

# Misbehaving Attorneys, Angry Judges, and the Need for a Balanced Approach to the Reviewability of Findings of Misconduct

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## INTRODUCTION

It is likely no surprise that attorneys sometimes fail to abide by the standards of ethical and professional conduct during the course of litigation. This type of misconduct implicates a federal district court judge's obligation to maintain order and fairness in her courtroom. In order to effectuate this duty, the judge has at her disposal a variety of different tools with which she can admonish or punish an attorney, including the power to impose monetary sanctions.<sup>1</sup> Nonetheless, sometimes judges forego explicitly sanctioning an attorney, choosing instead to express their disapproval of an attorney's behavior by issuing an opinion including findings of professional misconduct. These findings of misconduct can range anywhere from a general observation regarding an attorney's "lack of professionalism"<sup>2</sup> to a more extreme conclusion that an attorney participated in "sanctionable, unethical, vexatious, contemptuous and nearly criminal conduct."<sup>3</sup> Given the potentially significant effects such findings of misconduct could have on an attorney's professional reputation, attorneys frequently attempt to appeal in order to expunge the relevant findings.

While it has long been established that nonparty attorneys may seek appellate review of monetary sanctions,<sup>4</sup> appeals of orders containing findings of misconduct present a number of more complicated issues. The various circuits have taken different approaches to appeals

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<sup>1</sup> See *Manual for Complex Litigation* § 10.154 (Federal Judicial Center 4th ed 2004).

<sup>2</sup> *Weissman v Quail Lodge Inc*, 179 F3d 1194, 1196 (9th Cir 1999).

<sup>3</sup> *Clark Equipment Co v Lift Parts Manufacturing*, 1987 WL 19150, \*14-15 (ND Ill).

<sup>4</sup> See, for example, *Retail Flooring Dealers of America, Inc v Beaulieu of America, LLC*, 339 F3d 1146, 1147-49 (9th Cir 2003) (discussing the appellate court's jurisdiction to hear the appeal of a Rule 11 sanction against a nonparty attorney). See also Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-fledged Parties*, 39 Ga L Rev 411, 512 (2005) (stating generally that attorneys have standing to appeal sanctions entered against them).

of this nature and have predictably come to three different results: never appealable, always appealable, and sometimes appealable. Given the number of different relevant legal doctrines that intersect in this particular area, the case law demonstrates a great deal of doctrinal confusion. Yet despite this complexity, the circuits' disagreements over this issue boil down to three main disputes: the applicability of various standing and reviewability doctrines, the appropriateness of appellate review of nonmonetary sanctions, and the definition of a sanction.

This Comment addresses each of these disputes in sequence and resolves them in favor of an approach that expands on the test used by the Ninth Circuit. This Comment first argues that the issue at hand does not directly implicate Article III standing requirements. Rather, it is properly framed by the traditional maxim that courts "review[] judgments, not statements in opinions."<sup>5</sup> Under this rule, appellate review should be extended to all findings of misconduct that qualify as a sanction regardless of whether the findings are accompanied by monetary liability. In this context, a sanction should be defined by two key features, its formality and its capacity to inflict harm. Consistent with this definition, the Comment proposes a "formality/harm test" that emphasizes both content and context when assessing which findings of misconduct constitute a sanction. Under this approach, findings of misconduct originally made in support of later-overturned sanctions would qualify as per se sanctions and therefore would be subject to appellate review. This rule would be both easy to administer and effective at achieving a number of important policy goals.

This Comment begins by providing a general background to the issues relevant to the circuit split in Part I. Then, Part II briefly summarizes the three different positions taken by the various circuits. Part III assesses the applicability of the "review judgments" rule and the reviewability of nonmonetary sanctions. Finally, Part IV analyzes which findings of misconduct qualify as sanctions and introduces the formality/harm approach.

## I. BACKGROUND

### A. Federal Judges' Sanctioning Power

District court judges bear the responsibility of assuring that those involved in the litigation process comport with certain minimum stan-

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<sup>5</sup> *Black v Cutter Laboratories*, 351 US 292, 297-98 (1956) (denying an appeal since the objected-to language was not necessary to the judgment), citing *Herb v Pitcairn*, 324 US 117, 125-26 (1945).

dards of conduct. Judges use many different tools to accomplish this goal, including monetary sanctions, formal reprimands, and punishment for contempt.<sup>6</sup> In cases of attorney misconduct in civil litigation, any valid exercise of a judge's sanctioning power derives its authority from one of two sources. A sanction may be imposed pursuant to the judge's inherent power to regulate attorney discipline<sup>7</sup> or according to the power granted by a specific Federal Rule of Civil Procedure.<sup>8</sup>

The federal courts have an inherent power to monitor the realm of attorney discipline. This power is implied due to the nature of the federal judicial institution and the perception that such authority is necessary to implement successfully other judicial powers.<sup>9</sup> When exercising this power, judges have sought to regulate a wide array of attorney misconduct and have utilized a number of different disciplinary mechanisms. Since this power over attorney discipline is seen as essential to the integrity of the judicial process, congressional statutes and rules are assumed not to limit the scope of a court's inherent powers.<sup>10</sup> In fact, a judge may invoke her inherent powers to sanction certain bad faith conduct even if that conduct could also be sanctioned under the Federal Rules of Civil Procedure.<sup>11</sup>

Despite this power, many federal judges instead decide to employ the intricate disciplinary scheme set out in the Rules. The Rules include a number of regulations specifically directed at attorney conduct and often authorize the use of sanctions to address misbehavior.<sup>12</sup> Par-

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<sup>6</sup> See *Manual for Complex Litigation* at § 10.154 (cited in note 1).

<sup>7</sup> See *Chambers v NASCO, Inc.*, 501 US 32, 43–44 (1991) (explaining that the institutional structure of the federal courts implies a power to regulate attorney misconduct).

<sup>8</sup> See, for example, FRCP 11(c) (“[T]he court may impose an appropriate sanction on any attorney, law firm, or party that violated [this Rule] or is responsible for the violation.”).

<sup>9</sup> See *Chambers*, 501 US at 43–44 (documenting the deeply rooted history of this well-established doctrine), citing *United States v Hudson*, 11 US 32, 35 (1812).

<sup>10</sup> See *Weinberger v Romero-Barcelo*, 456 US 305, 313 (1982) (“[W]e do not lightly assume that Congress has intended to depart from established principles.”).

<sup>11</sup> See *Chambers*, 501 US at 49–50 (approving the district court's reliance on its inherent power to sanction when the sanctionable conduct was made in bad faith and was only partially covered by the relevant rules and statutes). However, courts ordinarily should rely on the Rules rather than their inherent power. See *id.* at 50.

<sup>12</sup> See FRCP 11 (authorizing sanction of a party and/or her attorney for filing groundless pleadings, motions, or other papers); FRCP 16(f) (authorizing sanction of a party and/or her attorney for noncompliance with a pretrial order); FRCP 26(g)(3) (authorizing sanction of a party and/or her attorney for baseless discovery requests or objections); FRCP 30(g) (permitting a judge to award expenses when a party fails to attend a deposition or to serve a subpoena on a party to be deposed); FRCP 37(d), (g) (permitting a judge to award expenses when a party fails to respond to discovery requests or fails to participate in the framing of a discovery plan); FRCP 41(b) (permitting dismissal where a party fails to prosecute or comply with the Rules or an order of the court); FRCP 45(e) (permitting punishment for failure to obey a subpoena); FRCP 56(g) (permitting a judge to award expenses and/or contempt damages when a party presents an affidavit in a summary

ticularly relevant to the discipline at issue in this Comment, Rule 11 specifies that a judicially imposed “sanction” may include both monetary fines and “nonmonetary directives.”<sup>13</sup> The Advisory Committee Notes explain that these “nonmonetary directives” may consist of “an admonition, reprimand, or censure.”<sup>14</sup> This broad definition of sanctions immediately raises thorny issues of how to disentangle formal sanctions from findings of misconduct that might be more appropriately categorized as “routine judicial commentary.”<sup>15</sup>

Rule 11 also raises pertinent issues with its requirement that a judge imposing sanctions “must describe the sanctioned conduct and explain the basis for the sanction” in an order.<sup>16</sup> This is important since orders incorporating sanctions frequently include findings of professional misconduct that underlie the judge’s decision to impose sanctions. Hence, if a sanction judgment is later overturned, an order including harshly worded findings of misconduct may still remain on the record. This is precisely the set of events that gave rise to the disputed orders appealed by the attorneys in several of the cases discussed in this Comment.<sup>17</sup>

## B. Appellate Jurisdiction and Standing Requirements

It is settled law that nonparty attorneys may appeal an order of monetary sanctions entered against them, as monetary sanctions impose a harm sufficient to grant an attorney standing to bring such an appeal.<sup>18</sup> On the other hand, attorneys seeking to appeal findings of professional misconduct must confront a host of complex jurisdictional issues. At the heart of the matter are the standing and reviewability requirements embodied in Article III of the Constitution<sup>19</sup> and the traditional maxim that courts review judgments, not opinions.<sup>20</sup>

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judgment motion in bad faith or for the purpose of delay); FRCP 83 (allowing district courts to make rules governing local practice that are not inconsistent with the Rules).

