat in a constantly rising sea of litigation, a frivolous appeal can itself be a form of obscenity."[3]

Aside from the need to reduce caseloads, other factors underlie the courts' willingness to impose sanctions for frivolous appeals. One concern is that the costs to responsible, ethical litigants increase sharply when the court system's resources are diverted to meritless claims.[4] Another motivating factor is the simple desire to "insur[e] justice to the appellee."[5] Also exacerbating courts' frustrations with frivolous appeals is their realization that, as the judiciary and bar have grown, attorneys' incentive to regulate themselves has weakened because it is now less likely that any attorney will have to appear regularly before the same judge.[6]

Congress provided federal judges with an arsenal of statutes and rules they may use to impose sanctions and thereby defend themselves against abusive tactics.[7] Chief among them, Rule 38 of the Federal Rules of Appellate Procedure states: "If a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee."[8] Pursuant to Rule 38, federal appellate courts have found it appropriate to impose sanctions in a variety of cases, such as when the arguments presented in an appeal are "utterly baseless,"[9] when the arguments presented are irrelevant or bizarre,[10]

Id.; *Hill*, 814 F.2d at 1203 (imposing sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure and reminding the bar that "[t]his court has been plagued by groundless lawsuits seeking to overturn arbitration awards . . . if [the suit] is frivolous in whole or part this court will impose sanctions"); *see also* Anastasia Parnham Campbell, Comment, *Frivolous Civil Appeals: How to Avoid Sanctions*, 25 J. LEGAL PROF. 135, 137 (2001) (citing SANCTIONS: RULE 11 & OTHER POWERS (Melissa L. Nelken ed., ABA 3d ed. 1992)).

3. WSM, Inc. v. Tenn. Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983) (arguing that "Rule 38 [of the Federal Rules of Appellate Procedure] should doubtless be more often enforced than ignored in the face of a frivolous appeal").

4. *Hill*, 814 F.2d at 1203.

5. 16A CHARLES A. WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 3984.1, at 646 (3d ed. 1999).

6. *See Hill*, 814 F.2d at 1203.

7. For example, a federal court may impose a sanction in the amount of costs, expenses and attorney fees against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927 (2001). Courts also may use the provisions of 28 U.S.C. § 1912 to penalize frivolous appeals, since this provision provides that an appellate court can award single or double costs as damages for delay. 28 U.S.C § 1912 (2001) ("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 delay, and single or double costs."). Also, Rule 11 of the Federal Rules of Civil Procedure provides that a court can sanction a party and/or the party's attorney for filing groundless pleadings, motions, or other papers. *See* FED. R. CIV. P. 11.

8. FED. R. APP. P. 38.

9. *E.g.*, Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1571 (10th Cir. 1993) (ordering plaintiff and counsel to show cause why sanctions should not be imposed where they "have appealed and persisted on appeal in arguments which are utterly baseless, and patently in-

when "there [are] no reasonable, good-faith arguments advanced for the extension, modification, or reversal of precedent,"[11] and when it is clear that an appellant filed an appeal simply to delay the inevitable.[12] Furthermore, appellate courts have generally understood that it is within their authority to raise *sua sponte* the issue of Rule 38 sanctions.[13]

Rule 38's language, however, gives little guidance as to when a court should award such sanctions. From the Rule's use of the word "may," it is clear that whether to impose sanctions under the Rule is discretionary.[14] If it were mandatory, a word such as "must" or "shall" might have been used, as it is in Rule 11 of the Federal Rules of Civil Procedure.[15] Because Rule 38's language makes no mention of whom to sanction, it is also unclear whether the appellant, the appellant's attorney, or both should bear the burden of such sanctions. Furthermore, the Rule neither defines what are "just" damages nor indicates the circumstances appropriate for imposing single costs, as opposed to double costs.[16] The Advisory Committee Notes to Rule 38 do not give

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consistent with a massive body of authority, as well as raising claims — all specious — not fairly raised in the complaint under review").

10. *E.g.*, Cronin v. Town of Amesbury, 81 F.3d 257, 261 (1st Cir. 1996) (assessing double costs as "just damages" for the appeal where "a cursory reading of the relevant case law and treatises would have shown" that the appeal was frivolous, and where the appellant's attorney presented bizarre and irrelevant arguments on appeal).

11. Coghlan v. Starkey, 852 F.2d 806, 808 (5th Cir. 1988).

12. *E.g.*, SEC v. Recile, 10 F.3d 1093, 1098-99 (5th Cir. 1993) (imposing double costs under Rule 38 because the appeal was "nothing more than a frivolous play for time, delaying the inevitable by wasting the resources of this court and the [appellee] SEC alike").

13. *E.g.*, Romala Corp. v. United States, 927 F.2d 1219, 1225 (1991); *Coghlan*, 852 F.2d at 809; *Hill*, 814 F.2d at 1203; Reis v. Morrison, 807 F.2d 112, 113 (7th Cir. 1986) ("[W]e have decided to use our authority under Rule 38 of the Federal Rules of Appellate Procedure to award attorney's fees on our own initiative . . . .").

14. *See* FED. R. APP. P. 38.

15. *See* FED. R. CIV. P. 11(c) ("If . . . the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation."); *see also* 16A WRIGHT ET AL., *supra* note 5, § 3984.1, at 646 ("The 'just damages and single or double costs' mentioned in Rule 38 are awardable by the court as a matter of discretion."); *cf.* Ross v. City of Waukegan, 5 F.3d 1084, 1089 n.6 (7th Cir. 1993) (explaining that "it is within the sound discretion of the district court whether to grant or to deny sanctions under § 1927" because, unlike the "shall" language in Rule 11, a court "may" award fees under section 1927). The Wright treatise explains:

> In most cases, the appellee must file a motion to have the damages and costs awarded to it, although the court sometimes may perform the task for the appellee in its opinion affirming or dismissing the appeal. But the grant of such an award under Rule 38 remains within the discretion of the court of appeals, which can either assess the damages itself or remand the case to the district court to make that determination.

16A WRIGHT ET AL., *supra* note 5, § 3984, at 643.

16. *See* FED. R. APP. P. 38.

courts any clues about how to solve these questions.[17] The circuits do not take a uniform approach to solving these questions, either.[18] The only way to predict the resulting sanction — or lack thereof — is to determine what a particular circuit's attitude toward imposing sanctions has been in the past — aggressive, reluctant, or uncertain.[19]

Furthermore, there is visible disagreement over the elements of Rule 38. The Sixth Circuit recently noted a split between circuits on the issue of whether Rule 38 requires evidence of bad faith before a court can impose sanctions under the Rule.[20] One scholar, Robert J. Martineau, previously identified the crux of the courts' disagreement.[21] Some courts impose Rule 38 sanctions for an objectively meritless appeal, regardless of whether there is any evidence of bad faith.[22] Pursuant to this objective approach, a court focuses exclusively on the record, briefs and argument and, essentially, asks whether a "reasonably prudent attorney" would have filed the appeal.[23] In contrast, another

17. *See* FED. R. APP. P. Advisory Comm. Note (1994 Amendments) (referring vaguely to the "person to be sanctioned").

18. *See generally* Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 AM. U. L. REV. 603 (1985) [hereinafter Martineau, *Ways of the Circuits*].

For an outline of various Rule 38 awards given by federal appellate courts of various circuits, see Kevin Brown, *Award of Damages or Costs Under 28 U.S.C.A. or Rule 38 of Federal Rules of Appellate Procedure, Against Appellant Who Brings Frivolous Appeal*, 67 A.L.R. FED. 319 (2000), and Kevin D. Hart, Annotation, *What Circumstances Justify Award of Damages and/or Double Costs Against Appellant's Attorney Under 28 U.S.C.A. § 1912, or Rule 38 of the Federal Rules of Appellate Procedure*, 50 A.L.R. FED 652 (2000).

19. *See* Martineau, *Ways of the Circuits*, *supra* note 18, at 605-06 (categorizing circuits as either "aggressive" circuits, which regularly assess sanctions, "reluctant" circuits, which rarely assess sanctions, or "uncertain" circuits, which have demonstrated no apparent trend).

20. *See* Wilton Corp. v. Ashland Castings Corp., 188 F.3d 670, 676-78 (6th Cir. 1999) (listing cases from the Second, Third, Fifth, Seventh, Eighth, Tenth, and D.C. Circuit Courts of Appeals, which have embraced an objective approach, as well as cases from the Second, Seventh, and Ninth Circuit Courts of Appeals, which have required some evidence of bad faith).

21. In his article entitled *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845 (1984) [hereinafter Martineau, *Frivolous Appeals*], Martineau examines the sources of authority for the imposition of sanctions, as well as the cases in which sanctions have been assessed. Martineau argues:

> [I]t is imperative that when courts impose sanctions for frivolous appeals, they do so in accord with a procedure that is consistent with due process requirements. It is also essential that courts develop a clearly articulated definition of frivolous appeals, indicating, in particular, whether an objective or subjective standard is used. Further, they must clearly distinguish between (1) a sanction imposed for taking a meritless appeal, and (2) a sanction imposed for abusive litigation tactics during the pendency of an appeal with merit.

Id. at 849. Martineau concludes by proposing a revision in the statutes and rules governing the assessment of sanctions by federal courts of appeals. *Id.* at 878-85.

22. Martineau, *Frivolous Appeals*, *supra* note 21, at 854-55 (citing NLRB v. Lucy Ellen Candy Div. of F&F Labs., Inc., 517 F.2d 551, 555 (7th Cir. 1975)) (using a reasonable and objective standard to measure bad faith for purposes of its Rule 38 analysis).

