APPEALING FROM JUDICIAL SCOLDINGS

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I. INTRODUCTION

Assume for a moment that you are a lawyer whose alleged litigation conduct has notably disturbed the trial judge presiding over your case. In an order granting one of your opponent's motions, the judge writes that your conduct in discovery "violated the integrity of the judicial system,"

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opines that you acted "willfully in bad faith" and did so for "oppressive reasons," and asserts that you made material misrepresentations to the court in this matter and to another court in a parallel proceeding.[1] Although the judge fortunately declined to impose a monetary sanction, you worry that the opinion will harm your reputation.[2] You share the view expressed by the court in *Precision Specialty Metals, Inc. v. United States*, that "[a] lawyer's reputation is one of his most important professional assets" and that "a reprimand may have a more serious adverse impact upon a lawyer than the imposition of a monetary sanction."[3] To your further dismay, the court's order, although unpublished, attracts the attention of the legal media and is reported in an article published on a popular website.[4] Reasonably believing that the judge erred in so strongly criticizing your conduct, you would like to appeal the damning order to defend or restore your professional reputation. Will you be able to do so? In evaluating your appellate prospects, does it matter whether the court designated its criticism as a reprimand or sanction, or that the criticism underpins a specific finding of professional misconduct?

Alternatively, assume you are representing the plaintiffs in a dispute over the division of a substantial estate.[5] In ruling on the defendants' motion for sanctions, the trial court accuses you of making a "ridiculous" claim in one count of the complaint you drafted and, regarding the allegations in another count, remarks that "no competent attorney" could have considered the claim to be valid based on information available at the time.[6] With respect to your deposition examination of an elderly and infirm witness, the court labels your questioning "harsh and painful" and laments

[1] Costa & Grissom Mach. Co. v. Qingdao Giantway Mach. Co., No. 1:08-CV-2948-CAP, slip op. at 10, 41 (N.D. Ga. Dec. 2, 2009).

[2] Although in our hypothetical case the court declined to sanction the lawyer, the *Costa & Grissom* court did impose monetary sanctions against counsel. *Id.* at 46.

[3] 315 F.3d 1346, 1353 (Fed. Cir. 2003); *see also* Williams v. United States (*In re* Williams), 156 F.3d 86, 90 (1st Cir. 1998) (stating that "a lawyer's professional reputation is his stock in trade, and blemishes may prove harmful in a myriad of ways"); Walker v. City of Mesquite, 129 F.3d 831, 832 (5th Cir. 1997) (asserting that "one's professional reputation is a lawyer's most important and valuable asset").

[4] *See, e.g.*, Janet L. Conley, *Federal Judge Blasts Attorneys for 'Bad Faith,'* Feb. 10, 2010, http://www.law.com/jsp/article.jsp?id=1202443020590 (reporting magistrate's recommended award of attorney's fees, costs and expenses as a sanction on referral from district judge).

[5] Transcript of Proceedings at 125, Estate of Cohen v. Cohen, No. BER-C-134-08 (N.J. Super. Ct. Ch. Div. June 9, 2010).

[6] *See id.* at 139–41.

that this was but one example of the times that your conduct "crossed the boundary of appropriate litigation tactics."[7] The judge awards the defendants their attorneys' fees as a sanction. For many good reasons, however, you vehemently disagree with the judge's assessment of your performance. May you appeal the judge's order to request that an appellate court expunge the trial court's unflattering comments about your professional competence and conduct? Does the result change if the client settles and pays the defendants' attorneys' fees?

Finally, for now, consider a case in which a trial court is angered by your conduct and specifically delineates the bases for its displeasure in a written order, including harsh language implying that you may have violated rules of professional conduct. Rather than imposing sanctions of any kind, however, the judge either directs the court clerk to send a copy of the order to disciplinary authorities in your state or mails the order to disciplinary authorities herself. May you appeal from the order on the basis that the court's referral to disciplinary authorities is tantamount to a sanction, or is an appeal out of the question because the referral is equivalent to a show cause order, which is generally not appealable?[8] Are your appellate prospects enhanced if the court designates the referral to professional authorities as a sanction?

Depending on the jurisdiction and the characterization of the court's language, lawyers who are concerned about potential harm to their professional reputations as a result of judicial scoldings may or may not be entitled to appeal. Lawyers' dilemmas are perhaps most acute in federal cases, since (1) federal district courts publish many more orders and opinions than do state trial courts; (2) district court decisions are published in Westlaw and LexisNexis databases with far greater frequency than are state trial court decisions; and (3) almost all federal district court documents are available through PACER,[9] while many state docketing systems are not

[7] *See id.* at 125.

[8] *Compare* Goldstein v. St. Luke's-Roosevelt Hosp. Ctr. (*In re* Goldstein), 430 F.3d 106, 111 (2d Cir. 2005) (accepting jurisdiction over lawyer's appeal of referral based on specific findings of misconduct to disciplinary authorities because the referral "was in the nature of a sanction"), *with* Teaford v. Ford Motor Co., 338 F.3d 1179, 1181 (10th Cir. 2003) ("Because the referral letter reflects only the judge's suspicion that [ethics] violations may have occurred, it is analogous not to a censure or reprimand but to an order to show cause why sanctions should not be imposed. Such orders are not appealable.").

[9] PACER is the acronym for Public Access to Court Electronic Records, an electronic public access service operated by the Administrative Office of the United States Courts.

yet on-line. In short, federal decisions chastising lawyers are more likely to be discovered and thus to be considered harmful by their subjects, in turn increasing the desire to appeal. Nonetheless, state courts have also wrestled with lawyers' right to appeal from judicial scoldings.[10]

Lawyers' ability to appeal from judicial scoldings is a contentious and conflicting area of the law of lawyering and appellate practice, yet it has almost totally escaped scholarly attention. The problems here are practical ones. The ability to appeal from a trial or lower appellate court's harsh criticism may matter greatly to lawyers who prize their good professional reputations and worry that a court's depreciatory language may cost them valuable representations or desirable career opportunities. An adversary may use an opinion that is inordinately critical of a lawyer to oppose the lawyer's pro hac vice admission in litigation or to argue that the lawyer is unsuited to serve as lead counsel for plaintiffs in a class or collective action. At the same time, appellate courts are struggling to manage heavy dockets occupied by matters that many litigants might reasonably perceive to be more important than protecting lawyers' professional reputations or business models. Moreover, appellate courts do not want to chill lower courts' appropriate exercise of judicial candor by empowering chastened lawyers to conscript them into service as civility or demeanor police.[11] Striking the right balance is difficult.

Looking ahead, Part II examines lawyers' standing to appeal from

[10] *See, e.g.*, State v. Perez, 885 A.2d 178, 188–89 (Conn. 2005) (concluding that a lower court's finding that a lawyer violated an ethics rule was a disciplinary sanction tantamount to a reprimand, thus implicating due process concerns, but that the lower court's "pointed and strong" criticisms of the lawyer could not reasonably be so characterized); Cities Serv. Co. v. Gulf Oil Corp., 976 P.2d 545, 547–49 (Okla. 1999) (determining that lawyers aggrieved by trial judge's comments lacked standing to appeal); McCollough v. Tex. Pub. Util. Comm'n, No. 13-07-00624-CV, 2009 WL 2543153, at *5 (Tex. App.—Corpus Christi Aug. 20, 2009, no pet.) (mem. op.) (finding that "mild phrasing" used to criticize lawyer was not sufficiently harsh to support an appeal and that because the administrative agency declined to impose monetary sanctions accompanying its criticism, the lawyer became a prevailing party with no right to appeal).

[11] Appellate courts sometimes assume the role of civility or demeanor police, however, even though the parties to the underlying dispute have not asked them to do so. *See, e.g.*, *In re* United States, 614 F.3d 661 (7th Cir. 2010) (granting writ of mandamus and reassigning the case to another district judge after the district judge then-assigned demonstrated "a degree of anger and hostility toward the government" that exceeded any provocation revealed in the record; the judge "repeatedly accused the government lawyers of lying" and "threatened to conduct hearings concerning misconduct by the prosecutors"); *see also* Ameet Sachdev & Ray Gibson, *Panel: Judge Ejected for 'Hostility,'* CHI. TRIB., July 31, 2010, at 4 (reporting the Seventh Circuit's decision).

judicial scoldings and some key jurisdictional or doctrinal issues relevant to such appeals, including prevailing parties' inability to appeal from favorable decisions, the final judgment rule, the collateral order doctrine, and petitions for writs of mandamus. These doctrines or considerations are broad and important enough to support articles of their own and, accordingly, Part II examines them only briefly and in very general fashion.

Part III addresses courts' varying approaches to appellate review of judicial scoldings of lawyers. Categorizing these cases is something of an awkward exercise; there is not uniformity among courts and commentators on what cases fall into which analytical category. In any event, this Part first addresses the essential position that lawyers may not appeal from judicial scoldings that are nothing more than routine commentary on the lawyers' conduct. Second, it examines the conservative position that lawyers may appeal only monetary sanctions. Third, it discusses the moderate approach or position, which accommodates lawyers' appeals from judicial criticism (a) expressly designated as a reprimand or sanction; or (b) that constitutes an explicit finding of misconduct. Fourth, it examines what is sometimes described as the liberal approach to appellate jurisdiction, which permits appeals by lawyers even if the offending order is not explicitly designated as a reprimand or sanction. Importantly, courts in this category still require specific findings of misconduct by a lawyer to support an appeal. The occasional claim by courts and commentators that courts in this category consider judicial scoldings to be always appealable is incorrect. Finally, this Part discusses appeals from courts' orders or other communications referring lawyers to state disciplinary authorities.

Part IV inquires into what the correct approach to appeals from judicial scoldings is or might be. After rejecting the narrow approach permitting appeals only from monetary sanctions, this Part asserts that the approaches chosen by most courts, which permit lawyers to appeal from judicial criticism either explicitly designated as a reprimand or sanction, or accompanied by specific findings of misconduct, are equally appropriate. Both approaches suitably balance policy considerations and should be equally embraced by courts. To these two categories, this Part adds a third to permit lawyers to appeal orders directing them to perform an activity as a form of sanction. Such activities include attending mandatory ethics courses or programs, preparing or delivering continuing education programs on subjects related to their alleged misconduct, or writing articles with a professional responsibility focus. Mandated activities of this sort are monetary sanctions in fact if not in name by virtue of the time requirements

they impose on the lawyers. Failing that, they clearly constitute a formal reprimand.

II. STANDING TO APPEAL AND JURISDICTIONAL ISSUES

Although appeals seem to follow adverse trial court results as surely as night follows day, the right to appeal is, in fact, relatively constrained.

A. The Threshold Issue of Standing

To start, a person seeking to appeal must have standing to do so.[12] Standing distills to the legal right to set judicial machinery in motion.[13] In other words, standing is a prerequisite to a court's exercise of subject matter jurisdiction.[14] To invoke federal subject matter jurisdiction, for example, the standing doctrine requires (1) an injury-in-fact, meaning an invasion of a legally-protected interest that is (a) concrete or particularized and (b) actual or imminent; (2) a causal connection between the injury-in-fact and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision by the court.[15] Some state courts employ the identical test for standing,[16] or a test that is nearly identical,[17] while others impose different standards.[18] Regardless, standing is not some

[12] Gold v. Rowland, 994 A.2d 106, 121 (Conn. 2010) (quoting Fort Trumbull Conservancy, LLC v. Alves, 943 A.2d 420, 425 (Conn. 2008)).

[13] *Id.* (quoting Briggs v. McWeeny, 796 A.2d 516, 526 (Conn. 2002)).

[14] *See* Schmidt v. Catholic Diocese of Biloxi, 18 So. 3d 814, 826 (Miss. 2009) ("Standing is an aspect of subject matter jurisdiction."); Ferer v. Aaron Ferer & Sons Co., 770 N.W.2d 608, 613 (Neb. 2009) ("Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court.").

[15] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (quoting several cases).

[16] *See, e.g.*, Cable v. Union Cnty. Bd. of Cnty. Comm'rs, 769 N.W.2d 817, 825–26 (S.D. 2009) (articulating standing elements under South Dakota law and repeatedly citing and quoting *Lujan*, 504 U.S. at 560–61).