<sup>13</sup> FRCP 11(c)(4).

<sup>14</sup> FRCP 11, Advisory Committee Notes to the 1993 Amendments.

<sup>15</sup> *In re Williams*, 156 F3d 86, 91 (1st Cir 1998).

<sup>16</sup> FRCP 11(c)(6).

<sup>17</sup> See, for example, *In re Williams*, 156 F3d at 88–89 (concerning monetary sanctions imposed on two nonparty attorneys by a bankruptcy judge who later vacated the sanctions); *Sullivan v Committee on Admissions and Grievances*, 395 F2d 954, 956 (DC Cir 1967) (concerning the charges against an attorney that were dismissed while the district court judge still found that the attorney violated several ethical rules). See also *Bolte v Home Insurance Co*, 744 F2d 572, 572 (7th Cir 1984).

<sup>18</sup> See note 12.

<sup>19</sup> See US Const Art III, § 2.

<sup>20</sup> See note 5.

Article III provides that federal judicial power shall only extend to various enumerated “cases” and “controversies.”<sup>21</sup> The Supreme Court has held that the “irreducible constitutional minimum of standing contains three elements”: (a) an “injury in fact” that (b) is causally connected to the defendant’s conduct and (c) is likely to be “redressed by a favorable decision.”<sup>22</sup> The most relevant requirement for the purposes of this Comment is that an attorney must allege a sufficient “injury in fact” in order to have standing to appeal. The Court has further specified that the injury must consist of “an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”’”<sup>23</sup> While the alleged injury must satisfy all of these conditions, the Court intended for the “injury in fact” requirement to encompass a broad variety of economic, aesthetic, and other types of harms.<sup>24</sup>

Since Article III does not actually confer subject matter jurisdiction on the lower federal courts,<sup>25</sup> the constitutional constraints embodied in Article III serve as an outer bound for the statutory grants of jurisdiction that Congress enacts. Federal courts of appeals exercise their appellate jurisdiction pursuant to 28 USC § 1291 et seq.,<sup>26</sup> which empowers the appellate courts to hear appeals from “all final decisions” of the various federal district courts.<sup>27</sup>

The above background on § 1291 and Article III lays the necessary groundwork for a discussion of the “abecedarian rule that federal appellate courts review decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations.”<sup>28</sup> This rule is in fact a specific manifestation of the larger doctrine that “[o]rdinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom.”<sup>29</sup> This rule is most commonly applied to prevailing parties, who generally are not allowed to appeal since they have “not [been] aggrieved by the judgment affording the relief.”<sup>30</sup> Hence, if a party has prevailed on claims provid-

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<sup>21</sup> US Const Art III, § 2.

<sup>22</sup> See *Lujan v Defenders of Wildlife*, 504 US 555, 560–62 (1992) (holding that wildlife conservation organizations lacked standing to appeal a regulatory agency’s interpretation of the Endangered Species Act of 1973).

<sup>23</sup> See *id.* at 560 & n 1 (specifying further that a “particularized” injury “must affect the plaintiff in a personal and individual way”).

<sup>24</sup> See Geoffrey R. Stone, et al, *Constitutional Law* 107 (Aspen 5th ed 2005) (discussing the historical development and evolution of the injury-in-fact requirement).

<sup>25</sup> See US Const Art III, § 1.

<sup>26</sup> See 28 USC § 1291 et seq (2000).

<sup>27</sup> See 28 USC § 1291.

<sup>28</sup> *In re Williams*, 156 F2d at 90 (citations omitted).

<sup>29</sup> *Deposit Guaranty National Bank v Roper*, 445 US 326, 333 (1980).

<sup>30</sup> *Id.* See also *Lindheimer v Illinois Bell Telephone Co*, 292 US 151, 176 (1934).

ing the party with the maximum allowable relief, the prevailing party is typically barred from bringing an appeal no matter how erroneous the findings of the lower court may be.<sup>31</sup>

Even though courts have interpreted and applied this doctrine as an aspect of their standing analysis,<sup>32</sup> the precise basis for the doctrine is rather murky. Some courts have contended that the limitations implied by the doctrine are grounded in Article III standing requirements.<sup>33</sup> Nevertheless, the Supreme Court has held that “[t]he rule is one of federal appellate practice . . . derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art. III.”<sup>34</sup> The resolution of this doctrinal dispute might have real consequences in that a statutorily based rule may grant courts a greater degree of latitude to formulate exceptions. Regardless of the confusion regarding the rule’s legal basis, the doctrine has “strong policy bases in judicial economy.”<sup>35</sup>

### C. Findings of Misconduct in Context: Definitions, Procedural Posture, and Content

Before addressing the issues at stake in the circuit split, some background information on the terminology and factual circumstances dealt with in the cases is required.

This Comment refers to a district court judge’s disputed observations regarding an attorney’s behavior as “findings of misconduct.” Typically, the term “findings” is used to denote particular factual determinations made by a judge and is often employed in contradistinction to other judicial tasks such as applying law to facts or making legal conclusions. More importantly for the purposes of this Comment, under the “review judgments” rule, findings are distinguished from judgments and orders, and hence are typically unreviewable.<sup>36</sup> But this Comment’s use of the term “findings of misconduct” is merely a concession to convenience and is not meant to imply that these types of findings do not qualify as a judgment or order.

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<sup>31</sup> See, for example, *Mathias v WorldCom Technologies, Inc.*, 535 US 682, 684 (2002).

<sup>32</sup> See, for example, *Asarco, Inc v Secretary of Labor*, 206 F3d 720, 722 (6th Cir 2000).

<sup>33</sup> See, for example, *id.* at 724.

<sup>34</sup> *Roper*, 445 US at 333 (reasoning that since this rule is not constitutionally grounded, a prevailing party may appeal as long as she retains an interest in appeal satisfying Article III).

<sup>35</sup> See Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 Ga L Rev 813, 886–87 (2004). See also *United States v Accra Pac*, 173 F3d 630, 632 (7th Cir 1999) (concluding that the litigant’s desire to appeal to obtain “ammunition for some future dispute . . . [or] perhaps psychic gratification” is outweighed by the costs of the required judicial resources).

<sup>36</sup> See notes 28–29 and accompanying text.

This Comment also frequently employs the word “sanction,” which takes on a highly specialized meaning in this legal context as well. Given the implications of the “review judgments” rule for appellate review,<sup>37</sup> it becomes important to determine what exactly qualifies as a judgment or order. Since the “imposition of a sanction on an attorney is universally regarded as an order,”<sup>38</sup> many attorneys seek to characterize a judge’s harsh words as a judgment in the form of a sanction.<sup>39</sup> However, the meaning of the word “sanction” is ambiguous and the subject of much debate in this context. Adding to this confusion, courts have also on occasion utilized the term “reprimand,” which is functionally indistinguishable from the word “sanction” in these cases.<sup>40</sup> Therefore, in order to maintain analytical clarity, this Comment treats all judicial commentary regarding attorney misconduct as “findings of misconduct” and then discusses whether these “findings of misconduct” might qualify as a “sanction.”

It is also necessary to provide a better picture of the context in which these kinds of appeals arise by discussing the types of orders for which attorneys are seeking appellate review. Thus far, all of the circuits have addressed cases involving findings of misconduct contained in written orders<sup>41</sup> (rather than an appeal of oral comments made by a district court judge during the course of a courtroom proceeding). The written orders appealed are quite diverse in their type and their timing in the litigation process. Oftentimes, a judge will include findings of misconduct in an order addressing an adverse party’s motion for sanctions<sup>42</sup> or in an order addressing improprieties raised by the judge *sua sponte*.<sup>43</sup> Other times, findings of misconduct are included in a judge’s ruling on issues pertaining to the underlying case.<sup>44</sup>

The content of findings of misconduct varies greatly from case to case. Many judges express their disapproval concisely and often focus on the attorney’s candor or professionalism. One judge concluded that the attorney “had been less than honest during the settlement proceeding”<sup>45</sup> while another determined that the attorneys were guilty of

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<sup>37</sup> See *id.*

<sup>38</sup> *In re Williams*, 156 F3d at 90.

<sup>39</sup> See, for example, *id.* (arguing that judges’ findings qualified as a “*de facto* sanction”).

<sup>40</sup> See, for example, *Butler*, 348 F3d at 1168 (“[A]n order finding attorney misconduct but not imposing other sanctions is appealable under § 1291 even if not labeled as a reprimand.”).

<sup>41</sup> See, for example, *In re Williams*, 156 F3d at 88–89.

<sup>42</sup> See, for example, *Butler*, 348 F3d at 1165–66.

<sup>43</sup> See, for example, *Precision Specialty Metals, Inc v United States*, 315 F3d 1346, 1352–53 (Fed Cir 2003).

<sup>44</sup> See, for example, *Boite*, 744 F2d at 572.