23. *Id.* at 855 (citing Flaherty v. Flaherty, 646 P.2d 179, 187 (Cal. 1982); Kirsch v. Duryea, 578 P.2d 935, 939 (Cal. 1978)).

set of courts reads a scienter[24] requirement into Rule 38. Pursuant to this subjective approach, a court demands at least some evidence of bad faith before imposing Rule 38 sanctions.[25] Conceding that the issue of whether bad faith is an element of Rule 38 is still not "free of doubt," the Sixth Circuit sided with the set of courts that use an objective approach.[26]

Both the subjective and the objective approaches to Rule 38 have some identifiable problems. A court that makes a subjective inquiry into bad faith may be reading into the Rule a requirement that its drafters did not intend. On the other hand, courts that apply a purely objective test may threaten an attorney's ability to fulfill his ethical duty to represent with zeal the interests of his client[27] — a consequence that can also create a "chilling effect" on novel appeals.[28] Also, a purely "objective" test may achieve inequitable results when either pro se appellants or attorneys who work for large institutional clients and exercise little control over the litigation are held to the same standard as those attorneys who are experts in their fields and those who do exercise control over the litigation.[29]

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24. "Scienter" is defined as: "1. A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly . . . 2. A mental state consisting in an intent to deceive, manipulate, or defraud." BLACK'S LAW DICTIONARY 1347 (7th ed. 1999).

25. *See, e.g.*, Martineau, *Frivolous Appeals*, *supra* note 21, at 854 (citing TIF Instruments, Inc., v. Collette, 713 F.2d 197, 201 (6th Cir. 1983) (awarding against attorney because appeal urged in bad faith); Miracle Mile Ass'n v. City of Rochester, 617 F.2d 18, 21 (2d Cir. 1980) (refusing to award attorney fees absent bad faith); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971) ("[I]mposition of [Rule 38] sanctions . . . is highly unusual and requires a clear showing of bad faith"). "Bad faith" is defined as "[d]ishonesty of belief or purpose." BLACK'S LAW DICTIONARY 134 (7th ed. 1999).

26. *See* Wilton Corp. v. Ashland Casing Co., 188 F.3d. 670, 677 (6th Cir. 1999).

27. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3[1] cmt. (1998) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). The First Circuit explained:

> The mere finding that a position advanced was frivolous must not be cause for discipline of the attorney because of the danger that such action might inhibit the bar from the most vigorous advocacy of the clients' positions and thus restrict meaningful access to the court. Furthermore, an attorney would face an intolerable dilemma when the needs or instructions of his client would force him to argue a position which he personally may feel to lack merit, and which could lead to punitive action against him by the court.

In re Samuel A. Bithoney, 486 F.2d 319, 322 (1st Cir. 1973).

28. *See Wilton*, 188 F.3d at 677; Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993):

> We are well aware that the injudicious awards of Rule 38 damages may have the potential to chill the zeal for pursuing novel questions and difficult appeals . . . . [S]ometimes a questionable appeal may be due to mere overzealousness or inexperience of counsel, and it is sometimes difficult to draw the line "between the tenuously arguable and the frivolous."

Id. (internal citations omitted).

29. *See infra* Sections II.B and III.B.

In recognition of these sorts of problems, some ambivalent courts have articulated various two-part tests in their Rule 38 analyses. In *Zahran v. Schmidt*, the Seventh Circuit used a two-part test: "First, the court must conclude that the appeal is frivolous, and second, that sanctions are appropriate."[30] Under the first step of the *Zahran* test, an appeal is frivolous if "the result is foreordained by the lack of substance to the appellant's arguments"[31] or if the appeal "merely restates arguments that the district court properly rejected."[32] Under the second step, sanctions are appropriate only if the court has some "indication that the appeal was prosecuted for delay, harassment, or out of sheer obstinacy, with no reasonable expectation of altering the district court's judgment."[33] Other courts have implemented, and some commentators have advocated, similar two-part tests calling for a threshold inquiry into objective meritlessness, followed by an inquiry into the subjective intent of the appellant or the appellant's attorney.[34]

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30. No. 97-3710, 98-2123, 99-1710, 1999 U.S. App. LEXIS 7284, at *12 (7th Cir. Mar. 10, 1999) (citing Depoister v. Mary M. Holloway Found., 36 F.3d 582, 588 (7th Cir. 1994)). The *Zahran* court concluded that plaintiffs' "failure to address dispositive legal issues in their case brings this matter within reach of our broad observation in *Newlin v. Helman* that plaintiffs who have been told that their claims are foreclosed and then who appeal without offering any argument to undermine the district court's conclusions are acting in bad faith." *Id.* at *14.

31. *Id.* at *12 (quoting Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989)).

32. *Id.* (quoting A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1406-07 (7th Cir. 1992) (internal quotation and citation omitted)).

33. *Id.* at *13 (citing Flexible Mfg. Sys. Party Ltd. v. Super Prods. Corp., 86 F.3d 96, 101 (7th Cir. 1996)). The *Zahran* court applied this two-part test to determine that Rule 38 sanctions were appropriate not only because appellants omitted and failed to distinguish significant cases in their opening brief, but also because the district court had told them that their claims were foreclosed. They nevertheless appealed without offering any argument to undermine the district court's conclusion. *See id.*; *see also* Martineau, *Frivolous Appeals*, *supra* note 21, at 852-53 n.38-43, 48-50 (listing cases where courts have inferred bad faith from certain types of conduct, including refusing to participate in discovery or other court-ordered activities, making misstatements, key omissions, or other misrepresentations in the briefs, and filing an appeal despite the previous dismissals of similar lawsuits or similar meritless appeals).

34. *E.g.*, Gilles v. Burton Constr. Co., 736 F.2d 1142, 1146-47 (7th Cir. 1984) (finding that even though the appeal is "frivolous" within the terms of Rule 38, it was not "appropriate" to impose sanctions where appellants were not solely responsible for the confusing record and had nothing to gain by delay or the harassment of an appeal); McCandless v. Great Atl. & Pac. Tea Co., 697 F.2d 198, 200-01 (7th Cir. 1983) (holding that since "[t]he only litigants who are likely to be deterred [from bringing frivolous claims] are those who are *aware* that their claim is baseless but press on for some improper reason, such as harassment," it becomes necessary to evaluate subjective bad faith at the second part of a two-step analysis) (emphasis added); Martineau, *Frivolous Appeals*, *supra* note 21, at 870-71 (proposing that, while the objective merits of the appeal are all-important to the initial determination of frivolousness, the appellant's conduct (or that of his attorney) should only be significant to determine the nature and extent of the sanction to be imposed: "The more flagrant the conduct, the clearer it is that the intent or motive of the person is culpable and the larger the sanction should be .... [T]he conduct or intent should be the measure of the sanction, not the measure of the merit of the appeal").

This Note argues that Rule 38 requires federal appellate courts to apply a single-step, objective standard that does not take into account the subjective state of mind of the appellant or the appellant's attorney. It also argues that it is appropriate for courts imposing Rule 38 sanctions to command the appellant's attorney, rather than the appellant, to pay for the appellee's actual costs and attorney fees. Part I asserts that neither the plain language nor the legislative history of Rule 38 indicates that the Rule has a scienter requirement and proposes a single-step "reasonable attorney" test for defining frivolity under Rule 38. Part II argues that a court should ordinarily impose the full burden of Rule 38 sanctions upon the appellant's attorney, rather than the appellant. This approach is best because, if a reasonable attorney standard is appropriate for defining frivolity, it also makes sense to discipline the attorney who acted unreasonably by making the frivolous arguments, rather than to discipline the client who was not responsible for the merits of those arguments. In cases where the attorney represents a sophisticated institutional client that does not rely completely on the advice of its attorney, however, a court should impose Rule 38 sanctions jointly on the attorney and the client to ensure that all of those responsible for the appeal's frivolity will bear the burden of such sanctions. Part III explains why a single-step reasonable attorney test best advances the policy goal of deterring frivolous appeals. This Part also argues, however, that cases involving pro se appellants warrant an exception to the reasonable attorney test. This Note concludes that, by using a single-step reasonable attorney test and by imposing the full burden of Rule 38 sanctions against the attorneys responsible for filing meritless appeals, federal appellate courts can deter frivolous appeals and, in so doing, keep themselves afloat in the rising sea of litigation.

I. RULE 38 WARRANTS A SINGLE-STEP "REASONABLE ATTORNEY" TEST

This Part argues that, in deciding whether to impose Rule 38 sanctions, a court should apply an objective, single-step "reasonable attorney" test. Section I.A asserts that Rule 38 is an objective rule focused on the merits of an appeal, rather than the bad faith of an appellant or an appellant's attorney. Section I.B argues that courts should apply a reasonable attorney test to determine whether an appeal is frivolous for purposes of Rule 38. To avoid a chilling effect on novel appeals, however, a court should be careful to classify as frivolous only those appeals that have no colorable legal support. Section I.C maintains that only one step of objective analysis is necessary. No subjective "second step" is necessary to determine when a sanction is necessary to assign blame or to calculate a just sanction.

A. *Rule 38 Has No Scienter Requirement*

A textual analysis of Rule 38's plain language demonstrates that the Rule has no scienter requirement, and therefore, does not require an inquiry into the bad faith of the appellant or the appellant's attorney. To determine Rule 38's requirements, one should focus on the ordinary meaning of the Rule's language in its textual context, and then ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.[35] The plain language of Rule 38 makes no mention of a scienter requirement: "If 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."[36]

Unlike 28 U.S.C. § 1927, a rule allowing sanctions against an attorney who multiplies proceedings "vexatiously,"[37] Rule 38 has no language corresponding to the term "vexatiously" that gives courts a text-based justification for reading a bad faith requirement into the Rule.[38] Courts should not interpret the word "frivolous" to include bad faith intent. The ordinary meaning of the word "frivolous," when referring to an argument, is "trifling," "trivial," "of little value or importance," or

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35. *See* Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting); *see also* Caminetti v. United States, 242 U.S. 470, 485 (1917):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.

