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Cover Page Footnote
J.D. Candidate, 2009, Fordham University School of Law. I would like to thank Professor Grainne de Burca for advising me during the writing process. I would also like to thank my parents and three sisters for their love, support, and encouragement.

This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol77/iss1/5
SCOLDED: CAN AN ATTORNEY APPEAL A DISTRICT COURT’S ORDER FINDING PROFESSIONAL MISCONDUCT?

Carla R. Pasquale*

This Note addresses the split among the United States courts of appeals over whether an attorney can appeal a district court’s finding that he or she has acted unprofessionally, even when there is no monetary sanction imposed. After discussing the U.S. Constitution’s Article III “case or controversy” requirement and a district court’s power to sanction attorneys, this Note dissects the circuit split. It argues that attorneys should have standing to appeal a court’s finding of unprofessional conduct because this type of sanction can cause irreparable harm to an attorney’s professional reputation and thus to the attorney’s business.

INTRODUCTION

Suppose that a district court makes a specific finding of fact that an attorney has violated a rule of professional conduct. The district court then orders the court clerk to mail a copy of the order finding ethical violations to every court in which that attorney practices law.1 Next, suppose that a district court finds that an attorney did not act ethically when negotiating a settlement. The court reprimands the attorney and orders that he or she attend an attorneys’ ethics course.2 Finally, imagine that a district court finds that an attorney has violated an ethics rule and orders the attorney to pay a fine to the court as a sanction.

From which of these district court orders can the aggrieved attorney appeal? This Note addresses the split among the United States courts of appeals over whether an attorney can appeal a district court’s finding that he or she has acted unprofessionally, even when there is no monetary sanction imposed. Part I of this Note addresses a district court’s authority to sanction an attorney and the different types of sanctions available. An attorney’s standing to appeal when that attorney is not an original party to the case is also discussed in Part I. Additionally, this part discusses Article

* J.D. Candidate, 2009, Fordham University School of Law. I would like to thank Professor Gráinne de Búrca for advising me during the writing process. I would also like to thank my parents and three sisters for their love, support, and encouragement.
2. See Dawson v. United States, 68 F.3d 886, 893–94 (5th Cir. 1995).
III’s “case or controversy” requirement before addressing the nonparty rule and the attorney exception to the nonparty rule. Part I next discusses the circuit courts’ general agreement that an attorney may only appeal a sanction and introduces the circuit split over what is an appealable sanction.

Part II of this Note dissects and analyzes the circuit split over whether an attorney can appeal a district court’s decision or whether there must be either a monetary sanction or an express reprimand in order for an attorney to bring an appeal on his or her own behalf. Part III argues that courts of appeals should have jurisdiction over an attorney’s appeal from a district court’s order finding attorney misconduct. This part asserts that this is the most appropriate rule because of the likely damage to an attorney’s professional reputation that will result, and because these appeals will not cause a significant increase in litigation or jeopardize judicial candor. Furthermore, these appeals should be allowed because courts of appeals are unlikely to issue writs of mandamus in these cases, thus leaving aggrieved attorneys with no relief.

I: JUDICIAL SANCTIONS AND AN ATTORNEY’S STANDING TO APPEAL

Part I discusses judicial sanctions imposed on attorneys for professional misconduct. Part I.A examines district court judges’ power to sanction misbehaving attorneys, and the types of sanctions these judges may use. Part I.A also discusses the level of severity at which judges sanction attorneys. Part I.B introduces the U.S. Constitution’s Article III “case or controversy” requirement and appellate judges’ duty to analyze their own power to hear cases brought before them. Next, Part I.C discusses the rule that an appellate court does not have jurisdiction over an appeal if the petitioner is without standing, and only parties to a case generally have standing to appeal. Part I.C also explains the attorney exception to this nonparty rule. Part I.D discusses the circuit courts’ agreement that attorneys cannot appeal any and all criticism from a judge, and then introduces the circuit split over whether a finding of attorney misconduct in a district court order is an appealable sanction. Finally, Part I.E discusses a sanctioned attorney’s option to file a writ of mandamus against the district court.

A. Judicial Sanctions

Part I.A examines judicial sanctioning power and the types of sanctions imposed on attorneys by judges. Part I.A.1 explains judges’ essential role in maintaining integrity in their courtrooms by sanctioning unprofessional attorney behavior. Part I.A.1 further discusses the various rules that provide courts the power to sanction attorneys as well as courts’ inherent power to do so. Lastly, Part I.A.1 notes that attorneys usually choose to sanction behavior that undermines the judicial system’s integrity. Part I.A.2 then examines the discretion of judges to determine the severity of
sanctions imposed, and to choose between traditional and informal sanctions.

1. Judicial Sanctioning Power

"Judges can be and ought to be key figures in maintaining integrity and professionalism in the practice of law."3 One way for judges to perform this crucial role is to sanction attorneys who practice in the judges' courts. Federal judges primarily derive their power to sanction attorneys who act unprofessionally from two sources: rules and the inherent judicial power to sanction.4 The Federal Rules of Civil Procedure 115 and 376 allow judges to impose sanctions on lawyers who do not comply with rules pertaining to motions, pleadings, or discovery. Also, some local district court rules give courts the authority to sanction lawyers.7 Finally, it is widely accepted that federal courts have inherent power to regulate and sanction attorneys appearing before them.8 Federal courts "have long claimed the inherent

4. Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions, 32 Hofstra L. Rev. 1425, 1427 (2004) ("[I]n federal courts judges may rely on Rule 11 and Rule 37 of the Federal Rules of Civil Procedure, as well as various discovery rules, to establish norms of conduct and impose sanctions. Judges can supplement these rules with their own creative responses using the court's inherent power . . . "). Courts also have statutory power to sanction attorneys. See 28 U.S.C. § 1927 (2000) ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").
6. See Fed. R. Civ. P. 37(b); Joseph, supra note 5, § 47(B) (explaining the scope of Rule 37).
7. McMorrow et al., supra note 4, at 1440–41 (citing, for example, D. Ark. Local R. IV; D.D.C. Local R. 16.2(c)(6)).
8. See Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991); Roadway Express, Inc. v. Piper, 447 U.S. 752, 765–67 (1980); McMorrow et al., supra note 4, at 1440 (citing Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) ("[C]ourts . . . are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum, in their presence, and submission to their lawful mandates . . . ")); see also Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) ("The power is one which ought to be exercised with great caution, but which is, we think, incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession."); Judith A. McMorrow, Rule 11 and Federalizing Lawyer Ethics, 1991 BYU L. Rev. 959, 964 ("Both federal and state courts have traditionally asserted an inherent power to regulate the practice of law in their respective tribunals."). It is important to note, however, that "[a]lthough district courts have relied on the inherent power to impose a range of sanctions, including gag orders, fines, and even dismissals, they have not treated all wrongful conduct as sanctionable." Fred C. Zacharias & Bruce A. Green, Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory, 56 Vand. L. Rev. 1303, 1345 (2003).
authority to manage their proceedings, including 'the authority to impose reasonable and appropriate sanctions upon errant lawyers.'" 9

Several federal courts have even determined that it is a court's obligation to supervise attorney conduct and take necessary steps to regulate it. 10 The U.S. District Court for the Southern District of New York summed up this idea: "Where doubt may becloud the public's view of the ethics of the legal profession and thus impugn the integrity of the judicial process, it is the responsibility of the court to ensure that the standards of ethics remain high." 11 However, Professor Judith A. McMorrow's review of case law has shown that judges exercise their discretion in deciding when to impose sanctions on an attorney for professional misconduct rather than viewing sanctions as obligatory. 12

The key issue is when judges choose to sanction attorney misconduct. "District courts... appear to have adopted a hybrid approach—focusing their attention on conduct that sullies the underlying litigation and judicial system..." 13 In imposing sanctions, judges are primarily concerned with the preservation of the integrity of the judicial system as well as the maintenance of efficient judicial proceedings. 14