<sup>45</sup> *Seymour v Hug*, 485 F3d 926, 927 (7th Cir 2007).

“blatant misconduct.”<sup>46</sup> In several other cases, judges made more specific determinations that attorneys had violated a particular rule. In one instance, a court concluded that the attorneys had not complied with an ethical rule against ex parte contact with represented parties.<sup>47</sup> Another judge concluded that an attorney’s conduct violated Rule 37 since it was “intentional, unprofessional, and unjustified and his shifting the blame to his secretary [was] pure baloney.”<sup>48</sup> One court characterized an attorney’s conduct as a “pattern of violations” of several federal and local rules, which “border[ed] closely on incompetence.”<sup>49</sup>

## II. THE CIRCUIT SPLIT

The circuits take a number of approaches to answering the question of whether a nonparty attorney can appeal an opinion containing findings of professional misconduct. Their conclusions can be most simply classified into three basic categories: always appealable, sometimes appealable, and never appealable.

### A. Always Appealable

The Fifth, Tenth, and DC Circuits allow attorneys to appeal orders containing findings of misconduct even if they are not labeled as formal sanctions or associated with monetary sanctions.<sup>50</sup> All three circuits focus on assessing the attorney’s standing under Article III with each circuit analyzing whether the injury requirement of Article III is satisfied by the damage that findings of misconduct may inflict on an attorney’s reputation.<sup>51</sup> Since the circuits were “persuaded beyond peradventure that one’s professional reputation is a lawyer’s most important and valuable asset,”<sup>52</sup> they reasoned that “damage to an attorney’s professional reputation is a cognizable and legally sufficient injury.”<sup>53</sup> Hence, the question becomes which findings do sufficient dam-

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<sup>46</sup> *Walker v City of Mesquite*, 129 F3d 831, 832 (5th Cir 1997). See also *Weissman v Quail Lodge Inc*, 179 F3d 1194, 1196 (9th Cir 1999); *Bolte*, 744 F2d at 572.

<sup>47</sup> See *United States v Talao*, 222 F3d 1133, 1136 (9th Cir 2000).

<sup>48</sup> *In re Williams*, 181 BR 1, 4 (Bankr D RI 1995).

<sup>49</sup> *Biocore Medical Technologies, Inc v Khosrowshahi*, 181 FRD 660, 674 (D Kan 1998).

<sup>50</sup> See *Walker v City of Mesquite*, 129 F3d 831, 832–33 (5th Cir 1997) (holding that a nonparty attorney may appeal a finding of misconduct because of the potential reputational effects this might have on the attorney); *Butler v Biocore Medical Technologies, Inc*, 348 F3d 1163, 1168–69 (10th Cir 2003) (holding that “an order finding attorney misconduct but not imposing other sanctions is appealable under § 1291 even if not labeled as a reprimand”); *Sullivan v Committee on Admissions and Grievances*, 395 F2d 954, 956 (DC Cir 1967) (holding that the attorney could appeal the district court’s finding that he had violated various ethics rules even though the district court dismissed the charges and did not impose monetary sanctions).

<sup>51</sup> See *Walker*, 129 F3d at 832–33; *Butler*, 348 F3d at 1168–69; *Sullivan*, 395 F2d at 956.

<sup>52</sup> *Walker*, 129 F3d at 832.

<sup>53</sup> *Butler*, 348 F3d at 1168.



age to an attorney's reputation such that the minimum standing requirements are met.

In answering this question, the Fifth, Tenth, and DC Circuits concluded that findings of misconduct cause the requisite amount of damage.<sup>54</sup> Yet the Tenth Circuit sought to limit this broad rule by holding, rather ambiguously, that while appellate review is proper for orders finding misconduct, it cannot be extended to encompass "every negative comment or observation from a judge's pen about an attorney's conduct or performance."<sup>55</sup> Nevertheless, all three circuits agree that an attorney has standing to appeal regardless of whether the findings of misconduct are actually labeled as a sanction.<sup>56</sup>

### B. Sometimes Appealable

The First and Federal Circuits have adopted an approach that allows attorneys to appeal all orders in which the district court judge has expressly identified the finding of professional misconduct as a sanction.<sup>57</sup> The Third Circuit has ruled consistently with this approach but its narrow opinion avoided having to address the possible distinction between labeled sanctions and unlabeled findings of misconduct.<sup>58</sup> On the other hand, the Ninth Circuit has adopted the First and Federal Circuits' position<sup>59</sup> but has developed a slightly more nuanced approach.<sup>60</sup>

In justifying their position, the First and Federal Circuits rely heavily on the rule that "appellate courts sit to review judgments, not opinions."<sup>61</sup> Applying this rule, these Circuits hold that no matter how damaging a court's findings may be to the professional reputation of an attorney, these findings may not be appealed unless they qualify as a judgment, typically in the form of a sanction.<sup>62</sup> Since these circuits recognize that nonmonetary sanctions may be appealed,<sup>63</sup> the inquiry

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<sup>54</sup> See *id.* at 1168–69; *Walker*, 129 F3d at 832–33; *Sullivan*, 395 F2d at 956.

<sup>55</sup> *Butler*, 348 F3d at 1168.

<sup>56</sup> See *Walker*, 129 F3d at 832–33; *Butler*, 348 F3d at 1168–69; *Sullivan*, 395 F2d at 956.

<sup>57</sup> See *Precision Specialty Metals, Inc v United States*, 315 F3d 1346, 1352–53 (Fed Cir 2003) (permitting an appeal of an order in which an attorney was explicitly reprimanded for violating Rule 11); *In re Williams*, 156 F3d 86, 92 (1st Cir 1998) (holding that attorneys may only appeal orders including findings "expressly identified as a reprimand" of the attorney's conduct).

<sup>58</sup> See *Bowers v National Collegiate Athletic Association*, 475 F3d 524, 543–44 (3d Cir 2007) (allowing appeal of an explicitly labeled public reprimand while reserving judgment on the propriety of appeals of nonlabeled findings of misconduct).

<sup>59</sup> See *Weissman v Quail Lodge, Inc*, 179 F3d 1194, 1200 (9th Cir 1999).

<sup>60</sup> See *United States v Talao*, 222 F3d 1133, 1137–38 (9th Cir 2000) (allowing appeal from an order including a legal conclusion that a nonparty attorney violated a specific rule of ethical conduct).

<sup>61</sup> *Sun-Tek Industries, Inc v Kennedy Sky Lites, Inc*, 856 F2d 173, 176 (Fed Cir 1988); *In re Williams*, 156 F3d at 90.

<sup>62</sup> See *Precision*, 315 F3d at 1352; *In re Williams*, 156 F3d at 90.

<sup>63</sup> See *Precision*, 315 F3d at 1352–53; *In re Williams*, 156 F3d at 90.

shifts to assessing what types of findings may be properly categorized as sanctions.

In distinguishing between “routine judicial commentary”<sup>64</sup> and findings of misconduct that qualify as a sanction, both the First and Federal Circuits have developed a bright-line rule that an attorney may only appeal findings of misconduct expressly identified as a sanction by the presiding judge.<sup>65</sup> In *In re Williams*,<sup>66</sup> the First Circuit rejected a looser test that would have allowed certain harshly worded findings of misconduct to qualify as a “*de facto* sanction.”<sup>67</sup> The court explained that such a rule would “be almost impossible to cabin” and any attempt to differentiate “ordinary” from “extraordinary” findings of misconduct based on degrees of abrasiveness was bound to “proceed on an ad hoc basis.”<sup>68</sup> The majority similarly rejected as limitless and unpractical the dissenting judge’s approach, which focused on discerning whether the lower court judge intended the findings to serve as a punishment.<sup>69</sup> Furthermore, employing a vague standard in this context would in essence “enlist appellate courts to act as some sort of civility police.”<sup>70</sup> The fear of appellate review would have a chilling effect on judicial candor and would significantly inhibit judges’ ability to preside effectively and efficiently over the litigation process.<sup>71</sup> Therefore, while the First Circuit recognized that its test “may be viewed by some as formalistic,” it nonetheless felt that important practical and policy considerations weighed decisively in favor of a bright-line rule.<sup>72</sup>

While the Ninth Circuit in *Weissman v Quail Lodge, Inc*<sup>73</sup> adopted the First and Federal Circuits’ approach,<sup>74</sup> it later added a twist to this rule by treating certain findings of misconduct as a sanction despite their not being labeled as such.<sup>75</sup> In *United States v Talao*,<sup>76</sup> the district court judge determined that an attorney had violated a specific state rule of ethical conduct.<sup>77</sup> The Ninth Circuit held that a judge’s conclu-

<sup>64</sup> *In re Williams*, 156 F3d at 91.

<sup>65</sup> See *Precision*, 315 F3d at 1352–53; *In re Williams*, 156 F3d at 90.

<sup>66</sup> 156 F3d 86 (1st Cir 1998).

<sup>67</sup> *Id.* at 91.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 90–91 n 4 (rejecting this approach as “fraught with peril” since it is always possible to argue that a judge “intended [to sanction]—or else he would not have been so critical”).