[17] *See, e.g.*, Knox v. State, 223 P.3d 266, 278 (Idaho 2009) ("To satisfy the requirement of standing litigants must allege an injury in fact, a fairly traceable causal connection between the claimed injury and the challenged conduct, and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury."); Village of Chatham v. Cnty. of Sangamon, 837 N.E.2d 29, 39–40 (Ill. 2005) ("In Illinois, standing is shown by demonstrating some injury to a legally cognizable interest. The claimed injury, whether actual or threatened, must be distinct and palpable, fairly traceable to the defendant's actions, and substantially likely to be prevented or redressed by the grant of the relief requested." (citation omitted)).

[18] *See, e.g.*, State *ex rel.* Bd. of Regents for the Okla. Agric. & Mech. Colls. v. McCloskey Bros., 227 P.3d 133, 144 (Okla. 2009) (stating that an initial inquiry into standing must reveal that

procedural nicety or technicality; rather, it is essential to justiciability.

As a rule, courts hold that lawyers have standing to appeal from final orders imposing monetary sanctions against them provided that the sanctions have been fixed.[19] Lawyers are further entitled to appeal from contempt orders and from final orders imposing various non-monetary sanctions.[20] These are exceptions to the general principle that only a party to an adverse judgment may appeal from it, and they rest at least in part on the recognition that the "effective congruence of interests between clients and attorneys counsels against treating attorneys like other nonparties for purposes of appeal."[21] Courts' departure from the general rule that only parties may appeal from adverse judgments to permit lawyers' appeals in some circumstances may additionally be explained this way:

> [W]hen a court imposes a sanction on an attorney, it is not adjudicating the legal rights of the parties appearing before it in the underlying case. Instead, the court is exercising its inherent power to regulate the proceedings before it. Once that power to punish is exercised, the matter becomes personal to the sanctioned individual and is treated as a judgment against him.[22]

But with lawyers as with others, standing doctrine requires that a claimant have suffered a cognizable injury in order to seek judicial relief.[23] It is foreseeable that lawyers aggrieved by a court's criticism of their alleged conduct may have difficulty establishing an injury sufficient to confer standing to appeal.[24] Moreover, even if a lawyer is able to

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an actual injury has occurred, some relief for the harm can be given, and the interest to be guarded is within a statutorily- or constitutionally-protected zone).

[19] *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 2-372 to -373 (4th ed. 2008) (discussing federal court approach).

[20] Nisus Corp. v. Perma-Chink Sys., Inc., 497 F.3d 1316, 1319 (Fed. Cir. 2007).

[21] Cunningham v. Hamilton Cnty., 527 U.S. 198, 207–08 (1999) (discussing the appealability of a sanctions order issued against lawyer under FED. R. CIV. P. 37(a)).

[22] *Nisus Corp.*, 497 F.3d at 1319 (citations omitted).

[23] *See, e.g.*, Bd. of Cnty. Comm'rs v. Colo. Dep't of Pub. Health & Env't, 218 P.3d 336, 341 (Colo. 2009) (requiring "an injury in fact to a legally protected interest" to confer standing); Village of Chatham v. Cnty. of Sangamon, 837 N.E.2d 29, 39 (Ill. 2005) (basing standing on "some injury to a legally cognizable interest"); Krueger v. Zeman Constr. Co., 781 N.W.2d 858, 861 (Minn. 2010) ("Standing exists, if, among other things, the party has suffered an injury-in-fact.").

[24] *See, e.g.*, Barnhill v. United States, 11 F.3d 1360, 1371 (7th Cir. 1993) (observing that

demonstrate an injury-in-fact, an appeal from a judicial scolding may fail because the lawyer cannot satisfy other requirements for standing. An Oklahoma case, *Cities Service Co. v. Gulf Oil Corp.*, is illustrative.[25]

Cities Service arose out of litigation over an acquisition agreement.[26] Richard Funk and John Schmidt represented Gulf Oil in the underlying case.[27] The trial judge believed that Funk and Schmidt violated several in limine rulings.[28] Thus, she precluded Funk from questioning witnesses and from delivering closing argument.[29] The trial judge also halted Schmidt's closing argument and barred him from participating in post-trial proceedings.[30] The judge further described the lawyers' behavior as "contemptuous," but she never held them in contempt, nor did she impose monetary sanctions against them.[31] Funk and Schmidt sought appellate review of the judge's sanctions, which, along with her strong comments about their behavior during trial that were reported by a local newspaper, allegedly harmed their professional reputations.[32]

It is not apparent from the opinion what the trial judge said when faulting the lawyers' conduct; the lawyers described her comments as "vilifying," while the Oklahoma Supreme Court characterized them as "harsh" reflections on the lawyers' non-compliance with her orders.[33] Regardless, the trial judge's comments were neither orders nor sanctions, and thus did not constitute "appealable events" under the governing Oklahoma statute.[34]

Oklahoma standing doctrine requires (1) that a claimant have a legally-protected interest that was injured in fact, meaning that the injury is actual

lawyers could not show that they suffered a cognizable injury attributable to the district judge's criticism of their conduct); McCollough v. Tex. Pub. Util. Comm'n, No. 13-07-00624-CV, 2009 WL 2543153, at *5 (Tex. App.—Corpus Christi Aug. 20, 2009, no pet.) (mem. op.) (finding that "mild phrasing" used to criticize a lawyer's conduct was not "sufficiently harsh to vest in [the lawyer] a right to appeal").

[25] 976 P.2d 545 (Okla. 1999).

[26] *Id.* at 547.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 547 & n.1.

[30] *Id.*

[31] *See id.* at 547.

[32] *Id.*

[33] *Id.* at 547 & n.2.

[34] *See id.*

and concrete rather than conjectural; (2) a causal nexus between the injury and the challenged conduct; and (3) a likelihood, rather than mere speculation, that a favorable decision will redress the alleged injury.[35] While Oklahoma law recognized that a lawyer has standing separate from a client to appeal an order imposing monetary sanctions against the lawyer personally, the question of whether a lawyer has standing to appeal the imposition of non-monetary sanctions—here the trial court's limitation of Funk's and Schmidt's participation at trial—was one of first impression in Oklahoma.[36] Funk and Schmidt asserted that they had standing because they possessed legally-protected property interests in their professional reputations and the trial judge's rulings from the bench impaired those interests.[37] They further contended that they suffered pecuniary harm because their representation of Gulf Oil was limited by the trial court's sanctions orders and the injury to their reputations attributable to the trial judge's harsh comments would limit their ability to attract business in the future.[38] The *Cities Service* court was not persuaded.[39]

Assuming for the sake of analysis that Funk and Schmidt did enjoy a legally-protected interest in their professional reputations which was somehow harmed by the imposition of non-monetary sanctions, those injuries could not be remedied under the circumstances at hand.[40] The imposed sanctions consisted of limitations on the lawyers' ability to participate in the conduct of the trial, which was now concluded.[41] Focusing on the third element required for standing—the likelihood of redress by a favorable decision—the court could provide Funk and Schmidt with no remedy on appeal "other than a meaningless declaration" concerning their conduct.[42] The only other alternative was to order a new trial, but that remedy would be available only to Gulf Oil in its own right—not to Funk and Schmidt, who were not parties to the litigation.[43] "As a personal right," the *Cities Service* court noted, Funk and Schmidt as Gulf

[35] *Id.* at 547.

[36] *Id.* at 547–48.

[37] *Id.* at 548.

[38] *Id.*

[39] *See id.* (holding that the lawyers did not have standing to appeal because there was "no reasonable likelihood that the alleged harm would be redressed by a favorable opinion").

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

Oil's counsel were "not entitled to a new trial solely to vindicate perceived damage to their professional reputations."[44]

The court next turned to the lawyers' claim that the local newspaper's publication of the trial judge's critical comments and the fact of the sanctions impaired their ability to develop new business and thus conferred standing to appeal.[45] Even if it were to enter a decision favorable to the lawyers, the court observed, it was beyond its power to order the local media to publish that decision.[46] Because it was a "speculative contingency" that any such holding "would be deemed newsworthy by the local press, published and read by those who earlier read the so-called negative press coverage" the court reasoned, it was not likely that a favorable decision "would remedy the alleged harm to the lawyers' ability to attract new business."[47] If Funk and Schmidt thought that the trial judge's comments were "oppressive," their remedy was to file a judicial ethics complaint against her.[48] They did not, however, have standing to appeal.[49]

B. Decisions and Orders Versus Judicial Commentary and the Final Judgment Rule

Of course, even if a lawyer on the receiving end of a court's sharp criticism establishes standing to appeal, that does not necessarily mean that an appeal will lie. Appellate jurisdiction requires more than standing.[50] Among other considerations, there is the settled principle that courts review "decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations."[51] This principle is a manifestation of the larger doctrine that only a party that is aggrieved by a judgment may appeal from it.[52] For example, prevailing parties who have obtained the maximum relief

[44] *Id.* (emphasis omitted).

[45] *Id.* at 549.

[46] *Id.*

[47] *Id.*

[48] *See id.* (emphasis omitted).

[49] *Id.*

[50] *See, e.g.*, 28 U.S.C. §§ 1291, 1292, 1295, 1296 (2006) (specifying jurisdiction granted to federal courts of appeals).

[51] Williams v. United States (*In re* Williams), 156 F.3d 86, 90 (1st Cir. 1998).

[52] Matthew Funk, Comment, *Sticks and Stones: The Ability of Attorneys to Appeal from Judicial Criticism*, 157 U. PA. L. REV. 1485, 1489–90 (2009) (citing and quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980)); Robert B. Tannenbaum, Comment, *Misbehaving*

allowable are typically barred from appealing no matter how unsatisfying a lower court's reasoning may be.[53]

This approach to appellate review is further embodied in the final judgment rule, which generally confines appellate courts' jurisdiction to the review of lower courts' final decisions.[54] The final judgment rule is often statutorily-prescribed, as it is with respect to federal appellate courts.[55] The rule serves several important purposes, including preventing appellate courts from becoming overburdened with issues that may become moot upon the conclusion of cases at the trial court level, avoiding piecemeal litigation, reducing litigation delays caused by appeals in mid-stream, and protecting trial courts' authority and dignity by preventing appellate courts from regularly second-guessing trial judges' non-dispositive decisions.[56]

Regardless of the exact doctrinal basis, appellate courts commonly decline to review trial courts' criticisms of lawyers that fall under the rubric of judicial commentary as compared to a formal reprimand or sanction on the basis that there is nothing for them to review.[57] *Williams v. United*

Attorneys, Angry Judges, and the Need for a Balanced Approach to the Reviewability of Findings of Misconduct, 75 U. CHI. L. REV. 1857, 1861 (2008) (quoting *Roper*, 445 U.S. at 333).

[53] Tannenbaum, *supra* note 52, at 1861–62 (citing Mathias v. WorldCom Techs., Inc., 535 U.S. 682, 684 (2002)).

[54] *See* Commonwealth v. White, 910 A.2d 648, 653 (Pa. 2006) ("It is well settled that, as a general rule, appellate courts have jurisdiction only over final orders.").

[55] *See* 28 U.S.C. § 1291 (2008) (stating that "[t]he courts of appeals . . . shall have jurisdiction of appeals . . . from all final decisions of the district courts"); *id.* § 1295 (granting the United States Court of Appeals for the Federal Circuit exclusive jurisdiction over a variety of final decisions).

[56] R. Hewitt Pate, *Interlocutory Appeals*, *in* THE LITIGATION MANUAL: FIRST SUPPLEMENT 835, 836 (Priscilla A. Schwab ed., 2007).