Id.; NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 81-83 (5th ed. 1992). For examples of courts applying a "plain meaning" approach, see Estate of Cowart v. Niklos Drilling Co., 505 U.S. 469, 476 (1992) (construing section 33(g) of the Longshore and Harbor Workers' Compensation Act); West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98-102 (1991) (construing 42 U.S.C. § 1988); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42 (1989) (construing 11 U.S.C. § 506(b)); K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988) (construing the Tariff Act of 1930); Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 367-68 (1986) (construing the Bank Holding Company Act of 1956).

36. FED. R. APP. P. 38.

37. Pursuant to section 1927:

> 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.

28 U.S.C. § 1927 (2001).

38. Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1202 (7th Cir. 1987) (comparing the texts of Rule 38 and § 1927). Because appellees have requested sanctions under Rule 38 and section 1927 at the same time, making basically the same arguments in support of both requests, some courts have incorrectly assumed that Rule 38 does in fact have a state of mind requirement. *See, e.g.*, Ross v. City of Waukegan, 5 F.3d 1084, 1090 (7th Cir. 1993) ("The City's arguments in support of its request for Rule 38 sanctions are essentially the same as its arguments for sanctions under Rule 11 and pursuant to § 1927."). The *Ross* court required "some evidence of bad faith" before Rule 38 sanctions could be imposed. *Id.*

"not worth notice" — bad faith is not a part of the definition.[39] Likewise, in a leading law dictionary, the first definition of "frivolous" is purely objective: "lacking a legal basis or legal merit,"[40] and a "frivolous appeal" is objectively defined as "[a]n appeal having no legal basis."[41] Furthermore, the legislative history of Rule 38 makes no definitive statement about scienter.[42] Thus, there is no clear indication that an appellant's bad faith — or that of his attorney — is relevant at any stage of the Rule 38 analysis.[43] Although the Rule's silence concerning scienter may not be dispositive evidence of Congressional intent,[44] there still is no clear indication that any permissible meaning other than the ordinary meaning of the Rule's language should apply. The Rule's objective language, therefore, lends support to courts that have argued that Rule 38 is concerned only with the objective merits of an

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39. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 735 (2d. ed. 1983).

40. BLACK'S LAW DICTIONARY 677 (7th ed. 1999). Black's dictionary lists "not serious" and "not reasonably purposeful" as second and third definitions, respectively. *Id.* While it may be possible that these second and third definitions could be interpreted as subjective, it would nonetheless be a stretch to interpret either to mean "bad faith." Furthermore, that they are listed as second and third definitions should indicate that they are not as commonplace as the first definition, which is purely objective.

41. *Id.* The definition of "frivolous appeal" also explains that such appeals are "usu[ally] filed for delay to induce a judgment creditor to settle or to avoid payment of a judgment." *Id.*

42. *See* FED. R. APP. P. 38 Advisory Comm. Notes (1967). The Advisory Committee Notes to Rule 38 make clear that, under the Rule, a court of appeals need not require a showing that the appeal in question resulted in any kind of "delay." *Id.*

43. *See* Romala Corp. v. United States, 927 F.2d 1219, 1226 (Fed. Cir. 1991):

> [T]he subjective intent of Romala and its attorneys in making irrelevant arguments and grossly inaccurate statements is immaterial . . . The controlling consideration in the imposition of sanctions, then, is the consistently inaccurate and irrelevant character of Romala's assertions of fact, which is clear on the face of the briefs and for which no exonerating explanation is possible. Since our imposition of sanctions is thus based on a frivolity that is wholly contained within the written submissions, no separate briefing or argument on the issue would be useful. (citation omitted).

Id.; *Hill*, 814 F.2d at 1202 (asserting that the question under Rule 38 should never be whether an appellant's attorney has made "frivolous legal arguments willfully, or maliciously, or with 'conscious indifference' to their validity, or otherwise in bad faith," since the standard for imposition of sanction under Rule 38 is an objective one that does not take into account factual issues such as the personal motives of the individual sanctioned); *see also In re* Perry, 918 F.2d 931, 934 (Fed. Cir. 1990) ("[A]ll of Perry's relevant conduct appears in the record, in Perry's briefs, and in Perry's oral argument. An oral hearing would thus not develop or illuminate new relevant factual issues and would not aid this court." (citing *Hill*, 814 F.2d at 1201)).

44. *See* Nat'l Rifle Ass'n of Am. v. Reno, 216 F.3d 122, 129 (D.C. Cir. 2000) ("Heeding the Supreme Court's recent warning, '[w]e do not rely on Congress' failure to act' as dispositive evidence of congressional intent." (citation omitted)); Brown v. Sec'y of Health & Human Servs., 46 F.3d 102, 108 (1st Cir. 1995) ("[N]onaction by Congress is ordinarily a dubious guide . . . ." (citing Brown v. Gardner, 513 U.S. 115, 121 (1994))).

appeal, rather than the subjective bad faith of the appellant or the appellant's attorney.[45]

B. *An Objective Approach to Defining Frivolity: A "Reasonable Attorney" Test*

Because "[f]rivolity, like obscenity, is often difficult to define,"[46] courts need a method for determining when an appeal is frivolous for purposes of the Rule 38 analysis. Using a "reasonable attorney" test, courts can exercise a level of objectivity that is consistent with that required by the plain language and legislative history of Rule 38. It is useful to compare the reasonable attorney test to the negligence standard in tort law. The concept of negligence incorporates the notion of the "reasonable person" into tort law.[47] The reasonable person is an entirely objective, external standard defined by the community, rather than a subjective standard that focuses on the individual judgment or motivations of the particular actor.[48] Similarly, pursuant to Rule 38, a court should hold appellants and their attorneys to a "reasonable attorney" standard — an objective, external standard defined by the legal community which does not take into account the subjective intent of that attorney.[49] At its core, Rule 38 analysis should "depend[] on

45. *See, e.g.*, Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993) ("[The Rule 38] inquiry is an objective one, focusing 'on the merits of the appeal regardless of good or bad faith.' " (citation omitted)); *In re* Drexel Burnham Lambert Group, Inc., 995 F.2d 1138, 1147 (2d Cir. 1993) (explaining that the standard for imposing a "frivolous appeal" penalty is whether "the appeal taken is found to be groundless, without foundation, and without merit"); *In re* Perry, 918 F.2d at 934 (holding that bad faith was not a requirement for imposing sanctions for a frivolous appeal, and that the standard is an objective one and has nothing to do with the mental state of the person sanctioned); Asbury v. Brougham, 866 F.2d 1276, 1283 (10th Cir. 1989) ("[S]ubjective bad faith is not a prerequisite to an award of damages and double costs; an appeal lacking foundation is sufficient."); Coghlan v. Starkey, 852 F.2d 806, 814 (5th Cir. 1988) (holding that evidence of bad faith was not required to impose sanctions upon the appellate counsel for filing a frivolous appeal); *Hill*, 814 F.2d at 1202.

46. WSM, Inc. v. Tenn. Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983).

47. *See generally* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32 (5th ed. 1984).

48. *Id.* §§ 31-32.

49. *E.g.*, Hilmon Co. v. Hyatt Int'l, 899 F.2d 250, 254 (3d Cir. 1990). As the Third Circuit reasoned in another case involving a frivolous appeal:

> Careful analysis of the record and research of law should have led [the attorney], as it would any reasonable attorney, to conclude that he simply had no factual basis for the lawsuit. A reasonable attorney would have concluded that [the appeal] was wholly devoid of merit.
>
> Upon that conclusion our inquiry ends and Rule 38 sanctions become appropriate. It would be fundamentally unfair to [appellee] if we permit [appellant] to compel [appellee] to court to defend an appeal that is wholly devoid of merit, without facing sanctions for doing so. It is a hollow victory indeed for an appellee who successfully defends a frivolous appeal, if it is then further penalized by fee payments to its own attorney. Accordingly, we will award attorney's fees in [the appeal], plus costs, as a sanction for pursuing a frivolous appeal.

Quiroga v. Hasbro, Inc., 943 F.2d 346, 347 (3d Cir. 1991).

the work product: neither the attorney's state of mind nor the preparation behind the appeal matter."[50] The only appropriate question for purposes of the Rule 38 analysis should be: "whether, following a thorough analysis of the record and careful research of the law, a reasonable attorney would conclude that the appeal is frivolous."[51] Where it "should have been obvious" to the reasonable attorney that the appeal is frivolous, Rule 38 sanctions are appropriate.[52]

The determination of whether the appeal's frivolity should have been obvious to a reasonable attorney calls for the court to make an assessment of the quality of the arguments presented in the appeal. That a court can accomplish this objective, yet nuanced analysis in this context is clear from cases where courts declined to award Rule 38 sanctions because the arguments supporting an appeal, while objectively meritless, did not rise to a degree of frivolity deserving of a Rule 38 sanction. In *Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Investments*, the court did not impose Rule 38 sanctions because the appeal was not "wholly without merit."[53] Similarly, in *Meredith v. Navistar International Transportation Corp.*, the court refrained from imposing sanctions because, even though the appellant's presentation of the facts was a "pitch for a reversal" that was "way outside," it was "not so wild [a pitch] that sanctions for a frivolous appeal are warranted."[54] Also, in *Matter of Sherk*, the court held that the attorney's "bad habit" of "citing overruled cases" in the brief did not rise to the level of frivolity that, in its judgment, warranted a Rule 38 sanction.[55] These cases demonstrate that a court can make this decision in an objective fashion that does not take into account the subjective intent of the offending attorney. Furthermore, these cases show that application of an objective reasonable attorney standard is not

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50. *See* Berwick Grain Co. v. Illinois Dep't of Agric., 217 F.3d 502, 505 (2000) (quoting Mars Steel Corp. v. Cont'l Bank, N.A., 880 F.2d 928, 938 (7th Cir. 1989) (en banc)).