<sup>70</sup> *In re Williams*, 156 F3d at 91.

<sup>71</sup> See *id.* at 92 (contending that these same concerns motivate the “well-entrenched doctrine of absolute judicial immunity from liability for defamation”).

<sup>72</sup> *Id.* at 92 n 6.

<sup>73</sup> 179 F3d 1194 (9th Cir 1999).

<sup>74</sup> *Id.* at 1200. See also note 59.

<sup>75</sup> See *Talao*, 222 F3d at 1137–38.

<sup>76</sup> 222 F3d 1133 (9th Cir 2000).

<sup>77</sup> See *id.* at 1136.

sion that a nonparty attorney violated a specific rule of ethical conduct is a finding that per se constitutes a reviewable sanction.<sup>78</sup>

### C. Never Appealable

The Seventh Circuit remains the only circuit to hold that a nonparty attorney may never appeal an order where potential damage to professional reputation is the sole harm. In *Bolte v Home Insurance Co.*,<sup>79</sup> the court held that appellate review under these circumstances would not fall within the scope of § 1291.<sup>80</sup> In reaching this conclusion, Judge Richard Posner focused primarily on the policy implications that such review would engender. He worried that appellate review of findings of misconduct would presage a “breathtaking expansion in appellate jurisdiction” in that “[l]awyers, witnesses, victorious parties, victims, bystanders—all who might be subject to critical comments by a district judge—[would be able to] appeal their slight if they could show it might lead to a tangible consequence such as a loss of income.”<sup>81</sup> Additionally, it would be extremely difficult to assure a proper adversarial contest of this type of appeal since no party has a significant interest in having the findings of misconduct remain in the original opinion.<sup>82</sup> In Judge Posner’s estimation, these factors weighed decisively against appellate review, especially in “the age of congested appellate dockets.”<sup>83</sup> He explained that the attorney was not entirely without a remedy, noting that the writ of mandamus<sup>84</sup> is a more appropriate means of relief.<sup>85</sup>

Two later Seventh Circuit decisions affirmed the position taken in *Bolte*: *Clark Equipment Co v Lift Marts Manufacturing Co*<sup>86</sup> and *Seymour v Hug*.<sup>87</sup> Importantly, in *Seymour*, the Seventh Circuit reaffirmed its position even though it recognized its minority status on this ques-

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<sup>78</sup> See *id.* at 1138.

<sup>79</sup> 744 F2d 572 (7th Cir 1984).

<sup>80</sup> See *id.* at 573.

<sup>81</sup> *Id.* (implying that there would be no way for a court to make a principled distinction between attorneys and other courtroom participants).

<sup>82</sup> See *id.* (detailing how other types of sanctions implicate an opposing party’s interest such that they have a “solid basis for wanting to oppose the appeal”).

<sup>83</sup> See *Bolte*, 744 F2d at 573.

<sup>84</sup> The writ of mandamus in this context is a writ traditionally used by an appellate court “to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.” *Roche v Evaporated Milk Association*, 319 US 21, 26 (1943).

<sup>85</sup> See *Bolte*, 744 F2d at 573. But see *Barnhill v United States*, 11 F3d 1360, 1371 (7th Cir 1993) (denying nonparty attorneys’ writ of mandamus because the attorneys were unable to allege that the district court’s strongly worded findings of fact would result in anything more than speculative harm to their professional reputations).

<sup>86</sup> 972 F2d 817, 820 (7th Cir 1992).

<sup>87</sup> 485 F3d 926, 929 (7th Cir 2007).

tion amongst other circuits.<sup>88</sup> The court basically reiterated the previous arguments made in *Bolte* and *Clark Equipment* but also added that the rule is consistent with the maxim that courts “review . . . judgments, not statements in opinions.”<sup>89</sup>

While most other circuits interpret the Seventh Circuit’s opinions to foreclose appeal of nonmonetary sanctions,<sup>90</sup> the Seventh Circuit has in fact only expressed this opinion in dicta. The court has never actually decided a case in which the lower court judge expressly identified the findings of misconduct as a sanction.<sup>91</sup>

### III. ANALYSIS: DECISIONS AND DOCTRINES

In this circuit split, the various circuits take divergent paths as a result of analyzing the issue of reviewability under different legal frameworks. The “never appealable” circuit (the Seventh) and “sometimes appealable” circuits (the First, Third, Ninth, and Federal) concentrate on applying the traditional rule that appellate courts review judgments, not opinions. In contrast, the “always appealable” circuits (the Fifth, Tenth, and DC) focus their inquiry on assessing the attorney’s standing under Article III and ignore the “review judgments” rule.

Having made their choices as to the applicable legal framework, the circuits must then decide which, if any, findings of misconduct may be reviewed by an appellate court. For the “sometimes appealable” and “always appealable” circuits this determination is in large part dictated by their decisions as to the applicability of the “review judgments” rule. The “sometimes appealable” circuits apply the rule and hence ask whether the findings of misconduct qualify as a judgment in the form of a sanction. Conversely, the “always appealable” circuits inquire whether the injury caused by the findings of misconduct is sufficient to confer standing. On the other hand, the “never appealable” circuit declines to participate in this debate and instead seems to insist that findings of misconduct may not be appealed unless they are accompanied by monetary liability.

This Part first addresses the applicability of the “review judgments” rule and argues that it must be satisfied in order to appeal findings of misconduct. This Part then considers and rejects the proposition suggested by the “never appealable” circuit that appellate review must be limited to monetary sanctions.

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<sup>88</sup> See *id.* at 929.

<sup>89</sup> See *id.*

<sup>90</sup> See, for example, *Bowers*, 475 F3d at 543 (“Only the Seventh Circuit has clearly held that a public reprimand not accompanied by a monetary sanction is non-appealable.”).

<sup>91</sup> See *Precision*, 315 F3d at 1352 (contending that it is not clear that the Seventh Circuit would deny an appeal to an attorney “actually reprimanded for [ ] misconduct”).

### A. The Applicability of the “Review Judgments” Rule to Nonparty Attorney Appeals of Findings of Misconduct

1. The “always appealable” circuits’ approach fails to adequately address the “review judgments” rule.

In focusing their analysis on the attorney’s standing to appeal, the “always appealable” circuits essentially disregard the potential applicability of the “review judgments” rule. None of the three circuits mention the distinction between the reviewability of judgments and findings; instead they concentrate on determining whether the attorney suffered a cognizable injury giving her standing under Article III.<sup>92</sup> This injury-based approach significantly affects the way these circuits determine which type of findings warrant appellate review. Since the circuits are unconcerned with whether findings of misconduct qualify as a sanction, the circuits argue that it is nonsensical to allow an attorney to appeal a nominal fine but not a finding of blatant misconduct, seeing as the latter is much more damaging.<sup>93</sup> Additionally, under this line of analysis the requirement that findings be explicitly labeled as sanctions is viewed as highly formalistic since it has little to do with the extent of the harm caused.<sup>94</sup> Hence, given the “always appealable” circuits’ belief in the importance and fragility of an attorney’s reputation,<sup>95</sup> each of these circuits takes an expansive view of the type of findings that attorneys may appeal.

While the “always appealable” circuits’ approach proceeds with a certain internal logic, these circuits’ failure to confront seriously the “review judgments” maxim in this context is highly problematic. The “sometimes appealable” circuits argue quite persuasively that *findings* of professional misconduct implicate the “review judgments” rule;<sup>96</sup> hence, the primary issue is whether the findings of misconduct qualify as a judgment, not the degree of harm they have caused to the attorney’s reputation.<sup>97</sup> In light of this view, it is striking that the “always appealable” circuits do not make any attempt to reconcile their approach with the requirements of the “review judgments” rule, implicit-

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<sup>92</sup> See note 50.

<sup>93</sup> See *Walker v City of Mesquite*, 129 F3d 831, 832 (5th Cir 1997) (arguing that it defies reality to claim that a \$100 fine is more damaging than findings of blatant misconduct). See also *Butler v Biocore Medical Technologies, Inc.*, 348 F3d 1163, 1169 (10th Cir 2003).

<sup>94</sup> See, for example, *id.* at 1169.

<sup>95</sup> See, for example, *Walker*, 129 F3d at 832 (contending that an attorney’s reputation is her “most important and valuable asset”).

<sup>96</sup> See *In re Williams*, 156 F3d 86, 90 (1st Cir 1998); *Sun-Tek Industries, Inc v Kennedy Sky Lites, Inc.*, 856 F2d 173, 176 (Fed Cir 1988).

<sup>97</sup> See, for example, *In re Williams*, 156 F3d at 90–91 (rejecting an attorney’s argument that findings causing sufficient damage should qualify as “*de facto* sanctions”).

ly assuming that Article III standing is the only relevant issue. This deficiency leaves these circuits' entire injury-based approach on questionable grounds.