[57] *See, e.g.*, Grant v. Metro. Gov't of Nashville & Davidson Cnty., Tenn. (*In re* Metro. Gov't of Nashville & Davidson Cnty., Tenn.), 606 F.3d 855, 861–63 (6th Cir. 2010) (rejecting a party's argument that a new trial order based on counsel's misconduct was reviewable as a sanctions order); Venesevich v. Leonard, 378 F. App'x 129, 130 (3d Cir. 2010) (declining to review magistrate's "direct rebuke" of a lawyer in an opinion because it did not constitute a sanction); Nisus Corp. v. Perma-Chink Sys., Inc., 497 F.3d 1316, 1320–21 (Fed. Cir. 2007) (explaining this view quite thoroughly); United States v. Ensign, 491 F.3d 1109, 1116–19 (9th Cir. 2007) (concluding that judge's comments in revoking lawyer's CJA appointment and pro hac vice admission were not reviewable); Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1168 (10th Cir. 2003) (stating that "only orders finding misconduct are appealable and not 'every negative comment or observation from a judge's pen about an attorney's conduct or performance'" (quoting United States v. Gonzales, 344 F.3d 1036, 1047 (10th Cir. 2003) (Baldock, J., dissenting))); Weissman v. Quail Lodge Inc., 179 F.3d 1194, 1200 (9th Cir. 1999) (finding that because the district court's derogatory comments were not designated as a reprimand, they were

States (*In re Williams*) is a leading case on point.[58]

Williams arose out of an adversary action in a bankruptcy proceeding filed by Lawrence Williams.[59] Department of Justice lawyer Charles Cannon and William Blagg, a lawyer with the IRS, represented the government in the adversary action.[60] A discovery dispute erupted and, after a hearing on the matter, the bankruptcy court imposed sanctions under Federal Rule of Civil Procedure 37(b)[61] on the government, Cannon, and Blagg for failing to timely produce certain documents to Williams.[62] In the opinion awarding sanctions, the bankruptcy judge ripped Blagg and Cannon, characterizing their discovery conduct as obstructionist and unjustified.[63] With respect to the lawyers' testimony at the sanctions hearing, the judge described Blagg's testimony as "pure baloney" and ranked Cannon's credibility and performance as a witness at roughly the same level as Blagg's.[64] As a sanction, the bankruptcy judge ordered Blagg and Cannon each to pay $750 (and not to seek indemnity from the agencies that employed them), and ordered the government to reimburse Williams for his attorneys' fees incurred in obtaining the documents at issue.[65] Blagg, Cannon, and the government moved for reconsideration.[66] In response, the bankruptcy judge vacated the sanction against Blagg but refused to vacate the sanctions against Cannon or the government, and further refused to retract his findings concerning the lawyers' misconduct.[67] Blagg, Cannon, and the government then appealed to the district court, which agreed that Blagg and Cannon had behaved improperly but found that Rule 37(b) sanctions were incorrectly awarded because the lawyers had not violated a formal court order when they failed to produce the subject

not independently reviewable); State v. Perez, 885 A.2d 178, 189 (Conn. 2005) (declining to review "pointed and strong" criticisms of lawyer that could not be characterized as a reprimand or other sanction).

[58] 156 F.3d 86 (1st Cir. 1998).

[59] *Id.* at 88.

[60] *Id.*

[61] FED. R. CIV. P. 37(b) (governing the failure to comply with a court order in discovery).

[62] *Williams*, 156 F.3d at 88.

[63] *Id.*

[64] *See id.* (quoting Williams v. United States (*In re* Williams), 181 B.R. 1, 5 (Bankr. D.R.I. 1995)) (internal quotation marks omitted).

[65] *Id.*

[66] *Id.*

[67] *Id.*

documents.[68] The district court accordingly annulled the monetary sanctions imposed against Cannon but refused to vacate the bankruptcy judge's factual findings, i.e., the criticisms of Blagg and Cannon expressed in the course of his opinion.[69] Blagg and Cannon then appealed to the First Circuit seeking only the vacation of the bankruptcy court's disparaging findings.[70]

The threshold question for the First Circuit was whether the bankruptcy judge's findings of fact attributing misconduct to the lawyers were appealable as a decision, order, judgment, or decree under the federal statutes conferring appellate jurisdiction in bankruptcy matters and over final decisions of district courts.[71] The court concluded that they did not and dismissed the lawyers' appeals as a result.[72]

At the outset, the *Williams* court noted that monetary sanctions were no longer at issue in the case, those having been erased either by the bankruptcy court or the district court, such that the legal significance of the bankruptcy court's criticisms was thus all-important.[73] Imposing sanctions against counsel is a serious matter and, accordingly, federal courts must make specific findings to support sanctions orders.[74] Here, the bankruptcy court's findings were "explicit and unflattering," and it was therefore understandable that Blagg and Cannon would dispute them.[75] Nevertheless, the court explained, it was "an abecedarian rule that federal appellate courts review decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning or explanations."[76] Blagg and Cannon attempted to sidestep this hurdle by invoking the principle that the imposition of a sanction is an order, and an appellate court with jurisdiction to review such

[68] *Id.* at 89 & n.1.

[69] *Id.* at 89.

[70] *Id.*

[71] *Id.* (citing 28 U.S.C. § 158(d) (1994), *amended by* 28 U.S.C. § 158 (2006); 28 U.S.C. § 1291 (1994)).

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *See id.* at 89–90.

[76] *Id.* at 90. The *Williams* opinion was written by Judge Bruce M. Selya, who is known for his extensive vocabulary. "Abecedarian" as used here is synonymous with "elementary" or "rudimentary." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2 (New Coll. ed. 1979).

an order must necessarily examine the underlying findings.[77] As the lawyers saw matters, the bankruptcy court's harshly-worded findings were "tantamount to a sanction in the form of a public reprimand" and therefore grounded appellate jurisdiction.[78] Unfortunately for them, the First Circuit disagreed.[79]

Although Blagg and Cannon believed that the bankruptcy court's findings harmed their professional reputations, their success in getting the monetary sanctions against them vacated undermined their appeal.[80] The bankruptcy court chose to impose monetary sanctions for their discovery misconduct, not issue a reprimand, and with those sanctions erased, the court lacked jurisdiction to consider the propriety of the challenged findings.[81] There was, quite simply, nothing for the court to review.[82]

Unbowed, Blagg and Cannon argued that the bankruptcy court's derogatory findings so sullied their professional reputations that they were a de facto sanction.[83] The First Circuit was sympathetic to this argument out of the recognition that "a lawyer's professional reputation is his stock in trade, and blemishes may prove harmful in a myriad of ways," but "not every criticism by a judge that offends a lawyer's sensibilities is a sanction."[84] Here, the bankruptcy court's criticisms of Blagg and Cannon clearly were not themselves a sanction, but instead served to justify monetary sanctions.[85] Never did the bankruptcy judge issue an express reprimand or otherwise indicate that his tongue-lashing of the lawyers was an element of the sanctions.[86]

Blagg and Cannon pressed on, arguing that a reprimand is among the sanctions available to a judge and even if a judge does not designate criticisms as a formal reprimand, stern language that reflects adversely on a lawyer's professional reputation should be treated as a reprimand and, by extension, a sanction.[87] The *Williams* court saw this argument as inviting it

[77] *Williams*, 156 F.3d at 90.
[78] *Id.*
[79] *See id.*
[80] *Id.*
[81] *Id.*
[82] *See id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 91.

to draw a line between routine judicial commentary on lawyers' performance, which would not be appealable, and "inordinately injurious" commentary that would.[88] This the court was unwilling to do.[89]

As a practical matter, any rule that purported to transform harsh judicial criticism into a de facto sanction would be nearly impossible to cabin.[90] Distinguishing routine findings from extraordinary ones based on the degree of abrasiveness could only be done on an ad hoc basis, and the court thought it impossible to formulate a test that would offer meaningful guidance to district courts and lawyers as to when criticism escalated to the point of becoming a sanction.[91] Equally concerning, if reputational injury were to be the guiding precept as Blagg and Cannon advocated, then parties, witnesses, and all other participants in the litigation process who were exposed to judicial criticism would be able to appeal if they could show that their slights had tangible consequences.[92] In short, adopting a de facto sanction theory would foreshadow a sweeping expansion of appellate jurisdiction.[93] That was simply not in the cards insofar as the *Williams* court was concerned.[94]

Another practical problem in the court's view arose from the reality that lawyers' appeals from unfavorable judicial findings would often be unopposed because the parties to the litigation in which the findings were made would have no interest in the outcome.[95] So it was in this case; Williams had not participated in the appeal because the outcome was inconsequential to him, and there was accordingly no reason to devote time or money to briefing or oral argument.[96] Any court hearing a lawyer's appeal would generally hear only one side of the story and would be deprived of the adversarial balance that is essential to the appellate process.[97]

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[88] *See id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* (quoting Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984)).

[93] *Id.* (quoting *Bolte*, 744 F.2d at 573).

[94] *See id.* at 93 (dismissing the appeal for want of appellate jurisdiction).

[95] *Id.* at 91.

[96] *Id.*

[97] *Id.*

Finally, policy considerations militated against adopting the lawyers' position.[98] The net result of accepting Blagg and Cannon's arguments would be the effective declaration of "open season on trial judges."[99] Having graphically headlined its concern, the court elaborated:

> If chastened attorneys can enlist appellate courts to act as some sort of civility police charged with enforcing an inherently undefinable standard of what constitutes appropriate judicial comment on attorney performance, trial judges are more likely to refrain from speaking and writing candidly. In our view, this chilling effect carries with it risks that are far greater than those associated with the evil of occasional overheated judicial commentary. Judicial candor is a trait strongly valued, both generally and in the sanctions context, and discouraging it will serve only to erode public confidence in the courts.[100]

All of the foregoing practice and policy considerations compelled the conclusion that a judge's derogatory comments about a lawyer, without more, do not constitute a sanction.[101] Trial judges are obligated to ensure the proper conduct of proceedings in their courts and must retain the power to comment—sharply when necessary—on lawyers' performance without having to wonder whether such comments will spark an appeal.[102] On lawyers' side of the coin, tolerating a trial judge's unkind comments has traditionally been among the rigors of trial practice.[103] Only when a judge's harsh words are expressly identified as a reprimand and thus a sanction is there a potential basis for appeal.[104] Critical comments made in the course of a trial court's functions, such as fact-finding or the writing of opinions, on the other hand, do not constitute a sanction and thus furnish no independent grounds for appeal.[105]

Commentators and courts often cite *Williams* for the proposition that in the First Circuit, judicial criticism must be designated as a formal

[98] *Id.*
[99] *Id.*
[100] *Id.* at 91–92.
[101] *Id.* at 92.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

reprimand to support appellate jurisdiction and, indeed, that was the approach on which the court settled.[106] As this discussion suggests, however, the decision equally illustrates appellate courts' general reluctance to second guess trial courts' criticisms of lawyers.

C. The Collateral Order Doctrine

Although well-entrenched, the final judgment rule is not absolute or insurmountable.[107] The collateral order doctrine affords would-be appellants a limited exception to the final judgment rule.[108] Described as "a haven of last resort" for litigants who are aggrieved by orders that do not terminate the underlying litigation,[109] the collateral order doctrine applies to a small class of rulings that do not end a case but which are appropriately deemed to be final.[110] To fit within that limited class, a decision must (1) be conclusive, (2) resolve important questions separate from the merits, and (3) be effectively unreviewable on appeal from a final judgment.[111] The criteria are stringently applied and the failure to meet any one of the three renders the doctrine inapplicable no matter how compelling the other factors may be.[112]

The collateral order doctrine is likely of little assistance to lawyers who wish to appeal a judge's stern criticism of them.[113] If the offending comments are identified as a form of sanction, the lawyers generally may appeal at the conclusion of the litigation.[114] The fact that the lawyers may

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[106] *See, e.g.*, Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1168 (10th Cir. 2003).

[107] *See* Ford Motor Co. v. Ferrell, 982 A.2d 1175, 1180 (Md. Ct. Spec. App. 2009) (discussing an exception to the final judgment rule).

[108] *Id.*

[109] Swanson v. DeSantis, 606 F.3d 829, 832 (6th Cir. 2010).

[110] Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 605 (2009) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–46 (1949)).

[111] *Id.* (quoting Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995)).

[112] N.J., Dep't of Treasury v. Fuld, 604 F.3d 816, 819 (3d Cir. 2010) (quoting *In re* Pressman-Gutman Co., 459 F.3d 383, 396 (3d Cir. 2006)).

[113] *See* New Pac. Overseas Group, Inc. v. Excal Int'l Dev. Corp., 252 F.3d 667, 669–70 (2d Cir. 2001) (concluding that order imposing sanctions against lawyer and client jointly under Federal Rule of Civil Procedure 37 was not appealable under the collateral order doctrine).