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9. Zacharias & Green, supra note 8, at 1342 (quoting Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 888 (5th Cir. 1968)).
10. See, e.g., Saier v. State Bar of Mich., 293 F.2d 756, 760 (6th Cir. 1961) ("Lawyers are officers of the court and the courts have a duty to supervise their conduct."); In re Shell Oil Refinery, 143 F.R.D. 105, 108 (E.D. La. 1992) ("Federal courts have authority to remedy litigation practices that threaten judicial integrity and the adversary processes. Indeed, the 'district court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it.'" (quoting Musicus v. Westinghouse Elec. Corp., 621 F.2d 742 (5th Cir. 1980))); Black v. State of Mo., 492 F. Supp. 848, 862 (W.D. Mo. 1980) ("'[I]t appears to be the court's duty in a situation of this kind (where an appearance of impropriety may result) to act sua sponte to determine if a breach of professional ethics has occurred or is about to occur.'" (quoting Universal Athletic Sales Co. v. Am. Gym, Recreational & Athletic Equip. Corp., 357 F. Supp. 905, 908 (W.D. Pa. 1973))); United States v. Anonymous, 215 F. Supp. 111, 113 (E.D. Tenn. 1963) ("Courts are required mandatorily to exercise this duty to preserve judicial decorum and to enforce the respectability of the legal profession." (citing Burr, 22 U.S. (9 Wheat.) 529)).
12. See McMorrow et al., supra note 4, at 1441.
13. Id. at 1442 ("Courts are concerned primarily with whether an attorney's behavior taints the judicial process and by implication the system as a whole. Preservation of popular faith with the judicial system is the court's foremost consideration."); see also Zacharias & Green, supra note 8, at 1345 ("The courts... have limited the exercise of inherent authority to conduct that has threatened the judicial process in some way... "). See generally Jonathan Macey, Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession, 74 FORDHAM L. REV. 1079, 1086 (2005) (noting courts' frustration as to drawing the line between unethical conduct and zealous advocacy).
14. See McMorrow et al., supra note 4, at 1429 ("The picture that emerges from the reported decisions in both state and federal courts is a desire to maintain the integrity of the judicial process and a concern for the efficiency and fairness in the proceeding before the court.").
2. Types of Sanctions

District court judges must follow the Code of Conduct for United States Judges,\(^\text{15}\) adopted in 1973 by the Judicial Conference of the United States.\(^\text{16}\) The Code "prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary."\(^\text{17}\) Section (B)(3) of the Code states, "A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer."\(^\text{18}\) In assessing what is "appropriate action," it is helpful to look at a comment to the Model Code of Judicial Conduct (used by state judges),\(^\text{19}\) which asserts that "[a]ppropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body."\(^\text{20}\)

When deciding what type of sanction to impose, judges seem to match the sanction's harshness with how negatively the attorney's professional misconduct "affected the integrity of the judicial system."\(^\text{21}\) The sanctions "must be proportional to the misconduct in question."\(^\text{22}\) In fact, several courts of appeals have expressed that judges should use sanctions with the least severity necessary to serve the purpose of administering a sanction.\(^\text{23}\) The U.S. Court of Appeals for the Fifth Circuit explained this principle in *Thomas v. Capital Security Services, Inc.*, noting that judges often are not cognizant of how harmful their criticism can be to a lawyer's career.\(^\text{24}\)

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17. *Id.* All federal judges obtain a copy of the Code of Conduct for United States Judges, which is updated periodically. *Id.*


20. MODEL CODE OF JUDICIAL CONDUCT Canon 3D(3) cmt. (2006). "This commentary makes clear that reporting to the bar is not the exclusive sanction for misconduct." McMorrow et al., *supra* note 4, at 1431; *see also Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) ("What is 'appropriate' may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances.").


22. Zacharias & Green, *supra* note 8, at 1346.

23. *See* Thomas, 836 F.2d at 878 ("[T]his Court has previously held that the basic principle governing the choice of sanctions is that the least severe sanction adequate to serve the purpose should be imposed." (citing Boazman v. Econ. Lab., Inc., 537 F.2d 210, 212–13 (5th Cir. 1976))); Reizakis v. Loy, 490 F.2d 1132, 1136 (4th Cir. 1974); Indus. Bldg. Materials, Inc. v. Interchem. Corp., 437 F.2d 1336, 1339 (9th Cir. 1970); *see also Zacharias & Green, supra* note 8, at 1346 (citing Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 886 (5th Cir. 1968)).

24. *See* Thomas, 836 F.2d at 878 ("Judges are prone to forget the sting of public criticism delivered from the bench. ... There is a distinction between bad practice and lack of integrity. Being guilty of the former does not invariably justify a charge of the later.")
district court should impose sanctions "with care, specificity, and attention to the sources of its power" because, "unless an attorney's questionable conduct threatens to taint the litigation pending before the court, 'the business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice [there].'" When courts do sanction attorneys, the sanctions are described as either traditional sanctions or informal sanctions.

a. Traditional Sanctions

Traditional sanctions are usually based on rules and "encompass the long-established responses to attorney misconduct." These sanctions include disqualification from a case, assessment of costs, and referral to a disciplinary committee, and "are designed primarily to ensure the integrity of the system and regulate conduct before the court." For example, in *Lasar v. Ford Motor Co.*, the U.S. District Court for the District of Montana both fined and disqualified an attorney for making misleading statements to the district court in his sworn application for pro hac vice status.

b. Informal Sanctions

Informal sanctions, unlike traditional sanctions, are not rule-based. They "include a court's decision to issue an opinion, naming the recalcitrant attorney, outlining his or her misdeeds in detail, and describing the court's disappointment and outrage." These informal sanctions "combine the
power of the written word with the importance of an attorney's reputation to impress upon an attorney (and the bar) the gravity of the conduct.\textsuperscript{34} Informal sanctions are more efficient than traditional sanctions because they allow courts to speak to the whole legal community about how lawyers should conduct themselves professionally.\textsuperscript{35} "While traditional sanctions and informal sanctions are often used in tandem, it is through informal sanctions that courts communicate directly with the attorneys...."\textsuperscript{36} This Note addresses the question of whether attorneys should be permitted to appeal a district court's imposition of these informal sanctions and, if so, under what circumstances attorneys should be allowed to do so.\textsuperscript{37}

B. Article III's "Case or Controversy" Requirement

Article III, section 2 of the Constitution states,

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.\textsuperscript{38}

One must present a "case" or "controversy" in order to have standing to sue or to appeal.\textsuperscript{39} This standing requirement of Article III limits federal judges because they only possess the power to resolve cases and controversies.\textsuperscript{40} "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."\textsuperscript{41} Adherence to Article III's "case or controversy" requirement is a way to guarantee that the federal courts are not given unlimited...
jurisdiction.\textsuperscript{42} To follow Article III, federal courts must analyze their own power to hear cases brought before them.\textsuperscript{43}

The question of jurisdiction is an important inquiry in maintaining the federal courts’ limited role established by Article III. Federal courts have an obligation to determine whether they have proper jurisdiction over an appeal.\textsuperscript{44}

“On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.”\textsuperscript{45}

Appellate judges must remain constantly aware of the question of jurisdiction in every case that comes before them\textsuperscript{46} because “[t]he requirement that jurisdiction be established as a threshold matter ‘spring[es] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’”\textsuperscript{47}

C. The Nonparty Rule and the Attorney Exception

If a petitioner is without standing, a court of appeals does not have jurisdiction over the petitioner’s appeal.\textsuperscript{48} It is a well-established rule that only parties to a case have standing to appeal a judgment rendered against them.\textsuperscript{49} This rule includes parties who have properly intervened in a case in addition to those parties who were part of the original controversy.\textsuperscript{50} However, in \textit{Lujan v. Defenders of Wildlife}, the U.S. Supreme Court established three requirements for standing.\textsuperscript{51} First, “the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not clandestine.’”\textsuperscript{52}

\textsuperscript{42} See id. at 341–42.
\textsuperscript{43} See id.
\textsuperscript{44} See Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94 (1998).
\textsuperscript{45} Id. (citing Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900)); see also Joan Steinman, \textit{Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts}, 38 GA. L. REV. 813, 838–39 (2004) (“When a court determines a person’s... standing to appeal, it is deciding whether the person... is a proper party to bring a particular issue to an appellate court for review. In essence, the question is whether that person is entitled to have an appeals court decide the merits of the dispute, or at least particular issues that the appellant contends were erroneously decided in the trial court.”).
\textsuperscript{46} See Steel Co., 523 U.S. at 94 (citing \textit{Great S. Fire Proof Hotel}, 177 U.S. at 453).
\textsuperscript{47} Id. at 94–95 (quoting Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)).
\textsuperscript{49} See Marino v. Ortiz, 484 U.S. 301, 304 (1988) (“The rule that only parties to a lawsuit... may appeal an adverse judgment, is well settled.”); see also Joan Steinman, \textit{Irregulars: The Appellate Rights of Persons Who are Not Full-Fledged Parties}, 39 GA. L. REV. 411, 484 (2005).
\textsuperscript{50} See Marino, 484 U.S. at 304.
\textsuperscript{51} Lujan, 504 U.S. at 560.
conjectural or hypothetical.’”52 Second, “there must be a causal connection between the injury and the conduct complained of.”53 Finally, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”54 The Lujan court did not articulate a “party” requirement,55 which suggests that one need not always be a party to a case in order to bring an appeal.