2. Attempting to reconcile the "always appealable" circuits' approach with the "review judgments" rule.

To justify their position, the "always appealable" circuits could have more closely examined the doctrinal basis for the "review judgments" rule. Since the "always appealable" circuits concentrate solely on demonstrating the attorney's standing under Article III, it becomes important to ascertain whether the "review judgments" rule is based in Article III standing requirements or in § 1291 and the historical practices of the federal courts.<sup>98</sup> If the rule is only a means for assuring that an appeal is consistent with the constitutional standing doctrine, then it is possible that an attorney's reputational injury, if sufficient under Article III, would render the "review judgments" rule superfluous under the circumstances. In essence, under this interpretation, a reputational injury would be distinguishable from the constitutionally insufficient type of injury that typically underlies an appeal of the lower court's findings.<sup>99</sup>

Nevertheless, despite various circuit courts' discussions of Article III in relation to the "review judgments" rule,<sup>100</sup> the maxim is more appropriately grounded in nonconstitutional principles. The Supreme Court explicitly held in *Deposit Guaranty National Bank v Roper*<sup>101</sup> that the rule "does not have its source in the jurisdictional limitations of Art. III."<sup>102</sup> This holding is consistent with the common interpretative practice of judges reading Article III broadly while interpreting statutes authorizing appeals more narrowly.<sup>103</sup> Grounding the rule outside of Article III's "case or controversy" requirement also grants courts greater flexibility in shaping exceptions for certain types of appeals or appellants.<sup>104</sup> Furthermore, there is nothing in case law discussing Article III that suggests that any court views Article III as the exclusive basis for the "review judgments" rule. If the "review judgments" rule is based in Article III and § 1291, an appellant must allege an injury sufficient to meet the requirements of both.

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<sup>98</sup> See notes 32–33 and accompanying text.

<sup>99</sup> See *United States v Accra Pac*, 173 F3d 630, 632 (7th Cir 1999).

<sup>100</sup> See note 35.

<sup>101</sup> 445 US 326 (1980).

<sup>102</sup> *Id.* at 333–34.

<sup>103</sup> See *Perry Education Association v Perry Local Educators' Association*, 460 US 37, 43 (1983).

<sup>104</sup> See Steinman, 38 Ga L Rev at 889 (cited in note 35) (arguing that under this interpretation courts could decide to accept any nonmoot appeals that do not implicate judicial economy concerns).

Although a reputational harm adequate under Article III will not be sufficient to displace a “review judgments” rule grounded in § 1291 and historical practices, this looser statutory basis for the rule does open the door for a number of potential exceptions. While there are potentially four different exceptions to the “review judgments” rule,<sup>105</sup> only the exception articulated in *Electrical Fittings Corp v Thomas & Betts Co*<sup>106</sup> is potentially relevant to the issue at hand.<sup>107</sup> The Supreme Court carved out this narrow exception allowing an appellate court to eliminate, but not to review, an adverse collateral ruling from the district court’s decree as long as the appellant retained a stake in the litigation satisfying the requirements of Article III.<sup>108</sup> At first glance, this type of appeal in some ways resembles appeals of findings of misconduct in that attorneys often only seek vacatur or expungement of the contested findings and allege a reputational injury that might be sufficient under Article III. Nevertheless, any superficial similarity is proved irrelevant since the Court limited appellate review to collateral adjudication of “one of the issues litigated.”<sup>109</sup> Given that findings of misconduct involving nonparty attorneys do not qualify as a ruling on one of the issues litigated in the underlying case, the *Electrical Fittings* exception is not applicable in this context.<sup>110</sup>

Attempting to fill the gap left in the “always appealable” circuits’ analysis by looking deeper into the applicability of the “review judgments” rule reveals that the rule is ultimately irreconcilable with these circuits’ approach. Since these circuits’ injury-based approach is justified solely as a means for assessing standing under Article III, it is ill fit for analysis of appealability under the “review judgments” rule.

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<sup>105</sup> See *id.* at 890–911 (discussing four different types of exceptions: orders dismissed without prejudice, orders that have a collateral estoppel effect, orders having an “adverse practical consequence,” and orders rendered in violation of Article III).

<sup>106</sup> 307 US 241 (1939).

<sup>107</sup> Appeals of findings of misconduct do not involve orders that have been dismissed with prejudice. The findings also will not have any estoppel effect in any future litigation involving the nonparty attorney. Finally, none of the attorneys alleged that the findings were rendered in violation of the district court’s powers under Article III.

<sup>108</sup> See *Electrical Fittings*, 307 US at 242 (1939). In *Electrical Fittings*, the district court had ruled that the plaintiff’s patent was valid but ultimately held that the defendant had not infringed on the patent and therefore dismissed the complaint. See *id.* at 241–42. Addressing the defendant’s attempt to appeal the patent validity ruling, the Court held that the court of appeals had jurisdiction to entertain the appeal but only so far as it sought to reform the decree (eliminating the validity ruling) and avoided reviewing the merits. See *id.* at 242. Crucially, the Court permitted a limited appeal despite its acknowledgment that the validity determination would not have any binding effect in subsequent litigation. See *id.*

<sup>109</sup> See *id.* at 242.

<sup>110</sup> Furthermore, the exception could be read narrowly only to apply to appeals of procedural decisions and findings of misconduct that do not involve procedural decisions.

## B. The Reviewability of Judgments in the Form of Nonmonetary Sanctions under the “Review Judgments” Rule

Since the “imposition of a sanction on an attorney is universally regarded as an order,”<sup>111</sup> it seems natural at this stage to begin to explore which findings of misconduct qualify as a sanction. But, it is first necessary to justify the “sometimes appealable” circuits’ implicit assumption that nonmonetary sanctions are reviewable. This assumption is potentially called into question by a literal reading of the “never appealable” circuit’s holdings.

### 1. The “never appealable” circuit’s approach to nonmonetary sanctions.

Several courts have interpreted the “never appealable” circuit’s line of cases to prevent appeal of any sanction that is unaccompanied by monetary liability.<sup>112</sup> Assuming for the moment that this rule is part of the circuit’s holdings and not merely dicta,<sup>113</sup> one can find support for this approach in the reasoning employed in *Bolte*. In that case, Judge Posner argued generally against expanding appellate jurisdiction, but he also included analysis that more specifically supported limiting appeals to sanctions coupled with monetary consequences.<sup>114</sup> He contended that the monetary aspect of a sanction ensured that “whoever received the benefit of the sanction [would] ha[ve] a solid basis for wanting to oppose the appeal.”<sup>115</sup> Judge Posner posited that, in the absence of this incentive, it would be difficult to ensure an adversarial appeal of nonmonetary sanctions.<sup>116</sup> The opinion also briefly mentioned a series of cases indirectly supporting this concern with nonmonetary sanctions.<sup>117</sup> In these cases, appellate review was denied to parties who had been adjudicated in contempt or in violation of an injunction but had not suffered any other penalties.<sup>118</sup> Yet although the

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<sup>111</sup> *In re Williams*, 156 F3d at 90.

<sup>112</sup> See, for example, *Butler*, 348 F3d at 1167 (classifying the Seventh Circuit as the only circuit that never permits appeal in the absence of monetary sanctions).

<sup>113</sup> See *Precision Specialty Metals, Inc v United States*, 315 F3d 1346, 1352 (Fed Cir 2003) (contending that it is not clear that the Seventh Circuit would deny appeal to an attorney “actually reprimanded for [ ] misconduct”).

<sup>114</sup> See *Bolte*, 744 F2d at 573 (7th Cir 1984).

<sup>115</sup> *Id.*

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*, citing *United States Steel Corp v Fraternal Association of Steel Haulers*, 601 F2d 1269, 1273 (3d Cir 1979); *Major v Orthopedic Equipment Co*, 561 F2d 1112, 1115 (4th Cir 1977); *Rosenfeldt v Comprehensive Accounting Service Corp*, 514 F2d 607, 611 (7th Cir 1975); *River Valley, Inc v Dubuque County*, 507 F2d 582, 584–85 (8th Cir 1974) (*per curiam*).