[114] *See* Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1167–68 (10th Cir. 2003) (discussing the three approaches adopted by federal circuits to determine the appealability of an order damaging only an attorney's professional reputation, and noting that only in the Seventh Circuit are offending comments deemed a sanction not appealable).

suffer reputational injury in the meantime is unfortunate but inconsequential for appellate purposes. Even if the parties were to settle the underlying case, the settlement ought not moot the lawyers' appeal,[115] especially if the lawyer is not a signatory to the settlement agreement.[116] If, on the other hand, the judge's criticism of counsel is not a form of sanction and therefore is not independently appealable, it is unlikely that it presents a question of sufficient importance to implicate the collateral order doctrine. For example, the collateral order doctrine generally does not accommodate appeals from orders compelling disclosure of attorney-client privileged materials even though the attorney-client privilege is of vital importance and broad public interest, and courts similarly require parties to wait until final judgment to vindicate other rights central to the adversary system, such as orders disqualifying counsel.[117] Given appellate courts' unwillingness to immediately take up such obviously important issues as the attorney-client privilege and the disqualification of counsel, it is quite a stretch to think that they would afford lawyers' alleged reputational injuries greater weight. Of course, different jurisdictions take different approaches, and it is possible that a particular court might determine that an order sanctioning a lawyer in the midst of litigation is an appealable final order.[118]

D. Writs of Mandamus

Appellate courts that decline to review lower courts' chastisements of lawyers on direct appeal sometimes comment that lawyers who believe that they were harmed by a lower court's criticism are not left without a remedy because they may petition for a writ of mandamus and request that

[115] *See, e.g.*, Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 133–34 (3d Cir. 2009) (agreeing that settlement did not moot appeal from sanction order); Indian Motocycle Co. v. Internal Revenue Serv. (*In re* Indian Motocycle Co.), 452 F.3d 25, 30 (1st Cir. 2006) (explaining that sanctions order refutes mootness because of its continuing affect on the person sanctioned); Obert v. Republic W. Ins. Co., 398 F.3d 138, 143 (1st Cir. 2005) (stating that although settlement mooted the sanctions imposed against the lawyers, the trial court's findings that the lawyers violated Rule 11 and state ethics rules were not moot).

[116] Lasar v. Ford Motor Co., 399 F.3d 1101, 1109 (9th Cir. 2005).

[117] Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 606 (2009).

[118] *See, e.g.*, Conterez v. O'Donnell, 58 P.3d 759, 761 & n.6 (Okla. 2002) (stating that "[a] mid-litigation sanction against a lawyer (rather than a party) for discovery-related misconduct is appealable," so long as the order conclusively determines the issue of sanctionability and sets the amount that stands imposed).

offending language be expunged from the record.[119] Because lawyers who believe themselves to be harmed by a trial court's unfair or unduly harsh criticisms are frequently not able to directly appeal, mandamus is available to correct any alleged judicial excesses.[120] But while this principle may be true, lawyers should derive little comfort from mandamus as a potential remedy for unreasonable judicial scoldings. Mandamus is a drastic and extraordinary remedy, and its use is limited to exceptional cases.[121] A court may exercise its discretion and decline to issue a writ even when the essential requirements for mandamus have been met.[122] In other words, the availability of a writ does not compel its issuance.[123] Indeed, the same courts that advocate mandamus as a remedy when lawyers wish to challenge trial courts' criticism of their conduct may decline to issue writs of mandamus in just those circumstances.[124]

III. COMPETING APPROACHES TO APPEALABILITY

Courts and commentators variously categorize courts' approaches to lawyers' appeals from judicial scoldings.[125] This article groups them four ways. First are those cases in which the court's criticism of a lawyer is routine judicial commentary.[126] No courts permit appeals in such cases.

[119] *See, e.g.*, Williams v. United States (*In re* Williams), 156 F.3d 86, 92 (1st Cir. 1998) ("A lawyer is free to petition for a writ of mandamus and request that offending commentary be expunged from the public record." (citation omitted)); Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817, 820 (7th Cir. 1992) (suggesting mandamus as a possible remedy for a lawyer who could show concrete harm attributable to a judge's criticism); Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984) (calling a writ of mandamus "the right route" to challenge a district judge's critical comments).

[120] *Williams*, 156 F.3d at 93.

[121] Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004) (quoting *Ex parte* Fahey, 332 U.S. 258, 25–60 (1947)).

[122] *See id.* at 381.

[123] Carla R. Pasquale, Note, *Scolded: Can an Attorney Appeal a District Court's Order Finding Professional Misconduct?*, 77 FORDHAM L. REV. 219, 229 (2008) (quoting *In re* Chambers Dev. Co., 148 F.3d 214, 223 (3d Cir. 1998)).

[124] *See, e.g.*, *Bolte*, 744 F.2d at 573 (observing on unsuccessful direct appeal that the court had denied the lawyers' earlier petition for a writ of mandamus).

[125] *See, e.g.*, Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1167–68 (10th Cir. 2003) (addressing the three approaches adopted by federal circuits to determine the appealability of an order damaging only an attorney's professional reputation).

[126] *See, e.g.*, *id.* at 1168 (quoting United States v. Talao, 222 F.3d 1133, 1137 (9th Cir. 2000) (explaining that the Ninth Circuit does not allow appeals from "routine judicial commentary")).

Second, at the conservative end of the spectrum, are courts that hold that lawyers may appeal only from orders imposing monetary sanctions against them.[127] Third, there is the majority approach, which permits lawyers to appeal either (a) judicial criticisms expressly denominated as reprimands and thus classified as sanctions; or (b) courts' specific findings of professional misconduct.[128] These two categories are combined here because in neither instance are monetary sanctions a jurisdictional prerequisite and because the first commonly swallows the second. Fourth, there is the supposedly liberal approach, which permits appeals even though the lower court did not explicitly describe or designate its criticisms as a reprimand or sanction.[129] It is inaccurate to describe this approach as liberal, however, because these courts still require specific findings of misconduct to support an appeal.[130] Finally, there is the somewhat separate issue of appeals from courts' referrals of lawyers to state disciplinary authorities.

A. Routine Judicial Commentary

We have already seen in our discussion of the final judgment rule and the First Circuit's decision in *Williams v. United States* (*In re Williams*) that appellate courts are loathe to review lower courts' criticisms of lawyers that are appropriately characterized as routine judicial commentary.[131] To date, it appears that no court has been willing to entertain jurisdiction in such a case. The decision in *United States v. Ensign* exemplifies courts' justifiable reticence.[132]

In *Ensign*, Patricia Ensign was among several people who were charged with tax fraud.[133] Ensign's appointed counsel, Alex Gonzalez, sought to have an Arkansas lawyer, Oscar Stilley, appointed as Ensign's co-counsel under the Criminal Justice Act.[134] Ensign moved to have Stilley admitted

[127] *See id.* at 1167.

[128] *See id.* at 1168.

[129] *See id.* at 1167 (stating that in some circuits orders damaging an attorney's professional reputation are "always appealable").

[130] *See, e.g.*, *id.* at 1167–68 (adopting the majority approach that considers orders damaging attorney's professional reputation as "always appealable" but making clear that the order must include a finding of misconduct to be appealable and not merely negative language).

[131] *See* 156 F.3d 86, 92 (1st Cir. 1998).

[132] *See* 491 F.3d 1109, 1119 (9th Cir. 2007).

[133] *Id.* at 1111.

[134] *Id.*

pro hac vice.[135] In his affidavit accompanying the motion, Stilley stated that he had never been suspended or disbarred, but revealed that he was the target of a disciplinary proceeding in Arkansas that was then in its pre-hearing stages.[136] The district court granted that motion and appointed Stilley as co-counsel for Ensign.[137] The government then filed under seal evidence concerning Stilley's disciplinary record in Arkansas.[138] In a later hearing, the district court cleared the courtroom except for Ensign and Stilley, inquired into Stilley's disciplinary history in Arkansas, and directed him to respond in writing.[139]

After considering Stilley's response, the district court entered a sealed order terminating Stilley's representation of Ensign and revoking his pro hac vice admission.[140] In explaining its decision, the district court observed that Stilley might have to serve a thirty-day jail sentence in Arkansas in the midst of Ensign's lengthy trial; stated that Stilley had not been forthcoming with respect to various matters pending against him in Arkansas; commented that Stilley's Arkansas disciplinary record was not as sparse as he had suggested, inasmuch as he had been sanctioned and subjected to disciplinary proceedings on several occasions; and that instead of responding to the court's specific inquiry at the hearing, he had resorted to a collateral attack on the Arkansas proceedings, which caused the court to conclude that he was "unable or unwilling to focus on the key issue, further lend[ing] credence to [the] [c]ourt's concerns regarding his representation" of Ensign.[141] The district court refused to reconsider its order on Ensign's motion, and the Ninth Circuit rejected Ensign and Stilley's requests for an interlocutory appeal and petitions for a writ of mandamus.[142]

Almost six weeks later and in the midst of trial, Ensign informed the district court that she had retained Stilley as counsel and requested that he be allowed to appear pro hac vice.[143] The district court declined to do so, explaining that Stilley had yet to satisfy its concerns about his ethical

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1111–12.

[140] *Id*. at 1112.

[141] *Id.* (internal quotation marks omitted).

[142] *Id.*

[143] *Id.*

fitness.[144] The court further stated that there were disciplinary proceedings pending against Stilley in Arkansas; some of the pleadings that Stilley submitted during the limited time that he had been admitted pro hac vice were of dubious merit and might have been filed for improper purposes, such as delay; and the timing of Ensign's request made Stilley's renewed admission unworkable, since trial was already two weeks underway.[145] When Ensign objected on the bases that Stilley had done excellent work on her behalf and that he had never been disrespectful to the court, the district judge agreed that he had always been respectful.[146] Nonetheless, the district court declined to allow Stilley to appear.[147]

Stilley appealed the district court's refusal to allow him to appear pro hac vice, claiming that he lost tens of thousands of dollars of fees as a result and that his professional reputation was damaged.[148] The Ninth Circuit concluded that the district court's orders did not work an injury-in-fact sufficient to confer standing on Stilley because it was plain from the record that Ensign was unable to pay him (hence his initial request to be appointed as her counsel) and Stilley had no basis to expect compensation either in seeking to appear pro hac vice or for work performed after his admission was revoked.[149] Furthermore, and perhaps more importantly, the district court's orders did not otherwise injure him in a fashion that would confer standing to appeal.[150]

Regarding the district court's denial of Stilley's pro hac vice admission during trial, the district court indeed "expressed reservation about Stilley's ethics, but it made no finding of [an] ethical violation and imposed no sanction."[151] In fact, the district court commented that Stilley was always respectful.[152] Returning to the district court's revocation of Stilley's appointment as Ensign's co-counsel and of his original pro hac vice admission, nothing that occurred there was sufficient to grant Stilley standing to appeal, as the court explained:

[144] *Id.* at 1112–13.
[145] *Id.* at 1113.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 1115–16.
[149] *Id.* at 1118 & n.8.
[150] *Id.* at 1118.
[151] *Id.*
[152] *Id.*

> Again, the court did not make any formal finding of a violation of any rule of ethical conduct and did not issue any sanction. Rather, it held that Stilley had failed to demonstrate that he qualified for the privilege of appointment *pro hac vice* under the Criminal Justice Act. Moreover, the district court was considerate of possible harm to Stilley's reputation as it cleared the courtroom before holding the hearing concerning Stilley's application, and it issued its order revoking his appointment under seal. Certainly, Stilley may have felt rebuked by the district court's decision, but an attorney's standing to seek appellate review of a district court order does not turn on the attorney's sensitivity to criticism.[153]

From the *Ensign* court's perspective, "prudential considerations" supported the reiteration of the line between district court orders clearly and intentionally sanctioning lawyers, and those that are only "directly or indirectly critical of counsel."[154] Among other considerations, there are no objective means for evaluating the extent to which an order granting or denying a given motion also rebukes a lawyer.[155] To allow lawyers to appeal from judicial criticism whenever they think it necessary to vindicate their honor could create mischief and is not necessary to protect parties' or lawyers' rights.[156] Moreover, if standing to appeal depended on the umbrage taken by a particular lawyer, it would be nearly impossible for a district court to know whether one of its orders might spawn an appeal.[157]

The *Ensign* court concluded that Stilley lacked standing to appeal because the district court did not clearly and intentionally sanction him.[158] It therefore dismissed his appeal.[159]

Ensign is correctly decided. Although the Ninth Circuit was to some extent influenced by the fact that Ensign also appealed the district court's refusal to permit Stilley to represent her, such that Stilley's individual

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[153] *Id.*

[154] *Id.* at 1119 (citing United States v. Chesnoff (*In re* Grand Jury Subpoena Issued to Chesnoff), 62 F.3d 1144, 1145 (9th Cir. 1995)).