Also, courts have articulated an attorney exception to the nonparty rule, finding that sanctioned attorneys may, in some cases, appeal a decision.56 Undoubtedly, a sanctioned attorney has suffered an “injury in fact,” thus meeting one of the standing requirements articulated by the Supreme Court in Lujan.57 Although the circuit courts differ in their opinions on which types of sanctions are appealable,58 there is general agreement among courts that attorneys may appeal an adverse judgment. The U.S. Court of Appeals for the Third Circuit has explained, “There is no doubt at all but that at some point an attorney subject to a sanction may appeal.”59 The U.S. Court of Appeals for the Tenth Circuit has decided that it has jurisdiction over an attorney’s appeal if a district court’s order has “‘directly aggrieve[d]’” the attorney.60 The U.S. Court of Appeals for the Federal Circuit has stated that “[a]s an exception to [the] general rule, a nonparty such as an attorney who is held in contempt or otherwise sanctioned by the court in the course of litigation may appeal from the order imposing sanctions.”61 Several circuit courts have even addressed the issue of jurisdiction over an attorney’s appeal without even mentioning the nonparty rule, treating as implicit the notion that attorneys have standing to appeal an adverse finding.62

D. Sanction Requirement

Whereas the circuit courts may disagree over the question of what constitutes an appealable attorney sanction,63 they generally do agree on

52. Id. (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
54. Id. (quoting Simon, 426 U.S. at 38, 43).
55. See supra note 51 and accompanying text.
56. See infra notes 58–62 and accompanying text.
57. Lujan, 504 U.S. at 560.
58. See infra Part II.
62. See, e.g., United States v. Talao, 222 F.3d 1133, 1137 (9th Cir. 2000); Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1199–200 (9th Cir. 1999); In re Williams, 156 F.3d 86, 92 (1st Cir. 1998); 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).
63. See infra Part II.
what is never appealable. In In re Williams, the U.S. Court of Appeals for the First Circuit noted that "not every criticism by a judge that offends a lawyer's sensibilities is a sanction." In United States v. Talao, the U.S. Court of Appeals for the Ninth Circuit stated, "We do not invite appellate review of every unwelcome word uttered or written by the district courts." A district court's general "expression [of] disapproval of a lawyer's behavior" will not suffice. Most circuit courts have required some degree of formality in the reprimands given by district courts before deciding that they have jurisdiction to hear an attorney's appeal. According to the U.S. Court of Appeals for the Sixth Circuit, "only where the district court makes a formal, particularized finding of misconduct that exists independent of the court's other factual and legal findings" is the order an appealable sanction.

Currently, there is a circuit split over whether a district court's order finding attorney misconduct is considered an appealable sanction. The courts of appeals take different approaches to answering the question of "whether an order damaging only an attorney's professional reputation and not accompanied by any other form of sanction can be appealed": (a) the order must impose a monetary sanction to be appealable; (b) the order must be likely to damage the attorney's professional reputation to be appealable; and (c) the order sanctioning the attorney must express definite formality as a reprimand to be appealable.

The U.S. Court of Appeals for the Seventh Circuit is the only circuit which has ruled that an attorney can only appeal when the court has formally sanctioned the attorney by imposing a fine. The U.S. Court of Appeals for the District of Columbia Circuit as well as the Tenth and Fifth Circuits take the approach that an attorney may appeal an order including a reprimand that could potentially damage his or her career, holding that, when a court makes a declaration of an attorney's professional misconduct,

64. See Bowers v. NCAA, 475 F.3d 524, 543 (3d Cir. 2007) ("Most courts agree that mere judicial criticism is insufficient to constitute a sanction." (citing Talao, 222 F.3d at 1138; Williams, 156 F.3d at 90; Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984))).
65. Williams, 156 F.3d at 90.
66. Talao, 222 F.3d at 1138.
67. Id.
68. See supra notes 26–32 and accompanying text.
69. In re Harris, 51 F. App'x 952, 956 (6th Cir. 2002). In In re Harris, while the district court acknowledged that the prosecutor knowingly produced a witness that would give false testimony, the court refused to discuss further the prosecutor's professional misconduct. Because the court's acknowledgement did not exist as an independent order finding professional misconduct, the U.S. Court of Appeals for the Sixth Circuit would not hear the attorney's appeal. Id. at 954.
70. For a full description of the circuit split, see infra Part II.
72. Id. at 1167-68.
the statement alone may be appealable. Finally, the First Circuit has landed somewhere in between the views of the other circuits, holding that "[w]ords alone may suffice if they are expressly identified as a reprimand." In Weissman v. Quail Lodge Inc., the Ninth Circuit agreed with the First Circuit’s reasoning. Additionally, in Talao, the Ninth Circuit held that, because a district court found a violation of a specific ethical rule, the order contained the "requisite" formality to be an appealable sanction. Lastly, the Federal Circuit held in Precision Specialty Metals, Inc. v. United States that an "explicit and formal" reprimand was appealable.

E. Writ of Mandamus

If an attorney does not have standing to appeal a district court’s order finding attorney misconduct, he or she still has the option to file a writ of mandamus against the district court. A court’s power to issue writs of mandamus is derived from the All Writs Act. A writ of mandamus is "[a] writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly." Writs of mandamus have been used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." However, the writ of mandamus "is seldom issued and its use is discouraged." Moreover, it is within a court’s discretion to refrain from issuing the writ even when the requirements for mandamus are technically satisfied. The availability of the writ "does not compel its exercise." Use of the writ is a drastic remedy that a court should grant only in extraordinary circumstances in response to an act amounting to a judicial usurpation of power because there is a strong hesitation to "mak[e] the judge a litigant."

74. See Butler, 348 F.3d at 1168–69; 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).
75. In re Williams, 156 F.3d 86, 92 (1st Cir. 1998).
76. See Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1199–200 (9th Cir. 1999).
77. United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000).
78. Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1352–53 (Fed. Cir. 2003). The court also placed a heavy emphasis on the damage to the attorney’s professional reputation likely to result from the district court’s order. Id.
79. 9 James Wm. Moore et al., Moore’s Federal Practice ¶ 110.28 (2d ed. 1996) ("[T]he writ may issue to review conduct that is not otherwise reviewable by appeal.").
80. See 28 U.S.C. § 1651(a) (2000) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); see also Hahnemann Univ. Hosp. v. Edgar, 74 F.3d 456, 460 (3d Cir. 1996).
83. Id. (quoting Lusardi v. Lechner, 855 F.2d 1062, 1069 (3d Cir. 1989)).
84. Id. (quoting Lusardi, 855 F.2d at 1070).
85. Id.; see also Mallard v. U.S. Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 209 (1989) ("[W]e have required that petitioners demonstrate a ‘clear abuse of discretion’ or
Part II dissects the circuit split over whether an attorney can appeal a district court's order finding professional misconduct. Part II.A discusses the Seventh Circuit's cases allowing an attorney to appeal monetary sanctions only. Part II.B examines the Tenth, Fifth, and D.C. Circuit cases permitting an attorney to appeal sanctions that will likely cause injury to the attorney's reputation. Finally, Part II.C discusses the First, Ninth, and Federal Circuit approach, which allows an attorney to appeal formal sanctions.

A. Appealing Monetary Sanctions Only: The Seventh Circuit Approach


The Seventh Circuit first addressed the question of whether an attorney may appeal a district court's finding of his or her professional misconduct in Bolte v. Home Insurance Co. In Bolte, the U.S. District Court for the Western District of Wisconsin found that the defendant's two attorneys, Terrence Joy and Thomas Hamlin, concealed from the plaintiff inconsistent statements made by one of the defendant's witnesses and also hid from the plaintiff the defendant's witness's name and address. The district judge called Joy and Hamlin's behavior "reprehensible," and, after the parties had settled, the district court judge refused to vacate his finding describing the attorneys' conduct in this manner.

The attorneys argued that the court should permit them to appeal the district judge's order because it might lead to disciplinary proceedings in their home state, and moreover, the order had caused damage to their reputations. However, the Seventh Circuit disagreed, ruling that it did not believe that this sort of finding is appealable under 28 U.S.C. § 1291, which states that "[t]he courts of appeals... shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The court reasoned that if it allowed appeals from district court orders finding conduct amounting to "usurpation of [the judicial] power." (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953)); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)); MOORE ET AL., supra note 79, 110.28, at 347 (describing the serious circumstances under which appellate courts have granted writs of mandamus to "prevent district judges from embarking on frolics of their own").