<sup>118</sup> See *United States Steel*, 601 F2d at 1273 (holding that a party found in civil contempt may only appeal once the court has sought to punish or coerce compliance); *Major*, 561 F2d at



court in *Bolte* did not expressly hold that nonmonetary sanctions were unreviewable,<sup>119</sup> subsequent “never appealable” circuit cases cite *Bolte* in explicitly stating that appellate review is limited to “situations involving monetary sanction only.”<sup>120</sup>

Given that Judge Posner did not directly address the issue of nonmonetary sanctions in *Bolte*, it is possible to expand upon his reasoning for additional support of the view that only monetary sanctions are reviewable. He was hinting at an important intuition by citing a series of cases in which courts denied appeals to parties seeking to challenge orders without any binding effect.<sup>121</sup> By doing so, he seemed to acknowledge implicitly the importance of a judgment’s binding nature to the availability of appellate review. In one of these cited cases, the Third Circuit emphasized this idea of bindedness in the context of civil contempt, explaining that “until a sentence or sanction has been imposed ‘the situation is lacking in the elements of operativeness and consequence necessary to be possessed by any judicial order to enable it to have the status of a final decision under § 1291.’”<sup>122</sup> Obviously Judge Posner had not forgotten about the reputational harm the attorney allegedly suffered;<sup>123</sup> rather he was articulating the fact that the findings had no binding effect on the rights or obligations of the attorney. In much the same way, even findings of misconduct qualifying as a judgment in the form of a sanction would not have any binding effect. The importance of a judgment’s binding nature to the availability of appellate review is further supported by the cases Judge Posner cited in *Bolte*, all of which denied appeal to parties seeking to challenge orders without any binding effect.<sup>124</sup>

An attempt to link appellate review to some form of binding judgment might serve as a way to prevent the “review judgments” rule from devolving into a type of empty formalism. Under the “sometimes appealable” circuits’ approach, there is very little substantive difference between unreviewable findings of misconduct and reviewable nonmonetary sanction judgments other than the latter being labeled as a

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1115 (holding that a finding of noncompliance with an injunction is not reviewable unless accompanied by a sanction or some further court action on the issue); *Rosenfeldt*, 514 F2d at 611 (denying an appeal of a finding of contempt that was no longer accompanied by a jail sentence or fine); *River Valley*, 507 F2d at 584–85 (denying as premature an appeal from a district court’s order for appellant to show cause as to why he should not be held in contempt).

<sup>119</sup> See 744 F2d at 573 (addressing findings that were not labeled as a sanction and holding these type of findings did not qualify as an appealable “final decision” under § 1291).

<sup>120</sup> *Seymour v Hug*, 485 F3d 926, 929 (7th Cir 2007). See also *Clark Equipment v Lift Parts Manufacturing Co*, 972 F2d 817, 820 (7th Cir 1992).

<sup>121</sup> See *Bolte*, 744 F2d at 573.

<sup>122</sup> *United States Steel*, 601 F2d at 1273, quoting *SEC v Naftalin*, 460 F2d 471, 475 (8th Cir 1972).

<sup>123</sup> See *Bolte*, 744 F2d at 572–73.

<sup>124</sup> See note 118.

sanction. This similarity would seem to violate the animating idea behind the “review judgments” rule that something significant distinguishes judgments from findings such that appellate review is only appropriate for the former. Hence, applying the “review judgments” rule in this context would be a highly formalistic exercise. In contrast, a simple, bright-line rule that denied appellate review to nonmonetary sanctions would uphold the integrity of the “review judgments” rule.

2. A literal interpretation of the “never appealable” circuit’s cases results in an overly narrow approach.

In order to refute a strict reading of the “never appealable” circuit’s approach, it is necessary to move past the “sometimes appealable” circuits’ conclusory rejection of this position.<sup>125</sup> In attempting to formulate a more nuanced rebuttal, it is necessary first to address how denying appellate review to nonmonetary sanctions is inconsistent with the mandates of Rule 11. Not only does Rule 11 explicitly permit nonmonetary sanctions,<sup>126</sup> but it also requires all sanctions to be accompanied by an order “describ[ing] the sanctioned conduct and explain[ing] the basis for the sanction.”<sup>127</sup> Since the purpose behind this requirement is presumably in part to facilitate appellate review, it would be odd and wasteful to extend this requirement to nonmonetary sanctions if these types of sanctions were unreviewable.<sup>128</sup>

Also, it appears upon closer examination that the policy rationales Judge Posner advances in *Bolte* only weakly support this narrow view of reviewability. The generic concern about congested appellate dockets is more relevant to refuting the “always appealable” circuits’ expansive position as opposed to the “sometimes appealable” circuits’ more focused approach, which significantly limits the number of appeals by requiring findings to be explicitly labeled as a sanction.<sup>129</sup> Judge Posner’s unease with one-sided presentations of appeals in this context is also overblown. This difficulty has seemingly been overcome in appeals of sanctions with fines payable to the court, a type of

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<sup>125</sup> See, for example, *Bowers v National Collegiate Athletic Association*, 475 F3d 524, 543 (3d Cir 2007) (discounting the “never appealable” circuit’s approach as inconsistent with the majority authority on this issue).

<sup>126</sup> See note 13 and accompanying text.

<sup>127</sup> FRCP 11(c)(6).

<sup>128</sup> This seems particularly strange since the Rules added additional requirements for monetary sanctions in Rule 11(c)(5) yet clearly neglected to distinguish between monetary and non-monetary sanctions in Rule 11(c)(6).

<sup>129</sup> See, for example, *Precision*, 315 F3d at 1352–53. Limiting appeal to explicitly labeled sanctions will also significantly limit the concern about the “breathtaking expansion” of appellate review to remarks made about nonattorneys.

appeal presumably consistent with the “never appealable” circuit’s requirement of monetary liability.<sup>130</sup>

Furthermore, the cases that Judge Posner cites in *Bolte* are not, as he admits, directly on point<sup>131</sup> and in fact do not support a broad reading of the holding in *Bolte* limiting appeals to monetary sanctions. These cases are much better categorized as concerning the appealability and hence the proper timing of appeal as opposed to the issue of reviewability of orders without any binding effect.<sup>132</sup> The courts in these cases emphasized that some further penalizing action had to be taken, either on behalf of the parties or the lower court, to make the contested order an appealable “final decision” under § 1291.<sup>133</sup> Particularly in the context of cases dealing with civil contempt, the courts clearly did not interpret a finding of contempt as the actual or intended sanction<sup>134</sup> but rather anticipated the imposition of a jail sentence or fine.<sup>135</sup> In contrast, a nonmonetary sanction is the final action of a district court on the issue of attorney misconduct and the reprimand by itself serves as the sanction.

The contention that the “review judgments” rule is rendered formalistic if used to justify the reviewability of nonmonetary sanctions is also ultimately unconvincing, as it fails to recognize the differences between findings and sanctions. While findings of misconduct may on occasion contain harsh criticisms similar to those included in sanction orders, judges will often choose to label findings of misconduct as sanctions in only the most egregious of cases.<sup>136</sup> Additionally, a more flexible approach to defining sanctions that does not rely solely on the explicit labeling of sanctions would help minimize the sense of empty formalism. The Ninth Circuit’s approach, which allows appeal when a judge finds that an attorney violated a specific rule, would do a great deal to help recognize those types of findings of misconduct that are particularly damaging to an attorney’s reputation and hence would diminish the impression that the distinction between findings and sanctions rests on formalistic rules. Moreover, a rule requiring the judgment to have a binding effect would seemingly run into similar

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<sup>130</sup> See David Scharf, *The Settled Sanction: Post-settlement Appeal and Vacatur of Attorney Sanctions Payable to an Opponent*, 61 U Chi L Rev 1627, 1641 (1994) (arguing in a related context that lack of adversarial appeals should not be determinative on the issue of reviewability).

<sup>131</sup> See *Bolte*, 744 F2d at 573 (“We cannot find a case directly on point.”).

<sup>132</sup> See notes 27–28.

<sup>133</sup> See, for example, *United States Steel*, 601 F2d at 1273.

<sup>134</sup> See, for example, *Rosenfeldt*, 514 F2d at 611.

<sup>135</sup> See, for example, *United States Steel*, 601 F2d at 1273.

<sup>136</sup> It is also likely that a judge’s decision to render her findings of misconduct in the form of a highly formalized sanction will in most cases add substantially to the reputational harm suffered by the attorney as it will serve as a clear indication of the judge’s disapproval.

problems since appealing the imposition of a nominal monetary fine would have to be deemed more compelling than an appeal of a non-monetary sanction for unethical conduct.<sup>137</sup> Since both rules can at times appear formalistic, it would be preferable to have a bright-line rule that extended appellate review to nonmonetary sanctions given the potentially significant reputational harm at stake.

The “never appealable” circuit’s line of cases is therefore best read more narrowly as having only held that an attorney is limited to appealing findings of misconduct that qualify as a sanction. Since the “never appealable” circuit has not yet directly confronted an order explicitly labeling findings as a sanction, it is entirely reasonable to interpret the circuit’s assertions regarding the reviewability of non-monetary sanctions as dicta.<sup>138</sup> This interpretation would enable the “never appealable” circuit’s cases to coexist consistently with the more defensible approach to nonmonetary sanctions adopted by the “sometimes appealable” circuits.

#### IV. THE SOLUTION: ADOPTING THE FORMALITY/HARM APPROACH

In attempting to determine which findings qualify for appellate review under the “review judgments” rule, this Part builds upon the Ninth Circuit’s solution to the circuit split and proposes a new test: the formality/harm approach. The problem that this solution attempts to resolve is a narrow one: how best to define which findings qualify as sanctions. First, this Part sketches out the difficulties encountered in attempting to define the term “sanction.” Then, it rejects as too broad and too narrow two polar opposite approaches developed by judges in the courts of appeals addressing this issue. This Part then introduces the more successful Ninth Circuit’s approach, which allows appeal of certain unlabeled sanctions. Yet this approach is also deficient in some ways, leading to the proposed formality/harm approach. This solution is supported by its consistency with the Ninth Circuit’s definition of sanctions and its ability to provide needed appellate review to an additional set of findings.