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

appeal was unnecessary,[160] the court's rejection of Stilley's appeal for lack of standing based on the nature of the district court's comments stands on its own. A court's critical comments about a lawyer in the course of the court's regular duties, such as ruling on motions, will not alone support an appeal, nor should they.

B. The Conservative Approach: Monetary Sanctions Required for Appeal

Moving beyond routine judicial criticism, the Seventh Circuit has long been regarded as the most conservative among the federal courts of appeals when it comes to lawyers challenging judicial criticism because of its limitation of appeals "to situations involving monetary sanction only."[161] This approach traces back nearly thirty years to *Bolte v. Home Insurance Co.*[162]

Richard Bolte sued Home Insurance Company to collect on a fire insurance policy.[163] Terrence Joy and Thomas Hamill represented Home, which denied Bolte's claim based on arson.[164] Bolte lost at trial based in part on the testimony of a key witness, Benedict.[165] Bolte moved for a new trial, alleging that Joy and Hamill had wrongfully withheld statements by Benedict that were inconsistent with his trial testimony, and had even concealed Benedict's name and address.[166] The district judge granted Bolte's motion and in a January 1983 order described Joy's and Hamill's conduct as "reprehensible."[167] The district court scheduled a hearing to determine what sanctions should be imposed on Joy and Hamill for their discovery misconduct, but the parties settled before the hearing.[168] Based on the settlement, in April 1983, the district judge entered an order dismissing the case with prejudice, but he declined to withdraw his earlier

[160] *See id.* (reasoning that "where, as here, the party the attorney represented (or sought to represent) files an appeal in her own right, there is no need for counsel to file an appeal on behalf of the client").

[161] *See* Seymour v. Hug, 485 F.3d 926, 929 (7th Cir. 2007).

[162] *See* 744 F.2d 572, 573 (7th Cir. 1984).

[163] *Id.* at 572.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *See id.*

[168] *Id.*

order lambasting Joy and Hamill and further declined to impose sanctions for their misconduct.[169]

The lawyers purported to appeal from the district court's January 1983 and April 1983 orders, but the *Bolte* court observed that they were actually "trying to appeal from the finding that they were guilty of misconduct and from the district judge's later refusal to expunge that finding."[170] In any event, Joy and Hamill argued that their appeal was proper because the district judge's description of their conduct as reprehensible had injured their reputations and could lead to disciplinary action against them in their home state of Minnesota.[171] These things might be true, the Seventh Circuit noted, but that did not convert the district judge's opinion of their behavior into an appealable final order.[172] As the court explained:

> If it were, a breathtaking expansion in appellate jurisdiction would be presaged. Lawyers, witnesses, victorious parties, victims, bystanders—all who might be subject to critical comments by a district judge—could appeal their slight if they could show it might lead to a tangible consequence such as a loss of income. Such appeals would be particularly unmanageable because usually there would be no appellee. . . . If a judge imposes sanctions for misconduct, then not only has the party or person who has been sanctioned a solid basis for wanting to appeal, but whoever received the benefit of the sanction has a solid basis for wanting to oppose the appeal . . . .[173]

The court acknowledged the possibility that the stigma of being accused by a federal judge of misconduct might be sufficient to confer standing to appeal on the lawyers by analogy to defamation law, but that did not resolve the question of whether Congress, in making district courts' "final decisions" reviewable in 28 U.S.C. § 1291, intended to allow non-parties "to appeal from a wounding or critical or even palpably injurious comment or finding by a district judge."[174] It might be possible to urge an affirmative answer to that question in this case if one assumed that the district judge's

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* at 572–73.

[173] *Id.* at 573.

[174] *Id.*

January 1983 order initiated a disciplinary action against the lawyers that concluded with his order in April 1983, and that the district judge's refusal to vacate his January 1983 misconduct finding constituted a sanction.[175] But that argument failed when weighed against the burdens imposed on courts and litigants by crowded appellate dockets and the difficulty of assuring adversarial balance in most such appeals.[176] If Joy and Hamill had any remedy for their alleged wrong, the *Bolte* court concluded, it was to petition for a writ of mandamus.[177]

Although commonly regarded as the most conservative court on this subject, the Seventh Circuit is not alone in disfavoring appeals from judicial scoldings.[178] The extent to which other courts share this reluctance depends on the facts of the case and the proper characterization of the trial court's comments. In *United States v. Barnett* (*In re Harris*), for example, the district judge accused an Assistant United States Attorney, Linda Nettles Harris, of knowingly presenting perjured testimony by two government witnesses.[179] When Harris tried to defend her conduct to the court, the district judge repeatedly declined to hear her arguments and advised her that it was against her interests to attempt to explain her actions.[180] The district court ultimately granted the defendant a new trial based in part on Harris' introduction of the allegedly perjured testimony by the two witnesses.[181] Later, the district judge wrote to the Department of Justice's Office of Professional Responsibility (OPR) to report Harris' perceived misconduct.[182] Harris appealed from the new trial order on the theory that

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *See, e.g.*, Grant v. Metro. Gov't of Nashville & Davidson Cnty., Tenn. (*In re* Metro. Gov't of Nashville & Davidson Cnty., Tenn.), 606 F.3d 855, 861–67 (6th Cir. 2010) (rejecting party's appeal and petition for writ of mandamus seeking review of district court order granting a new trial based in part on misconduct of party's counsel); Baker Group, L.C. v. Burlington N. & Santa Fe Ry. Co., 451 F.3d 484, 491–92 (8th Cir. 2006) (rejecting lawyers' untimely appeal on the additional grounds that they were essentially attempting to obtain review of a show cause order and lacked standing to appeal); United States v. Barnett (*In re* Harris), 51 F. App'x 952, 956–57 (6th Cir. 2002) (finding that district court's new trial order containing particularized findings of misconduct by prosecutor did not constitute an appealable sanction).

[179] 51 F. App'x 952, 954 (6th Cir. 2002).

[180] *Id.* at 954–55.

[181] *Id.* at 955.

[182] *Id.* at 957.

the district court's findings concerning her trial conduct constituted a sanction.[183]

The *Barnett* court saw its first task as determining whether the district court's new trial order constituted a sanction against Harris giving rise to an injury.[184] The court had never before addressed whether a district court's written order, standing alone, constituted a sanction.[185] Yet even if it were to agree that an order containing particularized findings of lawyerly misconduct did constitute a sanction, the court explained, the district court in this case had made no such finding.[186] Rather, the district court addressed Harris' conduct only in the context of its legal conclusions supporting the grant of a new trial.[187] Indeed, the district judge had made clear that he did not wish to address Harris' misconduct when he repeatedly refused to allow her to argue in her own defense and advised her that she was better served by remaining silent.[188]

The conclusion that the district judge had not sanctioned Harris was confirmed by his referral of Harris' potential misconduct to OPR for determination.[189] After investigating, OPR concluded that Harris committed no misconduct.[190] As a result, Harris could not establish that she had been injured by the district court's actions.[191]

In the end, the *Barnett* court concluded that Harris had failed to prove an injury sufficient to confer standing.[192] It therefore dismissed her appeal for lack of jurisdiction.[193]

A lack of jurisdiction is a common theme among courts studying appeals from judges' criticisms of lawyers, but these cases should not be read as requiring an award of monetary sanctions for appellate review.[194]

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[183] *Id.* at 955.

[184] *See id.* (explaining the three constitutional elements of standing—injury in fact, causation, and redressability—and proceeding to address the element of injury first).

[185] *Id.* at 956.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 956–57.

[189] *Id.* at 957.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *See, e.g.*, Keach v. Cnty. of Schenectady, 593 F.3d 218, 224 (2d Cir. 2010) (citing Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1167–69 (10th Cir. 2003)); Walker v. City of

Indeed, and as we shall see both in the next case and the next two sections of this Part, appellate courts often articulate jurisdictional prerequisites in the process of declining to review lower courts' criticisms of lawyers.

The plaintiff in *Keach v. County of Schenectady*, Robert Keach, was lead counsel in a class action.[195] After the case settled, but while an appeal over Keach's attorney's fee award was pending, the parties grappled over Keach's attempt to unseal some documents ostensibly for use in his appeal.[196] When the district court declined to unseal the documents, Keach gave a copy of his request and the court's order to the local media to show that the defendants were delaying payment of the settlement for political purposes.[197] This in turn led Keach to claim, apparently, that defense counsel had improper ex parte communications with the judge's clerk and, finally, to the district judge considering whether sanctions should be imposed on Keach.[198] The judge held a conference in response to the sanctions motion.[199] The judge questioned whether Keach had lied to the court, engaged in subterfuge, or behaved disingenuously by requesting that the documents be unsealed to aid in his appeal when he really wanted to release them to the media to satisfy ulterior motives.[200] The district judge further questioned whether Keach's conduct might justify professional discipline.[201] After reciting a litany of misconduct by Keach in other cases, and questioning whether Keach appreciated his professional responsibilities and the thin ice on which he was skating, the court then invited defense counsel to submit further support for his sanctions motion and directed Keach to show cause why he should not be sanctioned.[202]

Mesquite, 129 F.3d 831, 832–33 (5th Cir. 1997); Sullivan v. Comm. on Admissions & Grievances, 395 F.2d 954, 956 (D.C. Cir. 1967) (listing the circuits that do not even require an official reprimand before a specific finding of judicial misconduct is considered appealable).

[195] *Keach*, 593 F.3d at 219.

[196] *See id*. at 220–21.

[197] *Id.*

[198] *Id.* at 220–21 (explaining that Keach and the judge's clerk had a phone conversation from which the judge's clerk "was apparently left with the impression that Keach had accused the court of improper ex parte communication with [opposing counsel]").

[199] *Id.* at 221.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 222.

Opting to err on the side of caution, the district court ultimately declined to sanction Keach.[203] In the order denying sanctions, however, the district court unsparingly criticized Keach's conduct and repeatedly questioned his candor.[204] Nonetheless, the district court never found that Keach had violated any duty or rule that might subject him to professional discipline.[205] As for the allegations of improper ex parte communications, the district judge made no findings of fact and expressly declined to inquire further into the parties' competing views.[206] Despite having dodged sanctions, Keach appealed the district court's "alleged 'findings' of misconduct" to the Second Circuit.[207] The Second Circuit concluded that because "the district court's opinion was in the vein of routine judicial commentary, and made no findings of professional misconduct," it lacked jurisdiction to review the decision.[208]

In evaluating jurisdiction, the court in *Keach* explained that while non-parties generally cannot appeal from a district court's judgment, there is an exception to this rule for non-parties, such as lawyers, who have been sanctioned or held in contempt, and that Keach would be able to appeal if he had been sanctioned.[209] But the district court had denied the defendants' motion to sanction Keach, and it was settled that parties ordinarily cannot appeal judgments in their favor to obtain review of findings they think are erroneous.[210]

The court observed that it had previously held that a district court's referral of specific findings of misconduct to a disciplinary committee unaccompanied by a monetary sanction was an appealable sanction,[211] and that the Fifth, Tenth and District of Columbia (D.C.) Circuits permitted lawyers to appeal from specific findings of misconduct even absent an official reprimand.[212] Not surprisingly, Keach urged the court to adopt the

[203] *Id.* at 222–23.

[204] *Id.*

[205] *Id.* at 222.

[206] *Id.* at 222–23.

[207] *See id.* at 223.

[208] *Id.*

[209] *Id.*

[210] *Id.* (quoting K & A Radiologic Tech. Servs., Inc. v. Comm'r of the Dep't of Health of N.Y., 189 F.3d 273, 282 n.11 (2d Cir. 1999)).

[211] *Id.* at 224 (citing Goldstein v. St. Luke's-Roosevelt Hosp. Ctr. (*In re* Goldstein), 430 F.3d 106, 111–12 (2d Cir. 2005)).