51. *See Hilmon*, 899 F.2d at 254; *see also* E.H. Ashley & Co. v. Wells Fargo Alarm Svcs., 907 F.2d 1274, 1280 (1st Cir. 1990); 16A WRIGHT ET AL., *supra* note 5, § 3984, at 857 (Supp. 1995) (explaining that "sanctions are available on the basis of an objective determination that reasonable counsel should have been aware that the appeal must fail"); David Lopez, *Why Texas Courts are Defenseless Against Frivolous Appeals: A Historical Analysis With Proposals for Reform*, 48 BAYLOR L. REV. 51, 148 (1996):

> Federal appellate courts blend the relevant federal screening devices . . . into a single test, to wit: Would a reasonable attorney have known that the appeal had no chance of success? The test is entirely objective in nature. Moreover, the federal courts do not require that an appeal be wholly devoid of merit; sanctions are proper even in a case that joins meritorious points with frivolous ones.

Id. at 148 (citing McEnery v. Merit Sys. Prot. Bd., 963 F.2d 1512, 1516-17 (Fed. Cir. 1992)).

52. *See Berwick*, 217 F.3d at 505.

53. 951 F.2d 1399, 1413-14 (3d Cir. 1991).

54. 935 F.2d 124, 129 (7th Cir. 1991).

55. 918 F.2d 1170, 1178 (5th Cir. 1990).

overly harsh on attorneys because the bar for reasonableness is set quite low.

One significant danger of a purely objective Rule 38 analysis is that courts taking such an approach will chill novel or untested legal arguments.[56] It can be difficult in some cases for any judge to "draw the line 'between the tenuously arguable and the frivolous.' "[57] Furthermore, from a more cynical point of view, any judge has the power to write an opinion making an appellant's argument *seem* frivolous, even if a dispassionate review of the law would suggest that the appeal has at least some merit.[58] Thus, it is easy to see how an objective standard for Rule 38 could discourage an attorney from pursuing novel legal arguments on behalf of his client. This result, of course, could interfere with a lawyer's ethical duty to "act with commitment and dedication to the interests of the client and with zeal and advocacy upon the client's behalf."[59]

To mitigate the chilling effect on novel meritorious arguments, courts should move with caution, classifying as frivolous only those appeals that lack "colorable" support or are wholly without merit.[60] Colorable arguments are those that seem to be "true, valid, or right."[61] To ensure that this standard is not hollow, a court should, in its explanation of why an appeal is frivolous, point to specific indications of the

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56. *See Hilmon*, 899 F.2d at 253.

57. Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993) (quoting Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1578 (Fed. Cir. 1991)).

58. *See* Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1203 (7th Cir. 1987) (Parsons, J., dissenting) ("A judge awarding sanctions is often advocating the correctness of his decision and is likely to do so convincingly . . . . [A judge in an] opinion 'has the power to make an attorney's argument seem frivolous.' ") (quoting Melissa L. Nelken, *Sanctions under Rule 11 — Some "Chilling" Problems in the Struggle between Compensation and Punishment*, 74 GEO. L.J. 1313, 1339-40 & n.172 (1986) (citation omitted)).

59. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (1998).

60. *See, e.g.*, Quiroga v. Hasbro, Inc., 943 F.2d 346, 347 n.1 (3d Cir. 1991) (refusing to impose Rule 38 sanctions in a related appeal wherein "[appellant] presented a marginal argument which, albeit poorly articulated, raised a "colorable argument"); *Hilmon*, 899 F.2d at 253 ("This court has been reluctant to classify appeals as frivolous, so that novel theories will not be chilled and litigants advancing any claim or defense which has colorable support under existing law or reasonable extensions thereof will not be deterred."); *see also, e.g.*, *Nagle*, 8 F.3d at 145 (quoting *Finch*, 926 F.2d at 1578); Zarowitz v. BankAmerica Corp., 866 F.2d 1164, 1166 (9th Cir. 1989) ("Too exuberant use of sanctions could chill some meritorious appeals. We therefore hesitate to exercise our discretion by imposing a sanction in this case, even though the appeal borders on the frivolous."); Sauers v. Commissioner, 771 F.2d 64, 70 n.9 (3d Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986) (denying the government's motion for sanctions because, even though most taxpayers' arguments on appeal are frivolous, appellant raised a genuine issue in this case).

61. BLACK'S LAW DICTIONARY 259 (7th ed. 1999); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 449 (1993) (defining "colorable" as "seemingly valid and genuine: having an appearance of truth . . . : Plausible").

appeal's meritlessness.[62] For example, courts have made clear that an appeal has absolutely no chance of success if the appellant's brief makes only conclusory allegations with no factual underpinnings,[63] if the brief on its face has no intelligible, ascertainable claims,[64] or if the appellant filed the appeal in the face of long-established precedent, but gave no explanation for why this precedent must be pushed aside.[65] Courts have also made clear that an appeal is not frivolous simply because it fails to cite obscure or ancient precedent.[66] Thus, by applying a reasonable attorney test, and by classifying an appeal as frivolous only when an appeal lacks colorable support, courts not only can define frivolity in a manner that is consistent with the objectivity required by the ordinary language of Rule 38, but also can mitigate the chilling effect a purely objective approach could have on arguments that are novel, but meritorious.

C. *Only One Step of Objective Analysis Is Necessary*

The objective assessment of the merits of an appeal, described in Section I.B, is all that is necessary to determine whether an appeal is frivolous for purposes of the Rule 38 sanction.[67] Some courts, however, implement a subjective second step to the Rule 38 analysis.[68] Such courts analyze the surrounding circumstances to determine whether the appellant or the appellant's attorney pursued the appeal in bad

62. *See* Martineau, *Frivolous Appeals*, *supra* note 21, at 850 ("When a court finds an appeal to be frivolous, it usually labels the appeal as 'utterly without merit' or 'no chance of success.' In attaching one of these labels to the appeal, the courts point to various indicia of hopelessness.").

63. *See, e.g.*, McCoy v. Gordon, 709 F.2d 1060, 1063 (5th Cir. 1983); Wood v. McEwen, 644 F.2d 797, 802 (9th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982).

64. *See, e.g.*, Burke v. Miller, 639 F.2d 306, 306 (5th Cir. 1981) (referring to the arguments presented in the appellate brief as "legal spun sugar"); White v. United States, 588 F.2d 650, 651 (8th Cir. 1978); Mancuso v. Indian Harbor Belt R.R., 568 F.2d 553, 554 (7th Cir. 1978).

65. *See, e.g.*, Watson v. Callon Petroleum Co., 632 F.2d 646, 648 (5th Cir. 1980) (holding that the appeals were frivolous and did not "present a novel or unsettled question of Mississippi law"); Browning Debenture Holders' Comm. v. DASA Corp., 605 F.2d 35, 39 (2d Cir. 1978) ("[I]t is too well established . . . to require dilation here."); *In re* Newport Harbor Ass'n, 589 F.2d 20, 23-24 (1st Cir. 1978) (explaining that there was a "consistent body of precedent"); Furbee v. Vantage Press, Inc., 464 F.2d 835, 837 (D.C. Cir. 1972) ("Notwithstanding the clear state of law, Furbee pressed his appeal.").

66. *E.g.*, Sparks v. NLRB, 835 F.2d 705, 707 (7th Cir. 1987) ("A lawyer does not expose himself to sanctions merely by failing to dig up some obscure precedent." (citation omitted)).

67. *See supra* Section I.B.

68. *E.g.*, Ross v. City of Waukegan, 5 F.3d 1084, 1090 (7th Cir. 1993); Ruderer v. Fines, 614 F.2d 1128, 1132 (7th Cir. 1980).

faith.[69] Courts taking this two-step approach, therefore, do not completely ignore the objective nature of Rule 38; rather, they take the position that an additional, subjective inquiry is permissible because it comes after the objective inquiry. If a court determines in its second step of analysis that there is no evidence of bad faith, it may decide not to impose a Rule 38 sanction, even though it determined in its first step of analysis that the appeal is objectively frivolous.[70]

Some courts mistakenly apply a two-step analysis because of their confusion over the procedures for assessing sanctions, as well as the source of their authority for doing so. After all, there are no standard procedures for courts to follow in their deliberations over whether to assess sanctions.[71] Furthermore, the precedent concerning a court's authority for imposing sanctions pursuant to Rule 38 can also seem cloudy; many courts who have assessed sanctions previously neglected to indicate whether they were relying on Rule 38, the court's inherent authority, or section 1927 of the U.S. Code to impose sanctions for the filing of a frivolous appeal.[72] Rule 38 alone provides authority for imposing sanctions, and the reasonable attorney test provides a method for courts to follow.

Other courts mistakenly use a two-step approach because they reason that an inquiry into the subjective intent of the appellant or the appellant's attorney is necessary to make a fair judgment about who is actually responsible for the frivolous nature of the appeal,[73] even when it is already determined that the legal arguments presented in support of the appeal are objectively meritless.[74] These courts typically consider whether the appellant, or the appellant's attorney, has a good faith defense which might absolve him from responsibility.[75] For ex-

69. *See Ross*, 5 F.3d at 1090 (requiring, in addition to objective meritlessness, "some evidence of bad faith").

70. *See* Martineau, *Ways of the Circuits*, *supra* note 18, at 661. After reviewing many decisions of the different United States courts of appeals, Martineau concluded that reluctant circuits require "evidence of purposeful, intentional harassment or delay creat[ing] a standard of frivolousness so high that only the most excessive conduct invokes the authority to impose sanctions." *Id.*

71. *See* Martineau, *Frivolous Appeals*, *supra* note 21, at 872.

72. *Id.* (explaining that this problem is "particularly acute" when the court is acting sua sponte, rather than in response to a motion filed by an appellee, because a motion or supporting memorandum will likely cite a statute or rule as the basis for the motion).