86. Chambers, 148 F.3d at 223 (setting out as the prerequisites for issuance of a writ of mandamus, "the jurisdictional prerequisite inherent in the language of §1651(a)," "that petitioner have no other adequate means to attain the desired relief," and "that petitioner meets its burden of showing that its right to the writ is clear and indisputable").
87. 744 F.2d 572, 572–73 (7th Cir. 1984).
88. See id. at 572.
89. Id. (internal quotation marks omitted).
90. Id.
91. 28 U.S.C. § 1291 (2000); Bolte, 744 F.2d at 572–73.
attorney misconduct, "a breathtaking expansion in appellate jurisdiction would be presaged" and "[s]uch appeals would be particularly unmanageable because usually there would be no appellee."92

The court recognized that the shame attached to a district court's finding of "reprehensible" conduct might actually satisfy the Article III "case or controversy" requirement, but the court believed that Congress, in enacting 28 U.S.C. § 1291, did not intend "to allow people who were not even parties to a lawsuit in the district court to appeal from a wounding or critical or even palpably injurious comment or finding by a district judge."93

Attorneys Joy and Hamlin initially sought a writ of mandamus against the district judge in this case, which the court of appeals refused.94 However, the court suggested that a writ of mandamus is actually the appropriate remedy for attorneys aggrieved by a district court's reprimand under 28 U.S.C. § 1651, which states that "courts . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."95

2. Seymour v. Hug

Thirteen years after Bolte, the Seventh Circuit once again addressed the appealability of nonmonetary sanctions ordered by district courts.96 In Seymour v. Hug, attorneys appealed a finding that they acted dishonestly in the course of a settlement proceeding.97 The district court judge found that during the settlement negotiations, the plaintiff and her attorneys represented potential harm to the plaintiff's children.98 As a result, the defendants agreed to a settlement that covered the plaintiff/mother's claims and any potential claims of her children.99 The plaintiff then petitioned to the surrogate court, arguing that all of the settlement money should go to her and that her children had no separate claims.100 Because the original settlement was largely based on the children's potential independent claims,

92. Bolte, 744 F.2d at 573. But see Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1169 (10th Cir. 2003) (reasoning that the lack of appellees is not problematic because the court will review both the appellant's brief and the district court's order that provides the reasoning behind the sanction); In re Williams, 156 F.3d 86, 97 (1st Cir. 1998) (Rosenn, J., dissenting) ("An appeal in such situations is no more unopposed than is an appeal from monetary sanctions."); Petition for Writ of Certiorari, supra note 33, at 18.
93. Bolte, 744 F.2d at 573.
94. Id. For a discussion regarding the improbability of courts granting writs of mandamus in informal sanctions cases, see infra Part III.B.
95. 28 U.S.C. § 1651; Bolte, 744 F.2d at 573. For more information on writs of mandamus, see supra Part I.E.
96. See Seymour v. Hug, 485 F.3d 926 (7th Cir. 2007).
97. Id. at 928.
98. Id. at 927.
99. Id.
100. Id.
the district court held that the plaintiff and her attorneys acted dishonestly during the settlement proceedings.\footnote{101}

The Seventh Circuit began its analysis by stating the general nonparty rule that "a nonparty cannot challenge on appeal the rulings of a district court."\footnote{102} The court then described the Seventh Circuit's general exception to the nonparty rule that "an attorney can bring an appeal on her own behalf when challenging a district court decision imposing monetary sanctions on the attorney, but this rule does not allow an appeal of otherwise critical comments by the district court when no monetary sanctions have been imposed."\footnote{103}

The court recognized that the other circuits disagree with the Seventh Circuit precedent but also pointed out that the other circuits are split among themselves over whether the court must formally sanction an attorney in order for the attorney to appeal.\footnote{104} The Seventh Circuit adopted its own reasoning in Bolte\footnote{105} and explained that its decision in Seymour was compatible with the court's precedent of "review[ing]... judgments, not statements in opinions."\footnote{106} Finally, as it did in Bolte,\footnote{107} the court pointed out that attorneys still have the option to petition for a writ of mandamus against the district judge.\footnote{108}

In July 2007, Leslie V. Matlaw, the aggrieved attorney in Seymour, petitioned the Supreme Court for a writ of certiorari.\footnote{109} Among her arguments, Matlaw pointed out that one does not need access to Westlaw or Lexis Nexis to find and read judicial opinions chastising attorneys.\footnote{110} "[E]ven ‘unpublished’ opinions are immediately available... [by] anyone possessed of even the most rudimentary familiarity with the Internet—
basically, everyone in the world.” Matlaw also argued that potential clients and opposing counsel can easily “Google” an attorney and find the attorney’s website as well as a link to the judicial opinion with the reprimand. “An appellate decision (reversing, vacating, or even examining but ultimately affirming that order) would likewise be generated in that web search, thus... rendering precisely the relief sought.” Matlaw also asserted that the “avalanche of cases” that the court anticipated in Bolte had not accrued and that the “lack of an appellee” had not been problematic either.

Finally, Matlaw asserted that attorneys will not argue as vigorously for their clients if they are only allowed to appeal monetary sanctions. She suggested that if an attorney does not have a right to appeal a district court’s finding of attorney misconduct, this will “chill zealous advocacy.” She contended that, without the possibility of appeal, an attorney might be hesitant to advocate fervently on behalf of a client, fearing that the judge might issue a sanction with no regard for its effect on the attorney’s reputation. Matlaw also wrote that, without the possibility of appeal, an attorney could even violate ethical rules prohibiting conflicts of interest if he or she does not advocate zealously. The Supreme Court denied Matlaw’s petition for a writ of certiorari in October 2007.

B. Appealing Sanctions That Could Damage an Attorney’s Professional Reputation: The Tenth, Fifth, and D.C. Circuit Approach


In Butler v. Biocore Medical Technologies, Inc., an attorney, Tim Butler, appealed from the U.S. District Court for the District of Kansas’s finding that he had violated several rules of professional conduct. The district court found that he had violated District of Kansas Rule 83.5.4, concerning “pro hac vice requirements for involvement of local counsel,” and District of Kansas Rule 26.3, “requiring the filing of notice of service of discovery...
disclosures, requests, or responses."124 The district court also found a violation of Federal Rule of Civil Procedure 5(d), "requiring the filing of papers that have been served on a party be given to the court clerk," and Federal Rule of Civil Procedure 45(b)(1), "requiring notice to all parties of subpoenas".125 Finally, the district court found that Butler violated Model Rule of Professional Conduct 8.4(g), "providing that it is professional misconduct for a lawyer to 'engage in any . . . conduct that adversely reflects on the lawyer's fitness to practice law,'"126 and Canon 9 of the Code of Professional Responsibility, "requiring attorneys to avoid the appearance of impropriety."127 Furthermore, and perhaps most harmful to Butler, the district court ordered that the court clerk mail a copy of its findings to all the courts in which Butler was admitted to practice.128

The Tenth Circuit first addressed the question of jurisdiction to hear the attorney's appeal.129 The court concluded that it had jurisdiction over these appeals from attorneys as long as the final judgment has "directly aggrieve[d]" the attorney.130 The court also stated that it could hear an attorney's appeal if the attorney has been "injured in the legal sense" by the district court's order.131

The court posed the question in this case of "when, if ever, an order . . . affecting an attorney's professional reputation imposes a legally sufficient injury to support appellate jurisdiction."132 The Tenth Circuit took the position that, under 28 U.S.C. § 1291,133 it does have jurisdiction to hear an attorney's appeal from a district court's finding of a professional conduct violation without monetary sanctions and without express language of a reprimand.134 The court provided three reasons for its decision. First, the court found "that damage to an attorney's professional reputation is a cognizable and legally sufficient injury."135 Second—confronting the
concern that attorney appeals such as these would not be contested, and thus would undermine the adversarial approach—the Tenth Circuit pointed out that it reviews not only the petitioner’s brief, but also the district court’s order so that the court “will not ‘hear only one side of the story.’” Finally—in response to the argument that the court’s approach would lead to “excessive appellate supervision”—the Tenth Circuit explained that such an outcome would not occur because of the deferential “no reasonable basis” standard that the court employs when reviewing the district court’s order.

2. Fifth Circuit: Walker v. City of Mesquite

In Walker v. City of Mesquite, the Fifth Circuit addressed the question of whether an attorney could appeal a district court’s finding of attorney misconduct. The U.S. District Court for the Northern District of Texas found attorney Thomas Peebles guilty of “blatant misconduct” and of “violat[ing] his obligation of candor.”