[212] *Id.* (citing Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1167–69 (10th Cir. 2003));

position taken by the Fifth, Tenth and D.C. Circuits.[213] The Second Circuit was openly willing to embrace this standard, yet Keach still could not appeal the district court's statements.[214] Rather, as the court elaborated:

> [E]ven under this standard, the district court's statements here do not rise to the level of a "finding of misconduct," and cannot support jurisdiction over this appeal. Although the district court questioned Keach's candor and found his actions "troubling," it expressly declined to make a finding that Keach had lied, and it never reached any conclusion or made any finding that Keach violated a standard of professional practice.
>
> In contrast to a specific finding of professional misconduct, the district court's comments were in the nature of the kind of "routine judicial commentary" or criticism that does not permit an appeal under any Circuit's standard.[215]

To be sure, the district judge clearly was displeased by Keach's conduct, but the judge merely warned Keach that it was counterproductive to behave in a fashion that would cause courts to question his integrity.[216] Although appellate courts are empowered to reverse sanctions orders or specific findings that lawyers have violated rules of professional conduct, the *Keach* court reasoned, they are powerless to alter trial judges' poor opinions of the skill or trustworthiness of lawyers appearing before them.[217]

Walker v. City of Mesquite, 129 F.3d 831, 832–33 (5th Cir. 1997); Sullivan v. Comm. on Admissions & Grievances, 395 F.2d 954, 956 (D.C. Cir. 1967)).

[213] *Keach*, 593 F.3d at 225.

[214] *Id.* (stating that "a finding that an attorney is guilty of specific misconduct is an adverse decision that can be appealed, even if the court decides that no additional punishment needs to be levied"); *see also id.* at 226 ("[O]ur position is consistent with the overwhelming weight of authority: an attorney may appeal a decision where the district court imposes a tangible sanction or makes an express finding that a lawyer has committed specific acts of professional misconduct, but not where the court has engaged in such routine judicial commentary or criticism as the district court expressed here.").

[215] *Id.* (emphasis omitted).

[216] *Id.*

[217] *Id.*

C. The Middle Ground: Judicial Scoldings Denominated as Reprimands or Sanctions or Specific Findings of Misconduct May Be Appealed

Although the Second Circuit in *Keach* dismissed the lawyer's appeal for lack of subject matter jurisdiction,[218] it pointed to two other possible approaches to appellate review of judicial scoldings: one staking out a moderate middle ground and the other allegedly more permissive.[219] Courts occupying the middle ground—which is where the court in *Keach* finally placed itself—permit lawyers to appeal from either (a) judicial scoldings expressly denominated as reprimands and therefore properly described as sanctions; or (b) specific findings of professional misconduct.[220] Which of these approaches a court will select depends on the jurisdiction. Although admittedly different, these approaches are paired here because the lower court decisions that impose formal reprimands as a sanction and which are appealed on that basis often include specific findings of misconduct. Their present combination is further justified by the fact that in neither instance are monetary sanctions required for appellate jurisdiction.[221] In any event,

[218] *Id.* at 226.

[219] *See id.* at 224.

[220] *See, e.g.*, *id.* at 226 (taking the position that "an attorney may appeal a decision where the district court imposes a tangible sanction or makes an express finding that a lawyer has committed specific acts of professional misconduct"); Nisus Corp. v. Perma-Chink Sys., Inc., 497 F.3d 1316, 1320 (Fed. Cir. 2007) (requiring an "explicit reprimand or the issuance of some mandatory directive" to support an appeal); United States v. Ensign, 491 F.3d 1109, 1119 (9th Cir. 2007) (requiring that to confer standing, a district order "must, at a minimum, clearly and intentionally sanction the attorney"); Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 544 (3d Cir. 2007) (finding that "repeated, explicit public reprimand" of lawyers was an appealable sanction); Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1352–53 (Fed. Cir. 2003) (concluding that formal reprimand in unpublished opinion that was not coupled with monetary sanctions was appealable); United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000) ("[T]he district court made a finding and reached a legal conclusion that [the lawyer] knowingly and willfully violated a specific rule of ethical conduct. Such a finding, per se, constitutes a sanction [that may be appealed]."); Williams v. United States (*In re* Williams), 156 F.3d 86, 92 (1st Cir. 1998) ("Sanctions are not limited to monetary imposts. Words alone may suffice if they are expressly identified as a reprimand."); State v. Perez, 885 A.2d 178, 188 (Conn. 2005) (reviewing lower appellate court's explicit finding that the lawyer violated a rule of professional conduct on the basis that it "constituted a disciplinary sanction tantamount to a reprimand").

[221] *See, e.g.*, Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1352–53 (Fed. Cir. 2003) (concluding that formal reprimand in unpublished opinion that was not coupled with monetary sanctions was appealable); United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000) ("[T]he district court made a finding and reached a legal conclusion that [the lawyer] knowingly

Williams v. United States (*In re Williams*), discussed at length previously, exemplifies cases in the first category.[222] *United States v. Talao* is a representative case in the second category.[223]

Talao stemmed from a criminal case in which Assistant United States Attorney Robin Harris represented the government.[224] Virgilio Talao owned a construction company, SLGC, which was under investigation by a federal grand jury for violating labor laws.[225] SLGC's bookkeeper, Lita Ferrer, voluntarily approached Harris in the courthouse immediately prior to her grand jury appearance.[226] Christopher Brose, who represented Talao, SLGC, and all of SLGC's employees, was not yet at the courthouse when Ferrer approached Harris.[227] Ferrer told Harris that she did not want to be represented by Brose and agreed to discuss the case with her.[228] In the interview that followed, Ferrer told Harris that she did not trust Brose, and opined that Brose had been directed to appear with her to intimidate her and dissuade her from testifying truthfully.[229] Suffice it to say that Ferrer must have believed that SLGC was guilty as charged or close to it.[230] Brose arrived at the courthouse and demanded to see Ferrer.[231] Ferrer, however, did not want to speak with him.[232] Unsure how to proceed, Harris consulted a supervisor, who instructed her to continue Ferrer's interview without Brose being present.[233] Harris finished interviewing Ferrer and presented her testimony to the grand jury, which eventually indicted Talao and SLGC.[234]

The defendants moved to dismiss the indictment based on Harris' alleged violation of California Rule of Professional Conduct 2-100, which

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and willfully violated a specific rule of ethical conduct. Such a finding, *per se*, constitutes a sanction [that may be appealed].").

[222] *Williams*, 156 F.3d at 92. *See infra* Part II.B.

[223] *Talao*, 222 F.3d at 1138.

[224] *Id.* at 1135.

[225] *Id*.

[226] *Id*. at 1135–36.

[227] *Id.* at 1136.

[228] *Id.*

[229] *Id.*

[230] *See id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

prohibited some ex parte communications with represented parties.[235] The district court denied the motion, but found that Harris violated Rule 2-100 and stated that it would report Harris' misconduct to the State Bar of California.[236] The district court also indicated that if the case went to trial, it would inform the jury of Harris' misconduct and instruct jurors to take it into account in assessing Ferrer's credibility.[237] Later, the court partially reversed its finding and concluded that Harris had acted in good faith and did not deserve to be reported to the California Bar.[238] Harris then appealed the finding that she acted unethically and violated Rule 2-100.[239]

In the Ninth Circuit, the defendants insisted that the district court's finding that Harris violated Rule 2-100 did not constitute a sanction and thus provided no ground for appeal.[240] In making this argument, they relied on an earlier Ninth Circuit case, *Weissman v. Quail Lodge Inc.*,[241] in which the court analyzed a district court's disparaging remarks about a lawyer and decided that "words alone will constitute a sanction only 'if they are expressly identified as a reprimand.'"[242] In deciding as it did, the court in *Weissman* adopted the approach taken by the First Circuit in *Williams v. United States* (*In re Williams*), discussed earlier.[243] The *Talao* court, however, reasoned that *Weissman* and *Williams* did not control its decision.[244] Rather than employing words alone to reproach a lawyer or offering routine commentary on a lawyer's conduct, the district court here found and concluded that Harris knowingly and willfully violated a specific ethics rule.[245] "Such a finding, per se, constitutes a sanction," the court declared.[246]

The court went on to explain its reasoning, working from the

[235] *Id.* at 1136 & n.4 (quoting Rule 2-100).

[236] *Id.* at 1136.

[237] *Id.*

[238] *Id.*

[239] *Id.* at 1137. The government also filed a petition for a writ of mandamus to prevent the district court from giving its proposed remedial instruction at trial. *Id.* The government's pursuit of mandamus is not pertinent here.

[240] *Id.*

[241] *Id.* (citing *Weissman*, 179 F.3d 1194 (9th Cir. 1999)).

[242] *Weissman*, 179 F.3d at 1200 (quoting *Williams*, 156 F.3d 86, 93 (1st Cir. 1998)).

[243] *Id.*; *see also Talao*, 222 F.3d at 1138.

[244] *Talao*, 222 F.3d at 1137.

[245] *Id.* at 1138.

[246] *Id.*

proposition that the district court's disposition in this case more closely resembled a reprimand than it did a comment merely critical of a lawyer's behavior.[247] The court stated:

> A reprimand generally carries with it a degree of formality. The requisite formality in this case is apparent from the fact that the trial court found a violation of a particular ethical rule, as opposed to generally expressing its disapproval of a lawyer's behavior. Further, the district court's conclusion that Harris violated Rule 2-100 carries consequences similar to the consequences of a reprimand. If the court's formal finding is permitted to stand, it is likely to stigmatize Harris among her colleagues and potentially could have a serious detrimental effect on her career. In addition, she might be subjected to further disciplinary action by the California Bar.[248]

The court therefore had no difficulty in concluding that the district court's finding that Harris violated Rule 2-100 was an appealable sanction.[249]

In determining that it had jurisdiction over Harris' appeal, the court in *Talao* was clear that it was not inviting appellate review of every unwelcome word spoken or written by district courts.[250] To the contrary, a district court's formal finding of an ethical violation by a lawyer eliminates the need for difficult line-drawing on appeal in much the same way as a trial court's explicit pronouncement that its criticism of a lawyer is intended as a sanction.[251] The court was not concerned that finding jurisdiction in this context would erode judicial candor, because it was improbable that district judges would be uncertain or unsure about the effect and meaning of formal findings like the one against Harris.[252] The Ninth Circuit then analyzed the district court's application of Rule 2-100 and concluded that Harris had acted ethically.[253]

State v. Perez is interesting because the lawyer, Francis Mandanici,

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[247] *Id.*

[248] *Id.* (footnote omitted).

[249] *Id.*

[250] *See id.*

[251] *Id.*

[252] *Id.*

[253] *Id.* at 1138–41.

complained to the Supreme Court of Connecticut about an order issued not by a trial court but by the Connecticut Appellate Court.[254] In discussing Mandanici's arguments on behalf of his client, the appellate court wrote that he had made "blatantly incorrect" representations about the case facts that constituted a "material misrepresentation" to the court.[255] In a footnote appended to the negative comments in the preceding sentence, the appellate court cited Connecticut Rule of Professional Conduct 3.3(a), which prohibits false statements of material fact or law to tribunals, and quoted part of the commentary to the rule.[256] The appellate court went on to accuse Mandanici of misrepresenting the trial court record and branded his alleged mischaracterization of the trial court's findings "very disturbing."[257] Concluding, the appellate court accused Mandanici of a scurrilous attack on a panel of the court earlier in the appellate process, accused him of flouting respect for the judicial system, and observed that his conduct reflected contempt for the ethics rules and his obligations as a member of the bar.[258]

Mandanici claimed that the appellate court's finding that he violated Rule 3.3(a) and its criticism of his conduct each were disciplinary sanctions tantamount to reprimands for which he was afforded neither prior notice nor the opportunity to be heard.[259] He further argued that the appellate court's findings and criticisms were unjustified.[260]

The Connecticut Supreme Court first considered whether the appellate court's finding that Mandanici violated Rule 3.3(a) was a disciplinary sanction.[261] If it was, Mandanici was entitled to have it reviewed.[262]

Mandanici understandably contended that the appellate court's finding was tantamount to a reprimand even though the court never used that term because the consequences of a judicial finding of misconduct were no less serious than a reprimand.[263] The defendants countered that a judicial finding that a lawyer violated an ethics rule is equivalent to a reprimand

[254] 885 A.2d 178, 181 (Conn. 2005).

[255] *See id.* at 185.

[256] *Id.* at 185 & n.7 (quoting the rule and commentary).

[257] *See id.* at 185.

[258] *Id.*

[259] *Id.*

[260] *Id.* at 185–86.

[261] *Id.* at 187.

[262] *Id.* at 186 (quoting Briggs v. McWeeny, 796 A.2d 516, 528 (Conn. 2002)).