73. *See, e.g.*, Braley v. Campbell, 832 F.2d 1504, 1514 (10th Cir. 1987) ("But the determination to impose sanctions on an attorney for bringing a frivolous appeal involves [a second] step — placing the blame. And there remains for consideration the defenses which might absolve the lawyer of the responsibility for taking the frivolous appeal.").

74. *See, e.g., id.*; Herzfeld & Stern v. Blair, 769 F.2d 645, 647 (10th Cir. 1985) (noting that Counsel's "lack of good faith is manifest" in using baseless appeal to delay the payment of judgment and also by his "cavalier" or reckless mis-citation to the record, which "added grievously to the frivolous nature of his appeal").

75. *See Braley*, 832 F.2d 1504; *Herzfeld*, 769 F.2d 645.

ample, in *Gilles v. Burton Construction Co.*,[76] even though the court found that the appeal was objectively frivolous for purposes of Rule 38, the Seventh Circuit decided that it was not appropriate to impose sanctions because the appellants were not "solely responsible" for the confusion surrounding the appeal of a nonappealable order.[77]

A single-step reasonable attorney test, though, properly focuses on the conduct of the person who is typically responsible for the merits of an appeal — the appellant's attorney.[78] Professional ethics bind an attorney, rather than his client, to do the necessary research to assess a claim's merits;[79] failure to do so is a per se violation of that attorney's ethical duty to his clients, as well as to the court system.[80] An attorney who files a frivolous appeal breaches his affirmative ethical duty to make meritorious legal arguments on the client's behalf.[81] An attorney

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76. 736 F.2d 1142, 1146-47 (7th Cir. 1984).

77. *Id.*

78. *See* Coghlan v. Starkey, 852 F.2d 806, 816-17 (5th Cir. 1988) (finding that "blame for [the frivolous] appeal rests upon [appellant's] attorney, and usually so should the burden of any sanctions").

79. *See also* Romala Corp. v. United States, 927 F.2d 1219, 1225 (Fed. Cir. 1991) ("Frivolity in argument is no doubt attributable at least as much to tactical decisions made by an attorney in writing briefs as to the overall appellate strategy to which the client may specifically consent."); Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1201 (7th Cir. 1987) ("We also do not suppose, however, that a railroad brakeman is responsible for frivolous legal arguments, so we are minded to order Hill's counsel to bear personally the expense incurred by the railroad.").

80. *See* McCandless v. Great Atl. & Pac. Tea Co., 697 F.2d 198, 202 (7th Cir. 1983):

> Unlike a party, an attorney should be able to do the necessary research to evaluate properly the merits of a claim. Furthermore, it would seem that the personal animosity often existing between the actual litigants would be less likely to exist on the part of the attorney, toward either opposing counsel or his or her client. . . . Before filing suit, it would seem to be a reasonable expectation that the attorney do some basic research on the applicable law.

Id. In *Hilmon Co. v. Hyatt Int'l*, the Third Circuit explained:

> [The test is whether, following a thorough analysis of the record and careful research of the law, a reasonable attorney would conclude that the appeal is frivolous.] Here, the blameworthy acts consist of either ignoring or purposely disregarding the law and procedure. These are areas of expertise customarily committed to counsel and not the party. We see no reason whatsoever why the burden of attorney error or ignorance should fall full upon [appellant], who had a right to rely upon its attorney . . . who is responsible for pursuing the frivolous appeal.

899 F.2d 250, 254 (3d Cir. 1990); *see also* Quiroga v. Hasbro, Inc., 943 F.2d 346 (3dCir. 1991).

81. *See Hilmon*, 899 F.2d at 254:

> [A]ttorneys have an affirmative obligation to research the law and to determine if a claim on appeal is utterly without merit and may be deemed frivolous. We conclude that if counsel ignore or fail in this obligation to their client, they do so at their peril and may become personally liable to satisfy a Rule 38 award.

Id.; see also MODEL RULES OF PROF'L CONDUCT R. 3.1 (1998) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."); Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 PACE L. REV. 323, 333 (1999) ("The first ethical consideration for an attorney is whether to take an appeal at all.").

has no ethical obligation to abandon his professional discretion just to try to gain an advantage for a client.[82] As one court reasoned, "Telling would-be litigants that the law is against them is an essential part of a lawyer's job."[83] Thus, an attorney should refrain from advancing meritless arguments simply to see if any will "stick," even if this dangerous appellate strategy is consistent with the client's wishes.[84] Furthermore, in order to protect a court's ability to hear meritorious appeals, an attorney has a duty to refrain from appealing as a "conditioned reflex."[85] An attorney who files an appeal asks for the court's attention, and therefore, has an affirmative responsibility to the court to make reasonably well-developed arguments.[86] A single-step reasonable attorney test for Rule 38 makes sense because it provides a fair way of judging whether the attorney has lived up to the ethical duties he owes both to his client and to the court.

Courts should also use the objective single-step test to determine the level of sanctions to impose under Rule 38. One commentator proposed that, after the first step of objective analysis, an inquiry into the subjective bad faith of an attorney should be relevant to the measure of the Rule 38 sanction.[87] Given the objective nature of Rule 38,[88] however, this approach would be textually defensible only if the actual words of the current Rule were changed accordingly.[89] Under the ex-

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82. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. [1] (1998) ("[A] lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.").

83. Bailey v. Bicknell Minerals, Inc., 819 F.2d 690, 693 (7th Cir. 1987) (citing *In re* TCI, Ltd., 769 F.2d 441, 446-47, 450 (7th Cir. 1985)); *see also* Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300 (1986).

84. *See* Bradley C. Wright, *Ten Mistakes to Avoid at the Federal Circuit*, 17 No.2 INTELL. PROP. L. NEWSL. 1, 8 (1999) ("Some appellants believe that if they include enough allegations of error in their appeal brief, at least one of them will stick and the judgment will be reversed. That strategy almost always backfires. The weak and frivolous arguments included in such a brief detract from any meritorious ones."); Miner, *supra* note 81, at 326 (explaining reasons why many attorneys follow this dangerous appellate strategy, including their blind adherence to their clients' wishes and their desire to demonstrate to their clients a willingness to fight to the end).

85. *See* Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1202 (7th Cir. 1987) (" 'About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.' ") (quoting 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938)).

86. Reliance Ins. Co. v. Sweeney Corp., 792 F.2d 1137, 1138-39 (D.C. Cir. 1986); *see also In re* Bithoney, 486 F.2d 319, 322 n.1 (1st Cir. 1973) ("Lawyers have an obligation as officers of the court . . . .Vexatious litigation and the law's delays have brought the courts in low repute in many instances, and when the responsibility can be fixed, remedial action should be taken." (quoting Gullo v. Hirst, 332 F.2d 178,179 (4th Cir. 1964)).

87. After a court finds that an appeal is objectively frivolous, the "[bad faith] conduct or [bad faith] intent should be the measure of the sanction." Martineau, *Frivolous Appeals*, *supra* note 21, at 871.

88. *See supra* Part I.A (explaining that Rule 38 has no scienter requirement).

89. *See* Martineau, *Frivolous Appeals*, *supra* note 21, at 881. Martineau proposes that

isting Rule 38, a court's judgment of the objective merits of the appeal is all that is relevant.[90] Thus, a second step of inquiry into subjective bad faith of the appellant, or of the appellant's attorney, should not be relevant to any stage of the Rule 38 analysis.

Using an appellee's actual costs and attorney fees as its measure, a court can determine "just damages" in one objective step of analysis.[91] The plain language of the Rule does not indicate that a remand is necessary for the determination of the appropriate level of fees,[92] and an inquiry into the reasonableness of the fees and costs need not take place, except in extraordinary circumstances.[93] If, however, a court finds it too difficult to determine the actual fees and costs, that court can remand the issue to the district court.[94]

This is not to say that courts have no discretion at all as to the appropriate level of just damages and costs. The Rule expressly provides for judicial discretion: courts "may" choose to award either "single or double costs."[95] Because the Rule has no scienter requirement,[96] though, a court should in an objective fashion make its decision about whether an appeal warrants a sanction of single costs or double costs on the basis of how meritless the brief is.

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the first section of Rule 38 should be amended to read:

> A court of appeals shall impose a sanction upon a party or attorney or both for taking or continuing an appeal or initiating a proceeding in the court that the court finds to be frivolous. For purposes of this rule, a frivolous appeal is one that has no reasonable legal or factual basis.

Id.

90. *See supra* Sections I.A & I.B.

91. *See, e.g.*, Gen. Brewing Co. v. Law Firm of Gordon, Thomas, Honeywell, Malanca, Peterson & O'Hearn, 694 F.2d 190, 193 (9th Cir. 1982) (awarding damages in the amount of reasonable attorney fees); Seyler v. Seyler, 678 F.2d 29, 31 (5th Cir. 1982) (awarding damages of reasonable attorney fees); Church of Scientology v. McLean, 615 F.2d 691, 693 (5th Cir. 1980) (awarding damages including reasonable attorney fees); Libby, McNeill & Libby v. City Nat'l Bank, 592 F.2d 504, 515 (9th Cir. 1978) (awarding damages of reasonable attorney fees); Mancuso v. Indiana Harbor Belt R.R., 568 F.2d 553, 554 (7th Cir. 1978) (awarding damages of $350 as attorney fees); First Nat'l Ins. Co. v. Lynn, 525 F.2d 1, 3 (1st Cir. 1975) (awarding damages to the extent of the reasonable fees of the attorneys); *see also* 16A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3984.2, at 693 (3d ed. 1999) (explaining that this is the typical approach taken by courts).

92. *See* Wilton Corp. v. Ashland Castings Corp., 188 F.3d 670, 678 (6th Cir. 1999) (Gilman, J., concurring).