The Walker appellees argued that the court of appeals should not have jurisdiction because the only result of the district court’s findings would be a mere blow to Peebles’s professional reputation. The appellees cited the Seventh Circuit’s Clark Equipment Co. v. Lift Parts Manufacturing Co., which only allowed appeals from monetary sanctions; however, the Fifth Circuit strongly disagreed with the Seventh Circuit’s result. The Fifth Circuit provided the following argument against the Seventh Circuit’s monetary sanction requirement:

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

chastising him by name”); United States v. Schrimser, 493 F.2d 842, 844 (5th Cir. 1974) (discussing the importance of an attorney’s reputation in a community).

136. See Butler, 348 F.3d at 1169 (quoting In re Williams, 156 F.3d 86, 91 (1st Cir. 1998)).

137. Id.

138. See Walker v. City of Mesquite, 129 F.3d 831, 831–33 (5th Cir. 1997).

139. Id. at 832. The U.S. Court of Appeals for the Fifth Circuit began its analysis by stating the general rule that an attorney cannot appeal a sanction until a final order has been given in the district court. Id. However, the court recognized an exception to this general rule, allowing attorneys to appeal prejudgment when they are no longer counsel in the underlying litigation. Id. Because Thomas Peebles was no longer part of the original case, he was able to raise an appeal. Id.

140. Id.

141. Id. The appellees cite Clark Equipment Co. v. Lift Parts Manufacturing Co., 972 F.2d 817, 820 (7th Cir. 1992). For a further discussion on Seventh Circuit precedent, see supra Part II.A.
one’s professional reputation is a lawyer’s most important and valuable asset. ¹⁴²

In furtherance of its argument that an attorney should be permitted to appeal a sanction which harms his or her professional reputation, the Fifth Circuit quoted Justice John Paul Stevens’s dissenting opinion in Cooter & Gell v. Hartmarx Corp.: “‘Despite the changes that have taken place at the bar since I left the active practice 20 years ago, I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation.’” ¹⁴³

The Fifth Circuit concluded that the district court’s findings did constitute an appealable sanction, despite the lack of monetary accountability or explicit reprimand. ¹⁴⁴ The court also mentioned that courts of appeals have an interest in exercising jurisdiction over appeals such as these because it is their “duty to assure that lawyers, as officers of the court, live up to their ethical responsibilities.” ¹⁴⁵


In Sullivan v. Committee on Admissions & Grievances, a disciplinary committee found that an attorney had violated several Canons of Ethics. ¹⁴⁶ The U.S. District Court for the District of Columbia actually dismissed the charges that the committee had issued against the attorney, but the court still found that the attorney had violated the Canons of Ethics. ¹⁴⁷ The attorney appealed this finding. ¹⁴⁸

The D.C. Circuit ruled that, because the district court’s finding of a violation of the Canons of Ethics is harmful to the attorney’s professional reputation, the attorney had standing to appeal the finding. ¹⁴⁹ The court’s terse reasoning included that “[the attorney]’s posture is not unlike that of an accused who is found guilty but with penalties suspended.” ¹⁵⁰

¹⁴² Walker, 129 F.3d at 832; see also Cities Serv. Co. v. Gulf Oil Corp., 976 P.2d 545, 550 (Okla. 1999) (Opala, J., dissenting) (“Given the importance of a lawyer’s professional reputation and standing, the right to appeal from a decision that visits discipline should not depend on the form of inflicted sanction.” (citing Walker, 129 F.3d at 832)).

¹⁴³ Walker, 129 F.3d at 832 n.3 (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 412 (1990) (Stevens, J., concurring in part and dissenting in part)); see also FDIC v. Tekfen Constr. & Installation Co., 847 F.2d 440, 444 (7th Cir. 1988) (“A lawyer’s reputation for integrity, thoroughness and competence is his or her bread and butter.”).

¹⁴⁴ See Walker, 129 F.3d at 832–33.

¹⁴⁵ Id. at 833 n.5.


¹⁴⁷ Id. at 956.

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ Id.
C. Appealing Sanctions That Are Considered Formal: The First, Ninth, and Federal Circuit Approach

1. First Circuit: In re Williams

In *Williams*, two attorneys, Charles J. Cannon and William Blagg, sought to appeal a bankruptcy court’s findings that were upheld by the U.S. District Court for the District of Rhode Island. The bankruptcy court ordered Rule 37(b) sanctions on Cannon and Blagg for failing to produce certain documents on time. The judge additionally ordered each attorney to pay a $750 fine. The judge later decided that Blagg need not pay the fine but nonetheless did not vacate the monetary sanction against Cannon or the court’s findings that both lawyers acted unprofessionally. On appeal to the District Court of Rhode Island, the court lifted the monetary sanction but did not vacate the findings of fact criticizing the lawyers’ behavior.

The First Circuit opined that the question of whether the attorneys could appeal the bankruptcy court’s negative findings of fact “depend[ed] on whether the findings, simpliciter, comprise[d] a decision, order, judgment, or decree[,]” as is required by 28 U.S.C. § 158(d). The First Circuit found that the bankruptcy court’s critical findings of fact were not appealable.

The court based its analysis on the “legal significance” of the bankruptcy court’s criticism. While the court recognized that the lower court’s published opinion was both “explicit and unflattering,” “[s]till, it is an abecedarian rule that federal appellate courts review decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations.” The court acknowledged that the attorneys might suffer damage to their professional reputations, but pointed out that the

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151. *In re Williams*, 156 F.3d 86, 88–89 (1st Cir. 1998).
154. *Id.*
155. *Id.*
156. *Id.* at 89. Technical considerations under Rule 37(b)(2) caused the district court judge to annul the sanctions imposed by the bankruptcy court. “Sanctions under Rule 37(b)(2) may not be levied without the issuance, and subsequent violation, of a formal order under Rule 37(a).” *Id.* at 89 n.1 (citing R.W. Int’l Corp. v. Welch Foods, Inc., 937 F.2d 11, 19 (1st Cir. 1991)).
157. *Id.* at 89.
158. *Id.* (citing 28 U.S.C. § 158(d) (2000) (“The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees . . . .”)); see also 28 U.S.C. § 1291 (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .”).
159. *See Williams*, 156 F.3d at 90.
160. *Id.* at 89.
161. *Id.* at 89–90.
162. *Id.* at 90.
bankruptcy court actually had vacated the intended sanctions—the fines.\textsuperscript{163}

The court decided that it lacked jurisdiction "[b]ecause no sanction remain[ed]."\textsuperscript{164}

The First Circuit's justification for its ruling lies in its reading of the bankruptcy court's findings, which it found were "not the sanction itself, but, rather, served to justify the imposition of monetary sanctions" that were then vacated.\textsuperscript{165}

The court also raised the problem that most attorney appeals of this type will not have appellees. "This means, of course, that a reviewing court will hear only one side of the story, and will be deprived of the balanced adversarial presentation that is so helpful to the proper functioning of the appellate process."\textsuperscript{166} Furthermore, the First Circuit was concerned with the possible effect on judicial candor if judges' critical statements were made appealable.\textsuperscript{167} As a result of all of these considerations, the court held:

[A] jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a sanction. A trial judge has the obligation to assure the proper conduct of proceedings in his or her court, and must retain the power to comment, sternly when necessary, on a lawyer's performance without wondering whether those comments will provoke an appeal.\textsuperscript{168}

The First Circuit believed that the appealability of sanctions would deter judges from sanctioning attorneys in the first place.\textsuperscript{169} "We cannot expect judges to preside effectively over discovery and trials, and yet routinely subject them to appeals from critical comments reflecting their displeasure with the conduct of those they are charged with controlling."\textsuperscript{170}

The court made it expressly clear that it disagreed with the Seventh Circuit's precedent that only monetary sanctions can serve as the basis of an appeal:

Sanctions are not limited to monetary imposts. Words alone may suffice if they are expressly identified as a reprimand. But critical comments made in the course of a trial court's wonted functions—say, factfinding or

\textsuperscript{163} See id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 91. But see Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1169 (10th Cir. 2003) (noting that courts review both the appellant's brief and the original district court order); Petition for Writ of Certiorari, supra note 33 (asserting that the lack of an appellee in these appeals has not been problematic).
\textsuperscript{167} Williams, 156 F.3d at 92.
\textsuperscript{168} Id. (citing Quercia v. United States, 289 U.S. 466, 469 (1933); United States v. Polito, 856 F.2d 414, 418 (1st Cir. 1988)).
\textsuperscript{169} See id.
\textsuperscript{170} Id.
opinion writing—do not constitute a sanction and provide no independent basis for an appeal.\textsuperscript{171}

The court finally pointed out that its holding does not leave an attorney who has been harshly criticized by a court without a remedy; attorneys still have the option to file a writ of mandamus.\textsuperscript{172}

2. Ninth Circuit

a. Weissman v. Quail Lodge Inc.