[263] *Id.* at 187.

only if the court states explicitly that it is reprimanding the lawyer.[264] The appellate court having used no such language, the defendants continued, it was under no obligation to afford Mandanici notice or an opportunity to be heard before finding that he violated Rule 3.3(a).[265] The supreme court rejected the defendants' reasoning as "unduly formalistic."[266] Acknowledging that this was a case of first impression in Connecticut, the *Perez* court relied on federal authority to refute the defendants' argument:

> Although this case presents a matter of first impression for this court, a majority of federal circuit courts of appeals have concluded that, for purposes of appeal, a finding of professional misconduct is tantamount to an official sanction, irrespective of whether the finding is made in the context of a formal grievance proceeding. The rationale underlying the majority view is equally applicable to the issue raised by the present case: "a rule requiring an explicit label as a reprimand ignores the reality that a finding of misconduct damages an attorney's reputation regardless of whether it is labeled a reprimand and, instead, trumpets form over substance."[267]

Particularly persuaded by the Ninth Circuit's reasoning in *Talao*,[268] the Connecticut Supreme Court in *Perez* concluded that the appellate court's finding that Mandanici had violated Rule 3.3(a) was a disciplinary sanction tantamount to a reprimand.[269] Because the appellate court did not afford Mandanici notice and an opportunity to be heard before issuing its finding, principles of due process required that the finding be vacated.[270]

The supreme court, however, did not accept Mandanici's argument that he was entitled to notice and an opportunity to be heard with respect to the general criticism that the appellate court leveled against him.[271] Although the appellate court's criticism was "pointed and strong," those statements

[264] *Id.*

[265] *Id.*

[266] *See id.*

[267] *Id.* (citations omitted) (quoting Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1168 (10th Cir. 2003)).

[268] United States v. Talao, 222 F.3d 1133, 1137–38 (9th Cir. 2000).

[269] *Perez*, 885 A.2d at 188.

[270] *Id.*

[271] *Id.* at 189.

did not constitute a finding that Mandanici had violated Connecticut ethics rules.[272] As a result, they could not be reasonably characterized as a reprimand or sanction.[273]

A question worth asking in connection with the majority approach is what "findings" are sufficient to constitute "findings of misconduct" that will support an appeal? On one hand, it is clear that a court's explicit finding that a lawyer violated a rule of professional conduct supports an appeal.[274] That is the lesson of *Talao* and *Perez*, among other cases.[275] On the other hand, it is equally plain that a court's mere criticism or unfavorable characterization of a lawyer's conduct is insufficient for an appeal.[276] But what about something in between, such as a finding that an intellectual property lawyer engaged in pre-litigation inequitable conduct that rendered a client's patent unenforceable? The Federal Circuit answered that question negatively in *Nisus Corp. v. Perma-Chink Systems, Inc.*[277] Notwithstanding the inflammatory "inequitable conduct" label, the court explained, such a finding remains mere judicial criticism of a lawyer in the course of an action to which the lawyer is a stranger.[278] A judicial finding of inequitable conduct by a lawyer does not aggrieve a lawyer in the sense of inflicting a legal injury and is thus no different from any other critical comment about a non-party that a court might make in the course of resolving a dispute.[279] In other words, the *Nisus Corp.* court reasoned, the term "findings" in this context refers to a court's imposition of its power to penalize those who appear before it and not to its observation that a lawyer has simply failed to comply with some ethical or legal norm.[280]

[272] *See id.*

[273] *Id.*

[274] *Id.* at 187.

[275] *See id.* at 188 (citing *Talao*, 222 F.3d at 1138).

[276] *See, e.g.*, Nisus Corp. v. Perma-Chink Sys., Inc., 497 F.3d 1316, 1320–21 (Fed. Cir. 2007) (expressing this position); *Perez*, 885 A.2d at 189 (holding to the same effect).

[277] *Nisus Corp.*, 497 F.3d at 1320.

[278] *See id.* at 1320–21.

[279] *Id.* at 1321.

[280] *See id.* (citing Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1352 (Fed. Cir. 2003)).

D. The Supposed Liberal Approach: Judicial Criticism Explicitly Described or Designated as Reprimand or Sanction Is Not Required for Appeal

Some courts take a supposedly generous approach to appellate review of judicial scolding and permit appeals by lawyers even if the lower court did not explicitly describe or designate its critical comments as a reprimand or sanction.[281] Courts in this category are sometimes said to hold that judges' criticisms of lawyers are always appealable. *Walker v. City of Mesquite*[282] and *Butler v. Biocore Medical Technologies, Inc.*,[283] lead this line of authority. It is plainly wrong, however, to suggest that these courts hold that all judicial scoldings of lawyers may be appealed, or to brand this approach liberal or permissive. To the contrary, these courts still require specific findings of misconduct to support an appeal.[284] Courts taking this approach simply waive the requirement of formally designating harsh judicial criticism as a reprimand or sanction on the basis that it trumpets form over substance.[285]

In *Walker*, Department of Justice lawyer Thomas Peebles was the principal trial counsel for the Department of Housing and Urban Development in a fair housing action against local and federal authorities.[286] The plaintiffs accused Peebles and other DOJ lawyers of improper litigation tactics, which led to the district court to issue a memorandum opinion finding the DOJ attorneys "guilty of 'blatant misconduct.'"[287] The court later erased its findings of misconduct against all of the DOJ lawyers except Peebles; as for Peebles, it restated its earlier conclusion that he had violated

[281] *See, e.g.*, Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1168 (10th Cir. 2003); Walker v. City of Mesquite, 129 F.3d 831, 832–33 (5th Cir. 1997); Sullivan v. Comm. on Admissions & Grievances, 395 F.2d 954, 956 (D.C. Cir. 1967); *see also* B-Line, LLC v. Wingerter (*In re* Wingerter), 594 F.3d 931, 938 (6th Cir. 2010) (discussing appeal by a party and stating that a bankruptcy court's failure to designate its criticism of the appellant as a reprimand was "a distinction without a difference").

[282] 129 F.3d 831 (5th Cir. 1997).

[283] 348 F.3d 1163 (10th Cir. 2003).

[284] *Id.* at 1169.

[285] *See id.*

[286] *Walker*, 129 F.3d at 831.

[287] *See id.* at 832.

his duty of candor.[288] A formal order to that effect followed shortly, and Peebles appealed to the Fifth Circuit.[289]

The plaintiffs argued that the Fifth Circuit lacked jurisdiction because Peebles had not suffered a cognizable injury.[290] For Peebles to have been injured, they argued, the district court would have had to impose a fine, service, or other form of punishment on him.[291] The *Walker* court easily rejected the plaintiffs' position:

> Peebles was reprimanded sternly and found guilty of blatant misconduct. That reprimand must be seen as a blot on Peebles' professional record with a potential to limit his advancement in governmental service and impair his entering into otherwise inviting private practice. We therefore conclude and hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct.[292]

In short, Peebles had presented a reviewable appellate issue.[293]

Walker is not as indulgent of lawyers' appeals from trial courts' criticisms as observers seemingly believe. Although the district court did not designate its critical orders as formal reprimands or sanctions, and similarly did not find that Peebles violated a specific rule of professional conduct, the district court did find that Peebles had committed blatant misconduct by breaching his duty of candor.[294] *Walker* therefore follows the second fork of middle ground approach to appeals by lawyers discussed earlier.[295] The same is true of *Butler*.[296]

In *Butler*, Timothy Butler represented an executive in an acrimonious dispute with his former employer in a Kansas federal court.[297] Ruling on a

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.* at 832–33.

[293] *Id.* at 833.

[294] *Id.* at 832.

[295] *See supra* Part III.B.

[296] Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1168 (10th Cir. 2003).

[297] *Id.* at 1165.

motion to disqualify Butler, the district court made specific findings of fact regarding Butler's conduct and concluded that he violated a number of Kansas ethics rules.[298] Nonetheless, the district court declined to disqualify him and instead ordered him to remedy his violations of a Federal Rule of Civil Procedure and two local rules.[299] The order neither expressly identified itself as a reprimand, nor imposed any form of sanction.[300] Unhappily for Butler, however, the district court also directed the court clerk to mail a copy of its order containing its findings that Butler had violated rules of professional conduct to every court in which Butler was admitted to practice.[301] Butler eventually appealed from that order.[302]

Before reaching the merits of Butler's appeal, the Tenth Circuit paused to examine its jurisdiction.[303] The court framed the issue as when, if ever, an order affecting a lawyer's professional reputation imposes a legally sufficient injury to support appellate jurisdiction.[304] After surveying the approaches taken by other federal courts,[305] the *Butler* court concluded that "an order finding attorney misconduct but not imposing other sanctions is appealable . . . even if not labeled as a reprimand, is the proper position."[306]

The *Butler* court reached this conclusion for three reasons. First, damage to a lawyer's professional reputation is a cognizable and legally sufficient injury.[307] Thus, neither a monetary sanction nor the explicit description of judicial criticism as a reprimand is required for an appeal to lie.[308] To require an explicit label as a reprimand to support an appeal would exalt form over substance.[309] Second, any concern about a lack of adversarial balance was assuaged by the fact that an appellate court reviews the district court's order detailing the reasons for any finding of misconduct in addition to the appellant's brief, and thus avoids hearing "only one side

[298] *Id.* at 1165–66.
[299] *Id.* at 1166.
[300] *See id.* at 1167.
[301] *Id.* at 1166.
[302] *Id.*
[303] *Id.*
[304] *Id.* at 1167.
[305] *See id.* at 1167–68.
[306] *Id.* at 1168.
[307] *Id.*
[308] *Id.* at 1168–69.
[309] *Id.* at 1169.

of the story."[310] Third, district courts' need for freedom from excessive appellate supervision was achieved by the deferential standard of review applied to such appeals, which permits a district court's order finding misconduct to be overturned only if it is supported by "no reasonable basis."[311] That standard ensures that district judges retain ample discretion to comment on lawyers' performance in order to regulate the proper conduct of proceedings in their courts.[312]

The *Butler* court therefore held that an order finding that a lawyer has committed an ethics violation but not imposing any other sanction can be appealed as a final order.[313] After reviewing the district court's findings for an abuse of discretion, however, the Tenth Circuit affirmed the district court's order.[314]

E. Referrals to Disciplinary Authorities

As we saw in *Butler*, courts that are troubled by a lawyer's conduct sometimes refer the lawyer to disciplinary authorities in states where the lawyer is admitted to practice.[315] A court may, as in *Butler*, explicitly find that the lawyer violated rules of professional conduct while appearing before it and transmit those findings to professional authorities.[316] In other instances, a court may question whether a lawyer has violated rules of professional conduct and refer the matter to disciplinary authorities for determination.[317] Whether lawyers may appeal from courts' referrals to disciplinary authorities depends on the nature of the court's order or findings and not on the referral itself.[318] Let me explain.

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[310] *Id.* (quoting Williams v. United States (*In re* Williams), 156 F.3d 86, 91 (1st Cir. 1998)) (internal quotation marks omitted).

[311] *Id.* (quoting Weeks v. Indep. Sch. Dist., 230 F.3d 1201, 1207 (10th Cir. 2000)) (internal quotation marks omitted).

[312] *Id.* (quoting *Williams*, 156 F.3d at 92).

[313] *Id.*

[314] *Id.* at 1175.

[315] *See id.* at 1166.

[316] *Id.*

[317] *See, e.g.*, Teaford v. Ford Motor Co., 338 F.3d 1179, 1181 (10th Cir. 2003) ("Because the referral letter reflects only the judge's suspicion that violations may have occurred, it is analogous not to a censure or reprimand but to an order to show cause why sanctions should not be imposed. Such orders are not appealable.").