93. *See* 16A WRIGHT ET AL., *supra* note 5, § 3984.2, at 693-94 (explaining that "only in 'exceptional circumstances' may it be appropriate to inquire into the reasonableness of the fees").

94. *See, e.g.*, TIF Instruments, Inc. v. Collette, 713 F.2d 197, 201 (6th Cir. 1983) (awarding costs and attorney fees, the amount to be determined on remand).

95. FED. R. APP. P. 38. The cost of the transcript and the cost of printing and photocopying the appendix and briefs are likely to be the only significant costs. Martineau, *Frivolous Appeals*, *supra* note 21, at 866.

96. *See supra* Section I.A.

The discretion Rule 38 gives courts to choose between single and double costs, however, may seem to undermine the objective approach to the Rule advocated by this Note. In *Coghlan v. Starkey*,[97] for example, the Fifth Circuit makes its decision to impose single costs — as opposed to double costs — in a manner that suggests that courts inevitably must consider the subjective state of mind of the appellant or the appellant's attorney to make such a decision. Having concluded that a "patently meritless" appeal warranted Rule 38 sanctions,[98] the *Coghlan* court sought to distinguish it from the more "egregious" appeals that justify an award of double costs.[99] Rather than distinguishing the appeal in a purely objective manner, however, the court seems to suggest that what makes the appeal in question less egregious is the "good faith impression" of the appellant's attorney that the lower court's decision was erroneous.[100] The court's consideration of the attorney's subjective state of mind, however, was an unnecessary step — courts have demonstrated an ability to make such decisions objectively.[101] The *Coghlan* court, therefore, should have decided that the only factor relevant to its decision concerning the appropriate level of costs was the lack of rational argument presented in the appeal.[102] As this Part has shown, neither the plain language nor the legislative history of Rule 38 indicates that scienter is relevant to the analysis, and courts should apply a one-step reasonable attorney test focused on the objective merits of the appeal.

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97. 852 F.2d 806 (5th Cir. 1988).

98. *Id.* at 813 ("Rule 38 concerns are amply raised in this case by conclusory assertions of an alleged right in an appellate brief that cites only two cases, and fails to explain even those two.").

99. *Id.*

> [T]he circumstances of this case are not egregious enough to justify compensation of the prevailing party beyond its actual out-of-pocket outlays on appeal. Hence, we will not impose both attorneys' fees and *double* costs here. Nonetheless, the actions of plaintiff's counsel are sufficient to suggest the propriety of an award of attorneys' fees in addition to the *single* costs normally assessed as of right against the losing party.

Id.

100. *Id.*

101. *See, e.g.*, Strahl v. Mach. Tech., Inc., No. 89-16298, 1991 U.S. App. LEXIS 9463, at *2-3 (9th Cir. May 1, 1991) (awarding single costs pursuant to Rule 38 "[b]ecause [appellant's] claims are [objectively] meritless"); Adamsons v. Wharton, 771 F.2d 41, 43-44 (2d Cir. 1985) (deciding to assess double costs pursuant to Rule 38 because the appellant not only contradicted precedent, but also failed to challenge the district court's finding).

102. The court identified that the appeal demonstrated a "total inability to distinguish dispositive authority or make rational argument for the extension, modification, or reversal of precedent." *Coghlan*, 852 F.2d at 813.

II. SANCTIONING THE APPELLANT'S ATTORNEY

This Part argues that a court can and should impose the entire burden of Rule 38 sanctions on the appellant's attorney. Section II.A asserts that, although this approach does not find explicit approval in Rule 38's text, it is defensible for two reasons. First, the attorney is typically the individual who is responsible for the merits of the arguments presented in a frivolous appeal. Second, Rule 46(c) of the Federal Rules of Civil Procedure provides authority for this approach. Section II.B proposes an "institutional appellant" exception to this approach. In cases where the attorney represents a sophisticated institutional party, a court should impose Rule 38 sanctions jointly between the client and attorney.

A. *Those Responsible Must Bear the Burden*

Even though Rule 38's plain language makes no mention of whom a court should sanction,[103] it is appropriate for a court applying the reasonable attorney standard to impose the full burden of Rule 38 sanctions on the appellant's attorney. If courts are to apply a reasonable *attorney* standard, it follows that sanctions for an appeal which does not meet this standard should be brought against an attorney, rather than a client. Furthermore, it is the attorney — rather than the client — who is typically responsible for the objectively meritless arguments presented in a frivolous appeal.[104] In *Hill v. Norfolk*, for example, where the appellant was a railroad brakeman with no practical legal experience, Judge Richard Posner of the Seventh Circuit explained: "[W]e also do not suppose, however, that a railroad brakeman is responsible for frivolous legal arguments, so we are minded to order [the appellant's] counsel to bear personally the expense incurred by the railroad in briefing the issues that we have found were frivolously raised by [the appellant's] opening brief."[105] Similarly, in *Acevedo v. Immigration & Naturalization Service*,[106] the court decided that assessing Rule 38 sanctions against the appellant's attorney, rather than the appellant himself, was appropriate because the appellant had only a modest education; it therefore was unlikely that the appellant was responsible in any truly meaningful way for the

103. *See* FED. R. APP. P. 38.

104. *See Coghlan*, 852 F.2d at 816-17 ("Plaintiff Coghlan may have been unreasonable in her obdurate rejection of concession after concession, but blame for this appeal rests upon her attorney, and usually so should the burden of any sanctions.") (citation omitted); Sparks v. NLRB, 835 F.2d 705, 707 (7th Cir. 1987) (assessing Rule 38 sanctions against an attorney whose brief showed an "elementary lapse" in research).

105. Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1201 (7th Cir. 1987).

106. *See* 538 F.2d 918, 921 (2d Cir. 1976).

meritlessness of the legal arguments presented in the frivolous petition.[107]

Rule 38's silence on the issue of whether attorneys can be sanctioned arguably indicates that its drafters did not intend for these sanctions to be imposed against attorneys themselves. Unlike Rule 38, Rule 11 of the Federal Rules of Civil Procedure expressly provides for the imposition of sanctions against an attorney who files a groundless motion.[108] When courts hold attorneys liable for a Rule 38 sanction, they most frequently cite 28 U.S.C. § 1927, a section that, unlike Rule 38, is explicit in its applicability to "attorney[s] or other person[s] admitted to conduct cases."[109] Courts that do sanction attorneys pursuant to Rule 38 often rely solely on precedent to do so.[110]

An analogy to Rule 11 of the Federal Rules of Civil Procedure, however, shows that courts should interpret Rule 38's silence as a call for the imposition of the full burden of such sanctions against an appellant's attorney. Rule 11 of the Federal Rules of Civil Procedure is analogous to Rule 38 because it provides that a court can award sanctions for the filing of groundless pleadings, motions, or other papers,[111] and some courts look to Rule 11 for guidance in interpreting Rule 38 in spite of the fact that Rule 11 does not apply to appellate practice.[112] The Advisory Committee Note to Rule 11 explains that monetary sanctions for frivolous contentions of law are "more properly placed solely on the party's attorneys."[113] An appellate court should therefore take the view that, when an appeal is objectively frivolous, the attorney should naturally be the one to bear the burden of the monetary sanction, regardless of that attorney's subjective good faith.[114]

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107. *See id.* at 921.

108. *See* FED. R. CIV. P. 11(c) ("[T]he court may . . . impose an appropriate sanction upon the attorneys . . . ."); *see also supra* note 7.

109. 28 U.S.C. § 1927; *see also* Martineau, *Frivolous Appeals*, *supra* note 21, at 868-69.

110. *See, e.g.*, Romala v. United States, 927 F.2d 1219, 1225 (Fed. Cir. 1991) ("Though the language of Rule 38 does not explicitly provide for sanctions against attorneys, there is ample precedent in this and other circuits for imposing Rule 38 sanctions on an attorney as well as on the client."); Hilmon Co. v. Hyatt Int'l, 899 F.2d 250, 253-54 (3d Cir. 1990) (citing cases where Rule 38 damages were assessed directly against the offending attorney).

Even though Rule 38 and section 1927 of Title 28 have been used together, many courts have relied on Rule 38 alone to impose sanctions against the appellant's attorney. Coghlan v. Starkey, 852 F.2d 806, 818 (5th Cir. 1988).

111. *See* FED. R. CIV. P. 11.

112. *See, e.g.*, Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1200 (7th Cir. 1987).

113. FED. R. CIV. P. 11 Advisory Comm. Note ("Sanctions that involve monetary awards (such as a fine or award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys.").

114. *See* Nagle v. Alspach, 8 F.3d 141, 145-46 (3d Cir. 1993) ("It is manifestly evident that the responsibility for paying these damages rests squarely upon counsel."); Mathis v. Spears, 857 F.2d 749, 761 (Fed. Cir. 1988) (awarding sanctions under Rule 38 where analysis

Rule 46(c) of the Federal Rules of Appellate Procedure provides another source of authority for a court to assess sanctions directly against an attorney pursuant to Rule 38.[115] Rule 46(c) relates to disciplinary proceedings against an attorney "for conduct unbecoming a member of the bar or for failure to comply with any court rule."[116] Courts have imposed Rule 46(c) sanctions against attorneys for their negligence in multiplying proceedings by filing patently frivolous appeals[117] — conduct not unlike that which courts can sanction pursuant to Rule 38. Thus, a court can justify assessing Rule 38 sanctions against an attorney as an imposition of a Rule 46(c) disciplinary sanction, even though Rule 38 is silent as to this issue.[118]

Rule 46(c)'s hearing requirement, though, seems to present an obstacle to courts' justifying the assessment of Rule 38 sanctions against an attorney as an imposition of a Rule 46(c) disciplinary action. To require a hearing for the determination of Rule 38 sanctions would "impose on the opposing party and on the court an even greater burden in dealing with a frivolous appeal and entirely defeat the purpose of Rule 38."[119] Because Rule 46(c) has a hearing requirement that was not incorporated into Rule 38,[120] Rule 46(c) may not seem applicable to the imposition of Rule 38 sanctions.[121]

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of appellant's legal contentions, based on "record distortions, manufactured facts, and implausible and unsupportable legal arguments," compelled the conclusion that those contentions "lack even a minimally arguable basis and that this consolidated appeal is in major part frivolous"); Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987).