In \textit{Weissman}, attorney Lawrence W. Schonbrun attempted to appeal the U.S. District Court for the Northern District of California’s order that limited his ability to file objections to Americans with Disabilities Act class action settlement agreements and included disapproving comments about his professional conduct.\textsuperscript{173} Even though the district court found Schonbrun’s conduct “groundless, contrived and misplaced” and “reflect[ing] a serious lack of professionalism and good judgment,” the Ninth Circuit decided that the district court’s comments were not sanctions and were thus unappealable.\textsuperscript{174}

The Ninth Circuit noted that, even though a court’s formal reprimand might be a sanction, it was not so in this case because the district court’s comments “[were] merely its factual findings made in support of the Order.”\textsuperscript{175} The court expressly agreed with the First Circuit’s holding in

\begin{itemize}
  \item \textsuperscript{171} \textit{Id.} Compare Williams, 156 F.3d 86, with Bowers v. NCAA, 475 F.3d 524, 538 (3d Cir. 2007) (agreeing with the First Circuit that explicit reprimands are appealable sanctions, but declining to take a side on the circuit split).
  
  In \textit{Bowers v. NCAA}, the attorneys raised an appeal from the district court’s finding that they had violated Federal Rule of Civil Procedure 26(e) and “had willfully and in bad faith concealed from defense counsel evidence of [the plaintiff]’s escalating substance abuse and substance abuse treatment[,]” which led the district court to grant sanctions motions against the plaintiff and her attorneys. \textit{Bowers}, 475 F.3d at 538.
  
  In addressing the issue of jurisdiction, the U.S. Court of Appeals for the Third Circuit recognized that the district court “did not impose any additional monetary or disciplinary sanctions on [the plaintiff]’s attorneys beyond factual findings and language in the actual order that the conduct of those attorneys merited sanctions.” \textit{Id.} at 542. The court then noted that the circuits are in disagreement regarding whether—in order to be appealable—the district court’s factual finding must include explicit language of a reprimand. \textit{Id.} at 543. However, because the lower court in \textit{Bowers} “explicitly stated” that the attorneys were being sanctioned, the Third Circuit did not think it necessary to take a side in this disagreement. \textit{Id.} at 543–44. It did, however, agree with the U.S. Court of Appeals for the First Circuit that an “explicit public reprimand . . . constitutes an appealable sanction.” \textit{Id.} at 544. Because, in this case, the district court found that the attorneys violated a Federal Rule of Civil Procedure, and the district court explicitly granted sanctions motions against them, “[t]he order . . . clearly rose above mere judicial criticism” and was appealable. \textit{Id.}
  
  \textsuperscript{172} \textit{See Williams}, 156 F.3d at 92 (citing 28 U.S.C. § 1651 (2000)); \textit{see also supra} note 108 and accompanying text. For a discussion about the improbability of courts granting writs of mandamus in informal sanctions cases, see \textit{infra} Part III.B.
  
  \textsuperscript{173} \textit{See Weissman v. Quail Lodge Inc.}, 179 F.3d 1194, 1196 (9th Cir. 1999).
  
  \textsuperscript{174} \textit{Id.} (quoting the district court’s order).
  
  \textsuperscript{175} \textit{Id.} at 1199.
\end{itemize}
Williams that "words alone will constitute a sanction only 'if they are expressly identified as a reprimand.'" Because the language in the order against Schonbrun did not constitute an explicit reprimand (thus not a sanction), the Ninth Circuit found the words in the order unappealable.

b. United States v. Talao

In Talao, an Assistant United States Attorney, Robin Harris, wished to appeal a finding by the Northern District of California that she had violated a local rule of professional conduct prohibiting communications between a lawyer and a person also in the matter who is represented by a different lawyer.

The Ninth Circuit pointed out that the district court’s finding that "Harris knowingly and willfully violated a specific rule of ethical conduct" was per se a sanction. The court reasoned that the district court’s finding amounted to more than mere words and was an actual legal conclusion with the formality of a reprimand. "The requisite formality in this case [was] 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." The court also added that the district court’s finding of a violation of the California rule would likely affect Harris in the same way as a reprimand; it would probably "stigmatize Harris among her colleagues and potentially could have a serious detrimental effect on her career." Harris could also be subject to sanctions served by the California Bar.

The Ninth Circuit concluded its discussion by making it clear that "a formal finding of a violation eliminates the need for difficult line drawing in much the same way as a court’s explicit pronouncement that its words are intended as a sanction" and that the court would not be willing to

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176. Id. at 1200 (quoting Williams, 156 F.3d at 92).
177. See id.
178. See United States v. Talao, 222 F.3d 1133, 1135 (9th Cir. 2000). The district court found that Harris violated Rule 2-100 of the California Rules of Professional Conduct, which provides, in part: "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has consent of the other lawyer." Id. at 1136 n.4 (citing CAL. RULES OF PROF’L CONDUCT R. 2-100 (2008)); cf. MODEL RULES OF PROF’L CONDUCT R. 4.2 (2003).
179. Talao, 222 F.3d at 1138; see also State v. Perez, 885 A.2d 178, 187 (Conn. 2005). State v. Perez is an example of a state court of last resort agreeing with the reasoning in United States v. Talao. Perez, 885 A.2d at 187. In Perez, the Connecticut Appellate Court found that an attorney violated a Rule of Professional Conduct. Id. at 178. The Supreme Court of Connecticut ruled that "the Appellate Court’s finding that the plaintiff had violated rule 3.3(a) of the Rules of Professional Conduct constituted a disciplinary sanction tantamount to a reprimand." Id. at 188.
180. See Talao, 222 F.3d at 1138.
181. Id.
182. Id.
183. Id.
184. Id.
hear an appeal of every negative word spoken to an attorney. The Ninth Circuit also addressed the concern that its holding might make judges reluctant to find ethical violations for fear of reversal on appeal by arguing that it is doubtful that judges would be confused about "the meaning and effect of formal findings like the one against Harris." 

3. Federal Circuit: Precision Specialty Metals, Inc. v. United States

In Precision, the U.S. Court of International Trade reprimanded an attorney in the U.S. Department of Justice, Mikki Graves Wasler, for making misrepresentations in a motion for reconsideration. Wasler left out parts of quotations from judicial opinions, thus altering their meanings, and failed to add "emphasis added" in a footnote where it was required. In the court's unpublished opinion, it concluded: "[A]n attorney before this court violated [U.S. Court of International Trade] Rule 11 in signing motion papers which contained omissions/misquotations. Accordingly, the court hereby formally reprimands her." The Federal Circuit had to determine whether the sanction imposed by the court represented "a final decision of the United States Court of International Trade." The Federal Circuit decided that the sanction was appealable because it was "explicit and formal" and was imposed due to a Rule 11 violation. Because the Court of International Trade had used the language "formally reprimands" in its opinion, it "obviously intended its action to be a formal judicial action."
While the Federal Circuit centered its decision around the formality of the Court of International Trade's reprimand, it also heavily emphasized the negative effects that a court's admonishment can have on an attorney's professional reputation: "A lawyer's reputation is one of his most important professional assets. Indeed, such a reprimand may have a more serious adverse impact upon a lawyer than the imposition of a monetary sanction."\textsuperscript{193} The court also noted that its decision was not affected by the fact that the Court of International Trade's opinion was unpublished.\textsuperscript{194} "Unpublished opinions, although not then reprinted in the West Publishing Company reports, may be, and frequently are, reported elsewhere."\textsuperscript{195}

\section*{III: Recommending Standing to Appeal a Court's Explicit Reprimand of Attorney Professional Conduct}

The most appropriate rule is that an attorney should be permitted to appeal sanctions that could damage that attorney's professional reputation, as articulated by the Tenth, Fifth, and D.C. Circuits.\textsuperscript{196} This rule accounts for the importance of an attorney's professional reputation and recognizes the difficulty of obtaining a writ of mandamus as a remedy. This rule also urges judges to consider the consequences of their reprimands and whether a less severe sanction is appropriate under the circumstances.

Part III examines the policy considerations behind the suitable rule that attorney sanctions that cause damage to an attorney's professional reputation should be appealable, and discusses the insufficiency of writs of mandamus as relief. Part III.A discusses the policy considerations, which include the significance of professional reputation and the lack of negative consequences, associated with this rule. Part III.B argues that writs of mandamus are rarely granted, unless in extreme circumstances, and are therefore unlikely to relieve sanctioned attorneys.

decision, but that other kinds of judicial criticisms of lawyers' actions are not reviewable." \textit{Id.} at 1320.