##### A. Defining “Sanction”: A Deceptively Difficult Task

The task of defining “sanction” is far from easy. *Black’s Law Dictionary* defines a sanction as a “penalty or coercive measure that results from failure to comply with a law, rule, or order.”<sup>139</sup> Yet this gen-

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<sup>137</sup> See *Walker*, 129 F3d 831, 832 (5th Cir 1997).

<sup>138</sup> See notes 90–91 and accompanying text.

<sup>139</sup> *Black’s Law Dictionary* 1368 (West 8th ed 2004).

eral and broad definition of a sanction is of little use when attempting to draw a line between findings of misconduct and sanctions.

Developing a workable definition of a sanction does not become any easier when one looks to other possible sources of meaning. When a judge imposes sanctions pursuant to her inherent power, the definition of sanction is even less clear because the court does not act pursuant to a guiding legislative definition of sanctions to apply.<sup>140</sup> The multiple references to the term “sanction” contained in the Rules provide little assistance in discerning a meaningful definition of a sanction. While the Rules make it clear that sanctions can include nonmonetary directives,<sup>141</sup> they do not supply a clear definition, only briefly suggesting that nonmonetary sanctions may consist of “an admonition, reprimand, or censure.”<sup>142</sup> In the absence of any clear definition, courts have struggled to distinguish findings of misconduct from sanctions and have often justified their approach by relying on policy analysis.

#### B. Polar Opposite Approaches to Defining “Sanction”

The “sometimes appealable” circuits are the only circuits to have specified which findings of misconduct qualify as a sanction. These circuits have formulated two significantly different approaches, one endorsed by the First and Federal Circuits and the other developed in a dissenting opinion. Excluding for the moment the Ninth Circuit, the First and Federal Circuits have adopted a narrow bright-line test requiring that findings be expressly identified as a sanction.<sup>143</sup> On the other end of the spectrum exists an intent-based test that proceeds on a case-by-case basis. This test, developed in Judge Max Rosenn’s dissent in *In re Williams*, focuses on determining the judge’s intended purpose in making the contested findings.<sup>144</sup> Under the test, appellate review would be extended to findings intended to punish but would be denied

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<sup>140</sup> See notes 9–10 and accompanying text.

<sup>141</sup> See FRCP 11(c)(4).

<sup>142</sup> FRCP 11, Advisory Committee Notes to the 1993 Amendments. These terms are highly ambiguous. “Reprimand” is defined as “a form of disciplinary action—imposed after trial or formal charges—that declares the lawyer’s conduct improper but does not limit his or her right to practice law; a mild form of lawyer discipline that does not restrict the lawyer’s ability to practice law.” *Black’s Law Dictionary* 1329 (cited in note 139). “Censure” is defined as an “official reprimand or condemnation; harsh criticism.” *Id.* at 237. “Admonition” is defined as a “reprimand or cautionary statement addressed to counsel by a judge.” *Id.* at 52.

<sup>143</sup> See *Precision Specialty Metals, Inc v United States*, 315 F3d 1346, 1352–53 (Fed Cir 2003); *In re Williams*, 156 F3d at 92.

<sup>144</sup> See *In re Williams*, 156 F3d at 98 (Rosenn dissenting).

whenever the judge's intention was to stop misconduct or "control less offensive attorney misbehavior" such as cumulative questioning.<sup>145</sup>

The vast differences between these opposing approaches illustrate the shortcomings of each of the definitions proposed. The intent-based test is ad hoc and overinclusive. It is difficult to develop a clear and principled test that rests completely on discerning the district court judge's intent or identifying particularly damaging findings.<sup>146</sup> Given the uncertainty surrounding this test and the breadth of findings it may potentially cover, there is also a significant concern that the rule would chill candid speech by lower court judges.<sup>147</sup>

The First and Federal Circuits' bright-line test is certainly easier to administer, but this virtue also begets predictable weaknesses. The test's reliance on labeling is highly formalistic and completely ignores the substantive content of the findings.<sup>148</sup> Also, by allowing a district court judge to decide whether to label her findings as a sanction, this approach gives the judge the power to determine if her decision will be subject to appellate review.<sup>149</sup> Granting district court judges this authority seems particularly problematic in this context since harshly worded findings of misconduct are often made in a heated litigation environment. Therefore, it might be especially useful to have the findings reviewed by a disinterested appellate court far removed from this heavily charged atmosphere.

By tying appellate review completely to labels, the bright-line approach ensures that some findings that cause substantial reputational damage will escape appeal. While a judge's decision to sanction explicitly an attorney likely carries significant weight, in many situations a judge will do equivalent or greater damage by concluding that an attorney took part in highly dishonest or unprofessional conduct. Hence, the First and Federal Circuits' bright-line approach is considerably

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<sup>145</sup> See *id.* (arguing that this test would enable the district court to "retain the power to comment, sternly when necessary, on a lawyer's performance").

<sup>146</sup> See *id.* at 91 (majority) (noting the difficulty of assessing subjective intent in this heated context). Additionally, the absence of such a rule will likely lead to a significant rise in litigation. See *id.* This is particularly troublesome considering that appellate dockets are already congested.

<sup>147</sup> This chilling effect will operate to restrict judicial commentary due to judges' desire not to be overturned on appeal. This desire might be particularly strong in this context since judges likely loathe to have their findings overturned on appeal when they believe the attorney has engaged in egregious misconduct and displayed a disrespect towards the adverse party and the judge. Compare *Clark Equipment Co v Lift Parts Manufacturing*, 1987 WL 19150, \*1 (ND Ill) (describing that the court was "shocked by the [attorneys'] conduct," which included "attempted frustration of the court's jurisdictional power" and "deliberate disobedience of court orders").

<sup>148</sup> See *In re Williams*, 156 F3d at 97 (Rosenn dissenting) (arguing that it makes little sense to allow an attorney to appeal a nominal fine while denying the appeal of highly damaging findings of misconduct).

<sup>149</sup> See *id.* at 99.

underinclusive, leaving many attorneys significantly harmed and without recourse.

### C. A Step in the Right Direction: The Ninth Circuit Approach

The Ninth Circuit has managed to forge a middle ground in between these unsatisfying approaches. While the Ninth Circuit allows appeal of findings expressly labeled as sanctions,<sup>150</sup> it has supplemented this approach with an additional rule that expands the universe of findings subject to appeal.<sup>151</sup> The Ninth Circuit's standard permits an attorney to appeal an order that finds that the attorney violated a specific rule.<sup>152</sup> These types of findings of misconduct are said to constitute a *per se* sanction.<sup>153</sup>

In assessing whether these findings of misconduct qualified as a sanction, the Ninth Circuit reasoned that the essential features of a sanction were its degree of formality and its effect on the party reprimanded.<sup>154</sup> A finding of a specific rule violation is much more formal than a judge's general expression of disapproval. This type of finding of misconduct also has much the same effect as an explicitly labeled sanction since the finding of misconduct will damage the attorney's reputation and possibly subject her to disciplinary action at the state bar.<sup>155</sup> Furthermore, a rule recognizing these types of findings as sanctions would not undermine the policy considerations that the First Circuit felt weighed in favor of a strict bright-line rule.<sup>156</sup> Such a rule would not engender any significant line-drawing problems, as it clearly delineates the narrow set of findings subject to appellate review. The rule therefore would not chill judicial frankness since judges would not be operating under uncertain reviewability standards.

Even though this rule helps extend appellate review to many aggrieved attorneys, it falls short under many circumstances. Just as it was easy for a judge to evade appellate review under an explicit labeling approach, it would be similarly easy for a judge to avoid making findings of specific rule violations. For example, a judge could instead issue an opinion containing findings of misconduct that either detailed the conduct that violated the rule or expressed her disapproval in more general terms. In either case, the attorney would again be left without any access to appellate review.

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<sup>150</sup> See *Weissman*, 179 F3d at 1200.

<sup>151</sup> See *Talao*, 222 F3d at 1137–38 (9th Cir 2000).

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 1138.

<sup>155</sup> See *Talao*, 222 F3d at 1138.

<sup>156</sup> See notes 59–61 and accompanying text.

#### D. Solving the Circuit Split: A Formality/Harm Approach

Despite the limitations of the Ninth Circuit's test, it is possible to avoid the pitfalls of this approach while building on its basic framework. A key to expanding upon the Ninth Circuit approach is to appreciate its crucial insight into the importance of formality and harm. But, analysis of these characteristics need not be limited solely to the content of the findings. Instead, an appellate court should look for these two integral characteristics in both the specific wording of the findings and the context in which they were made.

##### 1. A new set of per se sanctions.

Looking at the context in which courts make findings of misconduct reveals a set of circumstances that provide a natural springboard for modifying the Ninth Circuit approach. The question of reviewability of findings commonly arises in situations where the district court's original imposition of sanctions is overruled on a motion for reconsideration or on appeal.<sup>157</sup> In these cases, the impact of the district or appellate court's decision is typically limited to the sanction judgment and therefore the original district court opinion is often left unaltered and available to the public. In many cases, the judge subsequently declines to vacate the original opinion.<sup>158</sup> To the dismay of the attorney involved, these opinions typically contain detailed and strongly worded findings of misconduct,<sup>159</sup> which were originally employed to support the imposition of monetary sanctions.