115. *Hill*, 814 F.2d at 1201 ("The imposition of Rule 38 sanctions directly on counsel could be thought the imposition of a disciplinary sanction under Rule 46(c) . . . .").

116. FED R. APP. P. 46 (c).

117. *See, e.g.*, *In re* Bithoney, 486 F.2d 319, 322-23 (1st Cir. 1973) (imposing disciplinary sanction against attorney personally who was grossly negligent in his lodging multiple appeals of patent frivolity).

118. This argument may seem to contradict the argument advanced by this Note that a state of mind requirement cannot be read into Rule 38 because the Rule is silent and because there is no language corresponding to "vexatious," as there is in 28 U.S.C. § 1927. *See supra* Section I.A. However, Rule 38's ordinary language does not indicate who should be sanctioned, so a court *must* decide this issue for itself. It is, therefore, not inconsistent with the ordinary language of Rule 38 for a court to assess sanctions directly upon an attorney as an imposition of a Rule 46(c) disciplinary sanction. This approach should be distinguished from one which voluntarily reads a state of mind requirement into Rule 38 and thereby ignores the plain meaning of the text.

119. Toepfer v. Dep't of Transp., 792 F.2d 1102, 1103 (Fed. Cir. 1986) (citing Hyde v. Van Wormer, 474 U.S. 992 (1985) (awarding damages under its Rule 49.2 without a hearing)).

120. FED. R. APP. P. 46(c) ("[T]he court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.").

121. *See In re* Perry, 918 F.2d 931, 936 (Fed. Cir. 1990) ("This court has specifically held that rule 46(c) has no applicability to the imposition of damages and costs under Rule 38." (citing *Toepfer*, 792 F.2d 1102)).

The obstacle created by the hearing requirement, though, is overcome by the fact that, typically, the arguments that are frivolous as filed in the appellate brief embody the sanctionable conduct. Because a procedural hearing on sanctions is mandatory only if there is a contested factual issue, there can be no factual issue that creates a right to a hearing when the appeal is frivolous as filed, regardless of whether the right is expressly provided in a rule, as it is in 46(c).[122] Thus, the absence of a hearing requirement in Rule 38 does not fatally undermine the arguments in support of justifying the assessment of Rule 38 sanctions directly against attorneys as a Rule 46(c) sanction.

This is not to say that an appellate court does not have a duty to provide the attorney with notice and an opportunity to respond before it imposes Rule 38 sanctions.[123] Even though the unambiguous language of the Rule itself should provide attorneys with general notice that they can be sanctioned for filing a frivolous appeal, actual notice is required.[124] This was not the case until the 1994 Amendment to Rule 38, which added the notice requirement.[125] Yet, as discussed above, no oral hearing is required because there are no factual issues — such as the attorney's subjective intent — at stake.[126] Therefore, an appellate

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122. Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1202-03 (7th Cir. 1987).

123. *See* FED. R. APP. P. 38 Advisory Comm. Note (discussing 1994 amendments); *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (setting forth that the requirements of due process are notice and opportunity to be heard).

124. *Hill*, 814 F.2d at 1202:

> The text of Rule 38, and our previous decisions applying it, provide all the notice that an attorney could reasonably demand that sanctions may be imposed on counsel directly for the making of frivolous legal arguments in this court — and imposed without a hearing, if there are no factual questions.

Id.; see also In re Perry, 918 F.2d at 935:

> Practitioners in this court are expected to know and follow the Federal Rules of Appellate Procedure and the precedents in the court's published jurisprudence. Rule 38 provides for sanctioning frivolous appeals. From an early date, this court has indicated that it will not hesitate to apply sanctions against parties and their counsel in appropriate cases . . . [a]ll members of the bar of this court, including Perry, have thus long been on notice that they may be personally liable for sanctions if they prosecute a frivolous appeal. (citations omitted).

Id. But see Hill, 814 F.2d at 1207-08 (Parsons, J., dissenting):

> There is to be drawn a distinction between the general notice about sanctions and notice that sanctions are being considered. Traditional procedural steps should always be taken before assessment of a penalty is made. . . . The need to deter frivolous litigation should never be considered demanding enough to cause us judges to weaken those structures of fundamental fairness upon which our judicial system rests.

Id.

125. *See, e.g.*, FED. R. APP. P. 38 Advisory Comm. Note (discussing 1994 amendments); Romala Corp. v. United States, 927 F.2d 1219, 1226 (Fed. Cir. 1991) ("[Appellant's attorney] is not entitled to an opportunity for written or oral explanation — we need afford no opportunity to explain misstatements and distortions in the briefs when their inaccuracy is apparent and no possible explanation could justify their inclusion.").

126. *See In re* Perry, 918 F.2d at 936 ("[T]he 'hearing' requirements of Rule 46 (c) [of the Federal Rules of Appellate Procedure] have not been incorporated into Rule 38.");

court can safely follow Judge Posner's approach in *Hill*: after the court determined that the appeal was objectively frivolous, the court imposed sanctions on the appellant's attorney and gave appellee fifteen days to submit proper documentation of costs to the clerk of the court, after which appellant was given an opportunity to respond.[127]

B. *The "Institutional Appellant" Exception*

One danger of imposing the full burden of Rule 38 sanctions on attorneys is that sophisticated institutional appellants will escape blame in cases where they deserve it. In cases where the appellant must rely completely on the advice of the attorney, the argument that the attorney should bear the full burden of sanctions is particularly strong.[128] Yet, where the party is a large, sophisticated institution, a court should bring sanctions jointly against the attorney and the client, since the two are in the best position to determine who (between the two of them) caused the appeal to be filed.[129] An analogy to the arguments in the Advisory Committee Note to Rule 11 supports this view. The Advisory Committee Note to Rule 11 suggests the appropriateness of an "additional inquiry" into the propriety of assessing sanctions against the party itself (along with the attorney) when that party is a governmental agency or institutional party, since those bodies typically put significant restrictions on their attorneys' discretion.[130] In the

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Braley v. Campbell, 832 F.2d 1504, 1515 (10th Cir. 1987) (arguing that an adversarial, evidentiary hearing is not required); *Hill*, 814 F.2d at 1201:

> [W]e believe absolutely that an attorney ordered to pay money as a sanction for the filing of a frivolous suit or appeal is entitled to due process of law, and that this entitlement includes an opportunity for a hearing if a factual question concerning the propriety of sanctions is raised. . . . But obviously the right to a hearing . . . is limited to cases where a hearing would assist the court in its decision. Where, as in this and most Rule 38 cases, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate.

Id. (internal citations omitted); *see also* Martineau, *Frivolous Appeals*, *supra* note 21, at 876:

> The courts have provided no uniform definition of a hearing, and have emphasized that the type of hearing required will vary from case to case. Courts seldom discuss whether an oral hearing is necessary when a motion is made in the appellate court. The oral argument on the merits is the only oral portion of the appellate process, and in many cases even the merits are decided on the basis of briefs with no oral argument. Various motions are uniformly made and acted upon without an oral hearing. Appellate Rule 27, which governs motions in the courts of appeals, does not require an oral hearing on any type of motion, substantive or procedural. Consequently, there does not appear to be any more reason to require an oral hearing on a motion for a frivolous appeal sanction than on any other type of motion.

Id. (citation omitted).

127. *See Hill*, 814 F.2d at 1203; *see also Wilton*, 188 F.3d at 678 (Gilman, J., concurring).

128. *See supra* text accompanying notes 105-108.

129. United States v. Potamkin Cadillac Corp., 689 F.2d 379 (2d Cir. 1982); United States v. Phoenix Petroleum, 727 F.2d 1579, 1582 (Temp. Emer. Ct. App. 1984).

130. FED. R. APP. P. 38 Advisory Comm. Note (discussing 1993 Amendments):

> When appropriate, the court can make an additional inquiry in order to determine whether

Rule 38 context, courts have demonstrated an ability to make this additional inquiry into the "sophistication" of the client, as well.[131] This is only a narrow exception that is consistent with the objectivity required by Rule 38 (i.e., it does not inquire into the "bad faith" intent of an attorney or the appellant). Furthermore, it is consistent with Rule 38's deterrence goal, discussed below, because it seeks to place the blame on the individuals who are truly responsible for the frivolous arguments presented to the court.

III. THE DETERRENCE GOAL . . . AND ITS LIMIT

Section III.A argues that an objective, single-step reasonable attorney test is best for achieving the policy goal of deterring frivolous appeals. Section III.B argues that courts should make an exception to the objective reasonable attorney test when an appellant proceeds pro se. In such cases, an inquiry into the pro se appellant's practical legal experience is appropriate to determine whether to impose sanctions.

A. *Deterring Frivolous Appeals Is the Name of the Game*

At its core, Rule 38 is an instrument for discouraging attorneys from filing frivolous appeals.[132] To this end, an objective, single-step reasonable attorney test is preferable to a test that requires an inquiry into an attorney's subjective state of mind. This is true for two reasons. First, because an attorney's subjective intent is often difficult to prove, the threat of sanctions authorized by Rule 38 — or any other rule — is considerably less ominous if courts require evidence of an attorney's bad faith.[133] Second, courts applying standards that take into account

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> the sanction should be imposed on such persons, firms, or parties . . . in addition to . . . the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving government agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Id.