The court noted that the facts in this case differ from facts in other cases concerning an attorney who wishes to appeal a court's criticism. \textit{See id.} at 1321. In \textit{Nisus}, the attorney wishing to appeal was no longer part of the underlying litigation. Teschner was merely the attorney who prosecuted the patent and was a witness in the infringement suit. \textit{Id.} "Mr. Teschner's pre-litigation conduct was plainly outside the scope of the court's authority to impose disciplinary sanctions, and the court's criticism of Mr. Teschner cannot reasonably be characterized as the imposition of a disciplinary sanction against him." \textit{Id.} Finally, the Federal Circuit noted that a nonparty still has a writ of mandamus available as a remedy. \textit{Id.} at 1322 (citing 28 U.S.C. § 1651); \textit{see also In re Williams}, 156 F.3d 86, 92–93 (1st Cir. 1998)). For a further explanation of the court's decision in \textit{Nisus}, see Amol Parikh, \textit{Federal Circuit Lacks Jurisdiction to Decide Appeal from Nonparty Patent Attorney}, \textit{Mondaq Bus. Briefing} (Oct. 2, 2007), http://www.mondaq.com/article.asp?articleid=52706.

193. \textit{Precision}, 315 F.3d at 1353.
194. \textit{Id.}
195. \textit{Id.; see also Petition for Writ of Certiorari, supra note 33, at *14–15.}
196. \textit{See supra Part II.B.}
A. Policy Considerations

Part III.A discusses the policy considerations related to the rule that an attorney should be permitted to appeal a district court judge’s finding of professional misconduct. Part III.A.1 stresses the importance of an attorney’s professional reputation in his community and emphasizes the negative effects that an informal sanction can have on that reputation. Part III.A.2 explains that appellate litigation has not ballooned in the circuits that allow these appeals, nor has the lack of an appellee posed a problem, because appellate courts review the district court’s original order. Finally, Part III.A.3 argues that the Tenth, Fifth, and D.C. Circuits’ rule does not place judicial candor in jeopardy.

1. Professional Reputation

An attorney’s professional reputation is, without a doubt, an important asset. Justice Stevens, concurring in part and dissenting in part in Cooter & Gell, articulated this by writing, “[d]espite the changes that have taken place at the bar since I left the active practice 20 years ago, I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation.” Having a good reputation in one’s community can affect the level of business that a lawyer receives and the kind of clients and business that a lawyer attracts. A court’s published finding chastising an attorney will likely damage his or her professional reputation in that attorney’s legal community, and this damage “is a cognizable and legally sufficient injury.” For this reason, a monetary sanction should not be required for an appeal.

Furthermore, drawing the line at explicit and formal reprimands—rather than allowing appeals from all written findings of attorney misconduct—places far too much emphasis on the use of the word “formal” or “reprimand” in the finding and not enough weight on the actual effects of the sanction. “[A] rule requiring an explicit label as a reprimand ignores the reality that a finding of misconduct damages an attorney’s reputation regardless of whether it is labeled as a reprimand and, instead, trumpets form over substance.” For example, in the First and Ninth Circuits,
which require an explicit reprimand,\textsuperscript{203} an order stating, "this attorney is guilty of egregious misconduct and blatant unprofessional behavior" might not be appealable, but an order stating "we formally reprimand this attorney for his egregious misconduct and blatant unprofessional behavior" would be appealable. Because these two separate findings would have the same detrimental effect on the sanctioned attorney's professional reputation, they should both be appealable.

Damage to an attorney's professional reputation is further exacerbated by the availability of judicial opinions online.\textsuperscript{204} Opposing counsel has access to and the ability to use commercial electronic databases to read judicial opinions, and potential clients can easily search the Internet for the name of an attorney and find out that a district court judge has made a finding of the attorney's professional misconduct.\textsuperscript{205} Because attorneys today so heavily rely upon the Internet to generate new business, these widely accessible judicial opinions can be extremely damaging to an attorney's reputation,\textsuperscript{206} and potential clients likely will not perceive or consider a difference between an "explicit" reprimand and a finding of blatant attorney misconduct when deciding whether to hire or even to fire an attorney because of a judicial finding.

2. The Absence of an Overwhelming Expansion of Appellate Litigation and a Problematic Lack of Appellees

Since courts of appeals have begun allowing appeals from findings of attorney misconduct, the "breathtaking expansion in appellate jurisdiction" that the Seventh Circuit predicted in Bolte\textsuperscript{207} has not occurred.\textsuperscript{208} The courts of appeals have not had to deal with an overwhelming number of appeals from nonmonetary sanctions.\textsuperscript{209}

This is hardly surprising in light of the abuse-of-discretion standard to be applied, along with the fact that a sanctioned attorney must pay out-of-pocket and opportunity costs to challenge the ruling below—in addition to facing the very real risk that the Court of Appeals will find the sanction justified.\textsuperscript{210}

\textsuperscript{203.} See supra Parts II.C.1–2.
\textsuperscript{204.} See Petition for Writ of Certiorari, supra note 33, at *14–15.
\textsuperscript{205.} See id.
\textsuperscript{206.} See id.
\textsuperscript{207.} See supra note 92 and accompanying text.
\textsuperscript{208.} See Petition for Writ of Certiorari, supra note 33, at *16–17. According to Leslie V. Matlaw's argument, as of July 2007, only one more case has arisen in the Fifth Circuit since Walker v. City of Mesquite, just four cases have arisen in the U.S. Court of Appeals for the Tenth Circuit since Butler, and only one case has arisen in the Federal Circuit since Precision Specialty Metals, Inc. v. United States. Matlaw also noted the Third Circuit case, Bowers v. NCAA, in her argument. Id. Nisus has also been decided in the Federal Circuit since Matlaw's petition. 497 F.3d 1316 (Fed. Cir. 2007).
\textsuperscript{209.} Petition for Writ of Certiorari, supra note 33, at *17–18.
\textsuperscript{210.} Id.
It is unlikely that attorneys will risk an affirmed finding of professional misconduct if they do not believe that they stand a chance of winning their appeal. Therefore, these types of appeals will be kept to a minimum.

Furthermore, the issue raised in 

Bolte

about the lack of an appellee in these appeals is unproblematic. On appeal, courts do not only review the appellant’s brief. Courts also review the original district court order, which explains the reason for imposing the finding. Moreover, if unopposed appeals from monetary sanctions are allowed, then appeals from these nonmonetary sanctions finding attorney misconduct should be heard despite the fact that they are uncontested.

3. Uncompromised Judicial Candor

“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.” However, the potential appealability of a district court judge’s finding of attorney misconduct will not make judges hesitant to impose these sanctions and speak truthfully about an attorney’s wrongdoings, nor does it remove their right to do so. In fact, a judge should only reprimand attorneys through a finding in an order if the attorney’s offense is serious enough to warrant such a sanction. If so, then the attorney has undoubtedly been “directly aggrieve[d],” and deserves the right to an appeal. If a judge believes that an attorney’s conduct provides adequate grounds for a finding of misconduct in a written opinion, that judge will likely understand that the severity of the sanction makes it appealable. Therefore, a judge’s candor will not be sacrificed.

Furthermore, if judges are worried about their findings being subject to appeal, they do not necessarily have to make a written finding of attorney misconduct in order to address and remedy an attorney’s poor conduct. Even if it is a judge’s duty to regulate attorney conduct, judges have a

211. Id.
212. See supra note 92 and accompanying text.
213. Petition for Writ of Certiorari, supra note 33, at *18; see supra note 136.
214. See supra note 136 and accompanying text; see also Petition for Writ of Certiorari, supra note 33, at *18 (“[S]ince alleged misconduct occurs before the trial court, fully-developed and readily-available records provide a firm basis for appellate court review; little adversarial assistance is needed to re-construct the facts behind the alleged wrongdoing.”) (citing 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEEDURE § 3533.10 (2d ed. 1984)).
215. Petition for Writ of Certiorari, supra note 33, at *18; see also In re Williams, 156 F.3d 87, 97 (1st Cir. 1998) (Rosenn, J., dissenting).
216. Williams, 156 F.3d at 92 (citing Bruce M. Selya, The Confidence Game: Public Perceptions of the Judiciary, 30 NEW ENG. L. REV. 909, 915 (1996)).
217. See supra notes 21–26 and accompanying text (discussing the principle that a sanction’s severity must correspond to the gravity of the attorney’s wrongdoing).
219. See supra Part II.B.
220. See supra note 20 and accompanying text.
221. See supra notes 10–11 and accompanying text.
wide variety of actions from which to choose when controlling their courtrooms and tackling behavior "that sullies the underlying litigation and judicial system," many of which are not appealable. Only if "the district court makes a formal, particularized finding of misconduct that exists independent of the court's other factual and legal findings" will the finding be appealable. Judges can still "reflect[] their displeasure with the conduct of those they are charged with controlling" without the use of appealable sanctions.