[318] *See, e.g.*, United States v. McCorkle, 321 F.3d 1292, 1298–99 (11th Cir. 2003) (finding that "sanction" of referral of lawyer to disciplinary authorities was not an appealable contempt

If a court explicitly finds that a lawyer has violated rules of professional conduct and transmits those findings to disciplinary authorities, the lawyer may appeal from that order if it is otherwise appealable.[319] But some courts, such as the Second Circuit in *Goldstein v. St. Luke's-Roosevelt Hospital Center* (*In re Goldstein*), are tempted in such a case to reason that the referral "was in the nature of a sanction."[320] Therefore, even though the lawyer can explain or justify her actions to the disciplinary authorities, and may argue there that the court erred in finding misconduct, "such an order [is appealable because it] has reputational consequences and potential costs in responding to the referral."[321] But, as Hertz intones in its rental car commercials, not exactly. It is the specific findings of misconduct in the order that supports appellate jurisdiction—not the referral itself.[322]

Generally speaking, a court's referral of a lawyer to state disciplinary authorities for investigation is not a sanction or finding of misconduct from which the lawyer may appeal.[323] Unless a court that refers a lawyer to disciplinary authorities explicitly finds that the lawyer has violated rules of professional conduct, the referral is akin to a show cause order and is not independently appealable.[324] Is there support for a minority rule that a court's mere referral to disciplinary authorities is itself a form of sanction? It is arguably possible to read the Second Circuit's opinion in *Goldstein*[325] that way, although the Second Circuit itself does not,[326] and, again, the trial court there explicitly found that the lawyer violated several ethics rules.[327] Would such a rule make sense? No. A court's referral of a lawyer to disciplinary authorities without an explicit finding of professional misconduct is not a formal judicial action which would support an appeal for the simple reason that all lawyers are able—and sometimes have a

order).

[319] *See, e.g.*, Goldstein v. St. Luke's-Roosevelt Hosp. Ctr. (*In re* Goldstein), 430 F.3d 106, 111–12 (2d Cir. 2005) (permitting appeal).

[320] *Id.* at 111.

[321] *Id.*

[322] *See id.* at 112 (observing that the magistrate judge's report and recommendations explicitly found that the lawyer violated various disciplinary rules and was therefore a form of sanction).

[323] Gwynn v. Walker (*In re* Walker), 532 F.3d 1304, 1311 (11th Cir. 2008).

[324] Teaford v. Ford Motor Co., 338 F.3d 1179, 1181 (10th Cir. 2003).

[325] 430 F.3d 106, 111–12 (2d Cir. 2005).

[326] Keach v. Cnty. of Schenectady, 593 F.3d 218, 224 (2d Cir. 2010) ("We have held that a district court's referral of *specific findings of misconduct* to a disciplinary committee, even absent a monetary sanction, is appealable." (emphasis added)).

[327] *Goldstein*, 430 F.3d at 112.

duty—to report other lawyers to disciplinary authorities.[328] In fact, anyone may report a lawyer to disciplinary authorities.[329] Absent explicit findings of misconduct, there is nothing special about a court's referral.[330] Although a court's referral to disciplinary authorities may tarnish a lawyer's reputation, that incidental harm alone does not transform the referral into a sanction.[331] Moreover, even the most generous interpretation of what constitutes an appealable sanction requires a finding of misconduct.[332]

IV. ANALYSIS AND RECOMMENDATIONS

Given courts' varying approaches to addressing lawyers' appeals from judicial scoldings, it is reasonable to ask what the correct approach is or might be. At the outset, it is fair to disfavor the narrow approach taken by the Seventh Circuit which requires an award of monetary sanctions for appellate jurisdiction.[333] That approach is beautifully simple, but the concern that principally fuels it—the fear that a broader rule would breathtakingly expand appellate jurisdiction[334]—has proven to be illusory.[335] Quite correctly, no court permits lawyers (or anyone else for that matter) to appeal from routine judicial criticism or commentary.[336] In addition, and important though the issue is, there is not a sufficient volume of appeals from courts' imposition of non-monetary sanctions against lawyers to perpetuate the Seventh Circuit's narrow approach on that basis.[337] Indeed, lawyers considering an appeal from a judicial scolding must weigh the risk of calling yet more attention to their alleged

[328] MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2009) (requiring lawyers to report other lawyers to professional authorities in specified circumstances).

[329] *Teaford*, 338 F.3d at 1181.

[330] *Id.*

[331] *Id.*

[332] *Id.* at 1182–83.

[333] *See* Seymour v. Hug, 485 F.3d 926, 929 (7th Cir. 2007).

[334] *Id.* (quoting Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984)).

[335] Pasquale, *supra* note 123, at 244.

[336] *See* United States v. Rivera, 613 F.3d 1046, 1051 (11th Cir. 2010) (dismissing a receiver's appeal and stating that "[w]e have never held that an appeal of a professional who challenges only a finding of fact that is potentially detrimental to her reputation is justiciable"); Keach v. Cnty. of Schenectady, 593 F.3d 218, 225 (2d Cir. 2010) (stating that no federal court of appeals permits lawyers to appeal from routine judicial commentary).

[337] Funk, *supra* note 52, at 1502; Pasquale, *supra* note 123, at 244.

misconduct.[338] The old adage "be careful what you wish for" richly applies here.[339] Finally, the notion that this approach is reasonable because lawyers aggrieved by non-monetary sanctions may seek relief by petitioning for writs of mandamus is misguided because, as an extraordinary remedy, mandamus is granted only in the rarest of cases.[340]

At the same time, the requirement of monetary sanctions for an appeal to lie cements an important jurisdictional prerequisite: standing.[341] Monetary sanctions represent a clear injury-in-fact; they constitute a concrete, particularized, and actual harm.[342] In contrast, reputational harm to lawyers—on which most courts rest standing in this context—seems at best conjectural and speculative unless a lawyer can demonstrate that he or she actually lost business or was denied concrete professional opportunities because of a court's criticism.[343] But that concern is easily resolved by analogy to the tort cause of action for defamation per se, which operates to protect individuals' reputations.[344] Defamation per se is actionable without proof of actual damages.[345] Damages are presumed in actions for defamation per se.[346] A communication is defamatory per se if it imputes misconduct in a person's occupation or profession.[347] That certainly is the case with judicial criticism of lawyers that exceeds the bounds of routine commentary on counsel's performance.

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[338] *See* Pasquale, *supra* note 123, at 244.

[339] *See, e.g.*, Barnhill v. United States, 11 F.3d 1360, 1371 (7th Cir. 1993) (reversing trial court's dismissal of government's case based on counsel's misconduct, but stating that "we too are dismayed by the behavior of the representatives of the United States," calling the government lawyers' conduct "hardly exemplary, [but] not contumacious," and "strongly suggest[ing] that Government attorneys demonstrate considerably more circumspection in the future").

[340] Pasquale, *supra* note 123, at 248.

[341] *See* Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817, 820 (7th Cir. 1992).

[342] *See id.*

[343] *See Barnhill*, 11 F.3d at 1370–71 (denying lawyers' mandamus request because their claim the district judge's finding of misconduct on their part would "cause future harm to their professional reputations" was nothing more than "speculative harm" and did not constitute a cognizable injury).

[344] Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc., 213 P.3d 496, 504 (Nev. 2009).

[345] Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 920 (Minn. 2009) (quoting Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980)).

[346] Dugan v. Mittal Steel USA Inc., 929 N.E.2d 184, 186 (Ind. 2010).

[347] Green v. Rogers, 917 N.E.2d 450, 459 (Ill. 2009); Baker v. Tremco Inc., 917 N.E.2d 650, 657 (Ind. 2009) (quoting Kelley v. Tanoos, 865 N.E.2d 593, 596 (Ind. 2007)); *Bahr*, 766 N.W.2d at 920 (quoting *Stuempges*, 297 N.W.2d at 255).

Of course, not only must a lawyer have an injury-in-fact to have standing to appeal, it is further required that a favorable decision by the appellate court be likely to remedy the injury.[348] Recall that the court in *Cities Service Co. v. Gulf Oil Corp.* determined that the lawyers lacked standing to appeal in part because it was unlikely that "a favorable decision would remedy the alleged harm to the lawyers' ability to attract new business" caused by a local newspaper's report of the trial court's harsh criticism and imposition of non-monetary sanctions against them.[349] But the *Cities Service* court's reasoning is unpersuasive for reasons beyond the fact that no state supreme court should discount the importance of, or public interest in, its opinions. First, in today's world, any on-line search that turns up unflattering judicial commentary concerning a lawyer is almost certain to further reveal a corrective or curative decision. Second, to the extent that a lawyer who has been scolded by a judge is questioned about those circumstances, the existence of an exonerating opinion allows the lawyer to refute any suggestion of misconduct. Third, a lawyer who is concerned that the media outlet that initially reported her scolding will miss or omit mention of an appellate correction can attempt to fix that problem by furnishing the reporter or editor with a copy of the superseding appellate decision and requesting a related story or retraction of the initial piece out of fairness and balance. Fourth, the legal media routinely report appellate decisions that escape the mainstream media, and it is often items in or on those specialized periodicals, services, and sites that are most likely to affect lawyers' reputations.

Although it is perhaps a convenient conclusion, the approaches chosen by most courts, which permit lawyers to appeal from judicial criticism either (1) explicitly designated as a reprimand or sanction, or (2) accompanied by specific findings of misconduct, are both proper. Either one should support an appeal. It makes no sense to limit lawyers' appeals to only those cases in which a court explicitly designated its criticism as a reprimand or sanction, because it is unnecessarily formalistic.[350] It is true that in adopting the formal reprimand approach the court in *Williams v. United States* (*In re Williams*) was reacting to the unsettling argument that de facto sanctions should support an appeal,[351] and

[348] *See* Cities Serv. Co. v. Gulf Oil Corp., 976 P.2d 545, 549 (Okla. 1999).

[349] *Id.* at 549. *See supra* Part II.A.

[350] Funk, *supra* note 52, at 1503.

[351] *See* 156 F.3d 86, 91 (1st Cir. 1998).

the path it identified was thus understandable, but the de facto sanctions trap is also avoided by predicating appellate jurisdiction on specific findings of misconduct by a lawyer.[352] As with designating judicial criticism of a lawyer as a formal reprimand or sanction, requiring a court to make specific findings of misconduct by a lawyer to support an appeal clearly demarcates the line between routine commentary that may be upsetting but is not appealable and inordinately injurious commentary that should be.[353] Courts should therefore adopt both approaches. This ought to be an uncontroversial proposition, since both approaches are already accepted and, accordingly, no doctrinal expansion is required.

To these two categories we should add a third; that is, lawyers should be permitted to appeal critical orders that direct them to perform some activity as a form of sanction. Such activities include, for example, attending a mandatory ethics course or program, preparing or delivering continuing education programs on subjects related to their alleged misconduct, or writing articles with a professional responsibility focus.[354] Mandated activities of this sort are monetary sanctions in fact if not in name by virtue of the time requirements they impose on the lawyers. Failing that, they clearly constitute a formal reprimand.

Last, a court's referral of a lawyer to state disciplinary authorities should not be treated as an appealable sanction. If a court makes specific findings of misconduct or formally reprimands or sanctions a lawyer in addition to referring the lawyer to disciplinary authorities, the lawyer should of course be able to appeal, but in that case it is not the *referral* that supports appellate jurisdiction.

V. CONCLUSION

Courts occasionally criticize in harsh terms lawyers who appear before them. It is normal for lawyers in that situation to believe that they have been wronged and want redress. Generally speaking, trial and lower appellate courts' claimed errors are remedied through appeals to higher courts. Lawyers' ability to appeal from judicial scoldings, however, has long been a contentious and conflicting area of the law of lawyering and appellate practice. The problems are practical ones. The ability to appeal

[352] *See* United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000).

[353] *See Williams*, 156 F.3d at 91.

[354] *See, e.g.*, Dawson v. United States, 68 F.3d 886, 893–94 (5th Cir. 1995) (requiring a lawyer to take a fifteen hour ethics course as a sanction).

from a trial or lower appellate court's harsh criticism may matter greatly to lawyers who prize their good professional reputations and worry that a court's harshly critical language may cost them valuable representations or desirable career opportunities. On the other side of the coin, appellate courts are struggling to manage heavy dockets and do not want to chill lower courts' appropriate exercise of judicial candor by empowering chastened lawyers to conscript them into service as civility or demeanor police.[355] Striking the right balance is difficult. But that balance can be struck by allowing lawyers to appeal from judicial criticism either (1) designated as a reprimand or sanction, or (2) accompanied by specific findings of misconduct. Both designating judicial criticism as a formal reprimand or sanction and requiring a court to make specific findings of misconduct to support appeals clearly delineate between routine commentary that is not appealable and inordinately injurious commentary that should be.

Lawyers should further be permitted to appeal orders directing them to perform some activity as a form of sanction. Such activities include attending mandatory ethics courses or program, preparing or delivering continuing education programs on subjects related to their alleged misconduct, or writing articles with a professional responsibility focus. These are monetary sanctions in fact if not in name by virtue of the time commitments they require of lawyers and, in any event, they clearly constitute a formal reprimand.

[355] *Williams*, 156 F.3d at 91–92.