131. *E.g.*, *Phoenix Petroleum*, 727 F.2d 1579; *Potamkin*, 689 F.2d 379; McConnell v. Crtichlow, 661 F.2d 116 (9th Cir. 1981); Cummings v. United States, 648 F.2d 289 (5th Cir. 1981); *In re* Cont'l Inv. Corp., 642 F.2d 1 (1st Cir. 1981); Lowe v. Willacy, 239 F.2d 179 (9th Cir. 1956).

132. Coghlan v. Starkey, 852 F.2d 806, 817 (5th Cir. 1988) (quoting Hagerty v. Succession of Clement, 749 F.2d 217, 222 (5th Cir. 1984) (explaining that Rule 38 sanctions present the most promising tool for discouraging attorneys from bringing frivolous appeals in the future)).

133. *See* Martineau, *Ways of the Circuits*, *supra* note 18, at 661 ("A requirement of bad faith adds a scienter requirement . . . . This requirement minimizes the effectiveness of the sanctions a court authorizes."); Michael L. Lamb, Comment, *Awards of Attorneys' Fees Against Attorneys:* Roadway Express, Inc. v. Piper, 60 B.U. L. REV. 950, 963 (1980) ("A malice standard as applied to attorneys substantially limits the circumstances in which bad faith can be found.").

an attorney's subjective state of mind are often unwilling to punish actions undertaken by an attorney in his representative capacity.[134] This unwillingness is particularly conspicuous when courts must apply a "malice" standard, as they must when they entertain a section 1927 or malicious prosecution action.[135] For example, in deciding whether to impose section 1927 sanctions, one court excused from liability an attorney who knowingly, but reluctantly, brought a meritless suit at his client's behest.[136] Thus, a standard requiring evidence of an attorney's bad faith narrows the range of circumstances under which courts are willing to find and punish attorney misconduct[137] and thereby enables an attorney acting in his representative capacity to file an appeal containing groundless arguments without fear of sanction — even if he knows the arguments presented in the appeal are objectively frivolous.[138]

The rationale for imposing Rule 11 sanctions against attorneys, also useful to an understanding of Rule 38,[139] supports the argument that a reasonable attorney test is best for deterring frivolous appeals. For example, in *Berwick Grain Co. v. Illinois Department of Agriculture*, an attorney appealing the Rule 11 sanctions imposed upon him by the district court offered as his excuse that, even though he looked for legal support before he filed his motion, he found none.[140] The appellate court rejected his excuse and found that he should not have filed the lawsuit in the first place.[141] As that court argued, the very point of Rule 11 sanctions is to lend incentive for attorneys to "stop, think, and investigate more carefully before serving and filing papers."[142] Similarly, one of the primary purposes of Rule 38 sanctions is "to encourage attorneys to be reflective about the issues they present for review,"[143] since an appeal should not be a "knee jerk

134. Lamb, *supra* note 133, at 963 n.116 ("An attorney can only be liable for malicious prosecution if he went beyond his representative capacity.") (quoting R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 45.15 (Supp. 1980)).

135. *See id.* at 963.

136. *See id.* (citing Chrysler Corp. v. Lakeshore Comm. Fin. Corp., 389 F.Supp. 1216, 1224 (E.D. Wis. 1975) (refusing to sanction an attorney pursuant to § 1927 without proof that the suit "was prompted by [plaintiff's] counsel rather than or without the consent of [the plaintiff]")).

137. *Cf. id.*

138. *Cf. id.*

139. *See, e.g.*, Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1200 (7th Cir. 1987) (looking to Rule 11 in order to understand Rule 38's rationale).

140. 217 F.3d 502, 505 (7th Cir. 2000).

141. *Id.*

142. *Id.* (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398 (1990)).

143. Int'l Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1406 (9th Cir. 1985).

reaction" to an unfavorable ruling.[144] Thus, it follows that it is best for deterrence purposes that the attorneys themselves bear the burden of Rule 38 sanctions as well since "penalizing the [appellant] 'will not guarantee that his attorney will be directly affected or that he will be deterred from filing similar frivolous appeals in the future.' "[145] This approach takes into account the realities of the attorney-client relationship.[146]

This is not to say that a reasonable attorney standard is the only standard that, if permitted under Rule 38, would effectively deter frivolous appeals. Some advocate an "intentional abuse" standard for awarding attorney sanctions.[147] Courts have used this standard, which represents a compromise between a bad faith standard and a negligence standard, to evaluate an attorney's conduct when they have applied analogous sanctions, such as section 1927 and malicious prosecution sanctions.[148] Under this standard, a court must make a two-step analysis.[149] First, the court must make an objective determination that a reasonable attorney would not have filed such a meritless appeal.[150] Second, a court must determine that the appellant's attorney knew the appeal was baseless, but filed it anyway.[151] Circumstantial evidence often proves an attorney's knowledge under this standard: a court can *infer* from a meritless legal argument that the attorney was aware of the argument's groundlessness.[152] Considering the appellee's limited access to proof, it is arguable that the inference of knowledge should be a *presumption* — activated, of course, only after the objective stage of the analysis has been satisfied.[153] Thus, such a standard could rid the courts of a good number of the evidentiary problems that might allow a blameworthy attorney to avoid liability under a bad faith standard.[154]

144. *See id.* (quoting Libby, McNeill & Libby v. City Nat'l Bank, 592 F.2d 504, 515 (9th Cir. 1978)).

145. Coghlan v. Starkey, 852 F.2d 806, 817 (5th Cir. 1988) (quoting Hagerty v. Succession of Clement, 749 F.2d 217, 222 (5th Cir. 1984)).

146. *See* Eash v. Riggins Trucking Inc., 757 F.2d 557, 564, n.10 (3d Cir. 1985) ("Traditionally, courts have treated the attorney as the client's agent so that the attorney's acts and omissions legally bind the client. Because this approach ignores the realities of the lawyer-client relationship, there has been a trend to seek to impose penalties upon only the offending lawyer.").

147. *E.g.*, Lamb, *supra* note 133, at 966-68.

148. *See id.* at 966 (citing Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1167 (7th Cir. 1968), *cert denied*, 399 U.S. 908 (1969) (§ 1927); Nyer v. Carter, 367 A.2d 1375 (Me. 1977) (malicious prosecution)).

149. *See id.* at 967.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 967.

While an intentional abuse standard may be desirable in cases involving analogous sanctions such as section 1927, this standard is impermissible in the context of Rule 38, which has no bad faith requirement.[155] By applying an objective, single-step reasonable attorney test for Rule 38, and by imposing the burden of Rule 38 sanctions against an appellant's attorney, courts can best deter frivolous appeals in a manner that is also consistent with the language of Rule 38.

B. *The Limit: A Pro Se Exception to the Reasonable Attorney Test*

Where an appellant proceeds pro se and has no practical experience in the law, courts should contain their efforts to deter frivolous appeals by refraining from imposing Rule 38 sanctions.[156] It is contrary to Rule 38's deterrence goal for courts to impose sanctions against pro se appellants who, because they are not attorneys themselves, often do not fully understand why the legal arguments they present to the court have no merit. As one court explained, Rule 38 seeks to discourage only the "blameworthy acts" of "ignoring or purposefully disregarding the law and procedure."[157] These are "areas of the expertise customarily committed to counsel" who can provide "sound advice on both the law and procedure."[158]

It is, however, consistent with the purpose of Rule 38 for a court to assess sanctions against a pro se appellant who has had some practical legal experience or training. A court's inquiry into an appellant's practical legal experience would, of course, be a second step following the court's initial objective assessment of the merits of the appeal. Courts have demonstrated an ability to make such an inquiry to determine whether or not to impose Rule 38 sanctions.[159] For example, one court assessed Rule 38 sanctions against a corporation president, even though the president was proceeding pro se, because he had practical experience dealing with attorneys; sanctions were appropriate because the president should have understood that the reason many attorneys refused to represent him in the matter was that his position was objectively frivolous.[160] While this approach is not entirely consistent with

155. *See supra* Section I.A.

156. *See, e.g.*, Lonsdale v. Comm'r, 661 F.2d 71, 72 (5th Cir. 1981) (refraining from invoking Rule 38 sanctions against pro se appellant in a tax dispute, even though the appellant's arguments were stale and had longstanding precedent aligned against them).

157. Hilmon Co. v. Hyatt Int'l, 899 F.2d 250, 254 (3d Cir. 1990).

158. *Id.*

159. *See Hilmon*, 899 F.2d at 254. (assessing damages against pro se appellant because of the appellant's "practical experience with the law"); *see also* Clark v. Green, 814 F.2d 221 (5th Cir. 1987); Clarion Corp. v. Am. Home Prods. Corp., 494 F.2d 860 (7th Cir. 1974).

160. *Clarion Corp.*, 494 F.2d 860.

the single-step attorney reasonableness test advocated by this Note, it is consistent with Rule 38's underlying purpose.

CONCLUSION

This Note argued that the language and legislative history of Rule 38 indicate that an objective, single-step reasonable attorney test is the most appropriate test under Rule 38. It also argued that courts should ordinarily assess the full burden of the sanction — the objective measure of the attorney fees and costs — against the appellant's attorney. Not only does this approach conform to the plain meaning of the statute, it is also best from a policy perspective because it seeks to deter those who are typically responsible for filing objectively frivolous legal arguments — the attorneys. Several qualifications to the reasonable attorney test, discussed above, balance the Rule 38 policy of deterring frivolous claims against competing policy concerns — such as the concerns that novel appeals will be "chilled," that blame will be unfairly assigned to pro se appellants, or that the entire burden of sanctions will be unfairly placed on attorneys who work for sophisticated institutional parties who give little decision-making authority to their attorneys. In sum, a one-step reasonable attorney test for Rule 38, coupled with the imposition of Rule 38 sanctions against the attorneys who are responsible for presenting frivolous arguments to the courts, promises not only to help appellate courts stay afloat, but also to ensure that courts imposing such sanctions do so only in appropriate circumstances.