The Code of Conduct for United States Judges requires "appropriate action" when a federal judge notices another judge or lawyer's professional misconduct. "Appropriate action," according to the Model Code of Judicial Conduct (used by state judges), includes "direct communication with the judge or lawyer who has committed the violation." This indicates that a judge's appropriate course of action may be to communicate one-on-one with an attorney to express the court's disapproval. Also, the Fifth Circuit suggested in Thomas that "[w]hat is 'appropriate' may be a warm friendly discussion on the record [] [or] a hard-nose reprimand in open court," showing that judges have other alternatives to monetary sanctions or public orders finding attorney misconduct. "A trial judge still retains broad, unappealable authority . . . to make pejorative comments or criticisms of a lawyer's performance without engaging in deliberate or published chastisement."

For example, hard-nosed and even caustic criticism of a lawyer's behavior, when intended to put a stop to that lawyer's misconduct, or even when the criticism is intended to control less offensive attorney behavior such as duplicative questioning of a witness or introduction of irrelevant evidence, and not intended as a sanction, are all ordinary efforts at courtroom administration and may not be appealed.

In fact, the Supreme Court has held that "expressions of impatience, hostility toward counsel, dissatisfaction, annoyance, and anger by judges" are unappealable. Therefore, judges' "expressions [of] disapproval of a

222. McMorrow et al., supra note 4, at 1442.
223. See supra notes 60–64 and accompanying text.
224. In re Harris, 51 F. App'x 952, 956 (6th Cir. 2002); see also supra notes 65–69 and accompanying text.
225. In re Williams, 156 F.3d 86, 92 (1st Cir. 1998).
226. See Zacharias & Green, supra note 8, at 1345.
227. See Judicial Conference, supra note 15.
228. See id., Canon 3(B)(3); see also supra notes 18–20 and accompanying text.
229. Supra note 20 and accompanying text.
231. In re Williams, 156 F.3d 86, 98 (1st Cir. 1998) (Rosenn, J., dissenting).
232. Id. (citing United States v. Donato, 99 F.3d 426, 434 (D.C. Cir. 1996); Hook v. McDade, 89 F.3d 350, 355–56 (7th Cir. 1996); and Blanche Road Corp. v. Bensalem Twp., 57 F.3d 253, 266 (3d Cir. 1995) as examples of judicial actions that do not constitute sanctions because they are not used for punishment).
233. Id. (citing Liteky v. United States, 510 U.S. 540, 556 (1994)).
lawyer’s behavior” are protected, but sanctions which are “intended to punish or deter” should be appealable.

Judges must sanction or reprimand an attorney in proportion to the gravity of the attorney’s misconduct. "Judges are prone to forget the sting of public criticism delivered from the bench." Therefore, with so many other alternatives available with which to control the conduct of the lawyers, judges should use care and specificity when sanctioning attorneys. Before sanctioning attorneys, judges should ask themselves whether an attorney’s conduct has “taint[ed] the judicial process.” Most lawyers will not overlook a reprimand from a judge—even if it is private—so discussing an attorney’s misconduct in chambers or sidebar might be the “appropriate action,” that is, “the least severe sanction adequate to serve the purpose.”

A judge’s written findings of misconduct can have grave effects on an attorney’s professional reputation, and thus, should be appealable. If a judge finds the attorney’s conduct so reprehensible as to justify a finding that can have significant negative effects on the attorney’s career, the judge should be aware that he or she is punishing the attorney with direct consequences and that the sanction will be appealable. Therefore, if a judge is worried about appeals, and an attorney’s behavior can be regulated through less severe measures, the judge can reprimand the attorney privately, express his or her disapproval, and demand a change in behavior. If a judge finds that an attorney definitely has acted so unprofessionally as to warrant a public chastisement in a written opinion, the judge will probably impose this sanction without fear that the finding will be reversed on appeal. Also, attorneys are unlikely to even bring appeals if they do not expect to win. Therefore, if the misconduct was so blatant as to justify the court’s sanction, judges will not worry about being reversed on appeal, and their candor will not be in jeopardy.

B. Insufficiency of Writs of Mandamus

Those courts of appeals that only allow appeals from monetary sanctions or require explicit formality of sanctions often conclude their opinions with a reminder that aggrieved attorneys still have the option to file for a writ of

234. United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000).
235. Williams, 156 F.3d at 98 (Rozenn, J., dissenting).
236. See supra notes 21–26 and accompanying text.
239. McMorrow et al., supra note 4, at 1442; see also supra notes 13–14 and accompanying text.
240. See supra note 18–20 and accompanying text.
241. Thomas, 836 F.2d at 878.
242. See supra Part III.A.1.
243. See supra notes 209–11 and accompanying text.
mandamus against the district court. However, the writ of mandamus "is seldom issued and its use is discouraged." Writs of mandamus are issued in serious circumstances, such as to compel a judge to preside over a second trial in a criminal case that originally ended in a mistrial; to stop a judge who wanted to dismiss an indictment without the proper authority to do so; and to prohibit a judge from ignoring a recent court of appeals ruling. It is unlikely that a court of appeals will find that a district court's final order reprimanding an attorney's conduct warrants a writ of mandamus. "Moreover, it is within a court's discretion to refrain from issuing the writ even when the requirements for mandamus are technically satisfied. The availability of the writ 'does not compel its exercise.'"

Because the writ of mandamus is such a "drastic remedy," it seems unlikely that an attorney who has been sanctioned will be granted a writ of mandamus against the district court judge who sanctioned him or her. In order for an appellate court to issue a writ of mandamus, the court must find "extraordinary circumstances" and a "judicial usurpation of power." Because the decision to sanction an attorney and the choice of sanction is highly discretionary, appellate courts are not likely to find that a district court judge abused his or her discretionary authority in reprimanding an attorney, and thus, issue a writ of mandamus. Therefore, in a jurisdiction that does not permit an attorney to appeal, the difficulty of obtaining a writ of mandamus can leave aggrieved attorneys with no relief.

CONCLUSION

It is extremely important that attorneys have standing to appeal a court's finding that they have acted unprofessionally because this type of sanction can cause irreparable harm to an attorney's professional reputation and thus to the attorney's business. For example, if a company seeking products liability defense counsel in Cleveland, Ohio looked up the name "Lawrence Sutter" on the search engine Google, it could learn several facts about Sutter. The company could learn that Sutter attended the University of

244. See Seymour v. Hug, 485 F.3d 926, 929 (7th Cir. 2007); In re Williams, 156 F.3d 86, 93 (1st Cir. 1998); Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984).
246. See Moore et al., supra note 79, ¶ 110.28, at 347 (citing United States v. Byran, 393 F.2d 90 (2d Cir. 1968)).
247. See id. (citing United States v. Dooling, 406 F.2d 192 (2d Cir. 1969)).
248. See id. ¶ 110.28, at 348 (citing Erie Bank v. U.S. Dist. Court for the Dist. of Colo., 362 F.2d 539 (10th Cir. 1966)).
251. Id.
253. See, e.g., Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984). The court of appeals suggested that an aggrieved attorney's appropriate course of action is to seek a writ of mandamus, but admitted that it refused to issue a writ of mandamus for the attorneys in this case.
Akron School of Law and that he has been named an Ohio Super Lawyer for the past several years.\textsuperscript{254} However, the company could also learn that Sutter was the attorney sanctioned by the court in \textit{Lasar} through a written order finding “egregious” misconduct and “twisted testimony.”\textsuperscript{255} Upon finding this information about Sutter, through a simple “Google” search, the company might justifiably decide to hire different counsel. Sutter will then have lost business because of an informal sanction, which might have been reversed on appeal in a circuit allowing appeals of a district court’s finding of unprofessional behavior.

Despite the immeasurable injury that a court’s finding of misconduct can have on an attorney’s professional reputation, the circuit courts do not agree on a standard governing the appealability of a court’s finding that may be harmful to an attorney’s reputation. The circuit courts have written a mix of opinions articulating under what circumstances an attorney has standing to appeal a court’s informal sanction. The Seventh Circuit’s stance ignores the severe and lasting harm that an informal sanction, though nonmonetary, is likely to have on an attorney’s professional life. Furthermore, the First and Ninth Circuits give far too much weight to the inclusion of the words “formal” or “reprimand” in the opinion. This view overlooks the detrimental power behind a court’s reprimand, despite the formality of the written admonishment. Because line drawing neglects the harm that can be inflicted on an attorney’s reputation, regardless of the written reprimand’s form, and a writ of mandamus is unlikely to be issued in these cases, attorneys should be permitted to appeal these judicial orders finding attorney misconduct that do not constitute mere judicial criticism.