Echoing the Ninth Circuit approach, findings made originally in support of later-overturned sanctions should qualify as per se sanctions and therefore be subject to appellate review. This approach extends the reach of the Ninth Circuit test while respecting its emphasis on formality and harm.

##### 2. Applying the contextualized formality/harm approach.

The requisite formality of findings of misconduct is apparent from examining their content and the context in which they are made. Under the circumstances described above—situations where the district court's original imposition of sanctions is overruled on a motion for reconsideration or on appeal—a judge made the findings with the

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<sup>157</sup> See note 17.

<sup>158</sup> See *In re Williams*, 156 F3d at 88–89; *Bolte*, 744 F2d at 572.

<sup>159</sup> See, for example, *In re Williams*, 156 F3d at 88 (describing the attorneys' conduct as "obstructionist and unjustified"); *Bolte*, 744 F2d at 572 (finding that the attorney's conduct was "reprehensible"); *Sullivan*, 395 F2d at 956 (describing the attorney's violation of five different canons of ethics).



deliberate intention of specifying the precise misconduct she originally concluded warranted sanctioning. Hence, these findings of misconduct, made for a particular, narrow purpose, are similar to findings of a specific rule violation, which indicates that the court is not just “generally expressing its disapproval of a lawyer’s behavior.”<sup>160</sup> Additionally, these findings are made within the very formal context of explicitly imposing sanctions. Often, sanctions are imposed only after a formal hearing takes place.<sup>161</sup> Then when the original sanctions are later overturned, the district court judge frequently makes an explicit choice not to vacate the findings.<sup>162</sup> Therefore, it appears that such findings have formal qualities and “bear[] a greater resemblance to a reprimand than to a comment merely critical of inappropriate attorney behavior.”<sup>163</sup>

The harm that this type of finding can inflict on an attorney’s reputation is of a similar magnitude to that caused by findings of a specific rule violation. Since the district court judge takes the drastic step of imposing sanctions, it is likely that the misconduct described in the order is very severe.<sup>164</sup> The finding supporting the imposition of a sanction will also likely be lengthy and detailed since the district court judge will anticipate appellate review and will seek to create a record to justify her choice of sanctions. These considerations weigh heavily in favor of the conclusion that such findings of misconduct may severely damage an attorney’s reputation.

It might be contended, however, that findings of specific rule violations are distinguishable from those made in support of later-overturned sanctions, since the latter were clearly not intended to serve as a sanction given that the judge imposed other sanctions.<sup>165</sup> First, this contention ignores the possibility that the original sanction was not the only intended sanction. It is possible that the findings serve a dual purpose: supporting the explicit sanction while themselves serving as a detailed public reprimand. Even if this possibility is rejected, the objection fails to examine the situation from the correct temporal perspective. While

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<sup>160</sup> *Talao*, 222 F3d at 1138.

<sup>161</sup> See, for example, FRCP 11. Unfortunately, this approach does very little to help with the most egregious abuse of a district court’s sanctioning power: criticizing the attorney without labeling it as a sanction and not affording the attorney due process to appeal this sanction.

<sup>162</sup> See, for example, *Bolte*, 744 F2d at 572 (explaining that the judge declined to dismiss his determination of misconduct even though the parties settled and that the case itself was dismissed).

<sup>163</sup> *Talao*, 222 F3d at 1138.

<sup>164</sup> While an attorney will have been vindicated to some extent by the withdrawal of the original sanction, this decision likely only reflects the judgment that the particular type of sanction imposed was not justified. In fact, it is entirely possible that the sanctions were thrown out on the basis of some procedural defect that had nothing to do with the substantive merits of the original sanction decision.

<sup>165</sup> Compare *Weissman*, 179 F3d at 1200 (explaining that the findings themselves were not intended as a sanction, rather they were only meant to support a different sanction).

the findings may serve merely as support when the original sanction was imposed, it is clear that after the sanction is overturned, the findings can no longer serve this same supportive purpose. Hence, the analysis should focus instead on the time at which the judge refused to vacate the findings. At this point in time, it is fair to infer that the judge intended to impose a type of sanction in the form of a public reprimand.<sup>166</sup>

### 3. Policy rationales supporting the adoption of the formality/harm approach.

In much the same manner as the Ninth Circuit test, the formality/harm approach will achieve the policy oriented goals attained by the First and Federal Circuits' bright-line test. This approach will apply in a set of well-defined circumstances and thus retain much of the clarity of a bright-line rule. Also, the rule will apply only to findings that the judge originally anticipated would be reviewed, such as those in support of monetary sanctions; hence judicial candor will not likely be influenced by the possibility of appellate review under this modified approach. In addition, the detailed set of findings made in support of the original sanctions will further help mitigate the difficulty of a one-sided appeal process. Furthermore, there is little concern that the rule will presage a "breathtaking expansion in appellate litigation" since it is naturally limited by the number of sanctions overturned on reconsideration or appeal.<sup>167</sup>

Another important advantage of the formality/harm approach is that it helps to minimize the potential for opportunistic behavior by district court judges. A judge only makes two decisions relevant to the applicability of the formality/harm approach: the decision regarding the imposition of the original sanction and the decision concerning vacatur of the findings. The latter decision is not particularly important because at that stage the judge must either accept appellate review or rule favorably for the attorney. In regards to the former decision, it seems much less likely that this decision will be significantly influenced by the possibility of future appellate review of findings than the decision whether to include a finding of a specific rule violation.<sup>168</sup>

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<sup>166</sup> See *Bolte*, 744 F2d at 573. In this sense, the formality/harm approach can also be viewed as in some sense fulfilling the goals of a more intent-based approach. See notes 144-43 and accompanying text.

<sup>167</sup> In this regard it is also important that these cases involved conduct originally thought serious enough to merit sanctions. This judgment will likely serve a filtering function that will help ensure that additional cases brought under this rule will involve findings of misconduct significantly damaging to an attorney's reputation.

<sup>168</sup> See Part IV.C.

The reduction of opportunistic judicial behavior is particularly important at the stage where the judge decides whether to vacate the findings. At this juncture, choosing not to vacate—and hence avoiding appellate review—might be especially appealing, convenient, and harmful. In any of these cases, the district court judge clearly thought the misconduct sufficiently egregious to warrant sanctions and likely developed strong feelings during what was presumably a very heated and contentious litigation environment. If the sanctions are later overturned by an appellate court, the district court judge might very well be dissatisfied with the outcome and concerned that the attorney will not be properly punished. At this point, denying the attorney's motion to vacate the opinion might seem very attractive. The opinion will serve as a form of public reprimand and will conveniently not be subject to appellate review. This seems particularly worrisome since an appellate court would have already ruled that the findings did not support the imposition of the original sanctions, therefore leaving it unclear as to whether any other punishment would be justified. The formality/harm approach would eliminate this troubling possibility.

Lastly, the inherent flexibility of the formality/harm approach points to the possibility that courts may in the future employ the rule to adopt more categories of *per se* sanctions. The Ninth Circuit and this Comment have merely identified two sets of findings that have the requisite formality and cause sufficient harm to qualify as *per se* sanctions. In the tradition of the common law, courts could hopefully build upon these two categories and react to changing circumstances by introducing and adopting new categories of sanctions slowly over time. In order to maintain a meaningful distinction from the “always appealable” circuits’ approach, these courts should not only stringently apply the formality and harm requirements but should also pay close attention to the policy considerations outlined in support of the *per se* sanctions advocated in this Comment. If this approach is faithfully adopted, it would do much to introduce a greater degree of rationality and transparency to the hazy world of nonmonetary sanctions and would likely lead to a more balanced approach to appellate review.

#### CONCLUSION

Having resolved the doctrinal confusion regarding the applicability of the “review judgments” rule and the reviewability of nonmonetary sanctions, it is clear that the task at hand is to define correctly which findings of misconduct qualify as sanctions. The adoption of the formality/harm approach solves this difficult question in a manner that is both doctrinally sound and justified on policy grounds. By avoiding the pitfalls of more extreme approaches, this Comment's proposal is able to build successfully on the Ninth Circuit's test in or-

der to achieve a more balanced solution. The proposed approach would treat all findings originally made in support of later-overturned sanctions as *per se* sanctions. This approach pays close attention to the two essential characteristics of sanctions: their formality and the degree of harm they cause. It is therefore able to remain true to the underlying logic of the Ninth Circuit test while also achieving some of the goals of a looser intent-based test. The parameters of the rule are clearly defined, which makes the rule simple to implement and its application easy to predict. More so than any alternative, the test substantially reduces the ability of district court judges to act opportunistically to avoid appellate review. Additionally, the formality/harm approach provides a guiding principle for courts in the future to expand the reach of appellate review further in this context by recognizing other categories of *per se* sanctions.