

## Not Taking Frivolity Lightly: Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38

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### I. INTRODUCTION

The availability of appellate review is integral to our contemporary justice system and serves important practical and symbolic functions. Appeal as of right, while not constitutionally guaranteed, is assured by statute for the vast majority of final trial-court decisions<sup>1</sup> and with good reason. For one, the principle of open access to the courts is a key value of American law. An accessible public forum for the adversary process ensures that grievances are properly heard and disposed of fairly. Accordingly, justice is best served when parties are able to comprehensively litigate their rights at every level of the judicial system. Appellate review allows novel legal theories and untested questions of law to be advanced and considered, and it affirms the continuing applicability of precedent. Additionally, the existence of successive levels of appellate review functions to reassure individual litigants and the general public that decisions of lower-court judges are, at least theoretically, accountable to higher authority. The appeals process hence plays an important role in maintaining the stability and trustworthiness of the judicial system at large.

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1. See, e.g., *Martinez v. Court of Appeal*, 528 U.S. 152, 159, 160 (2000).

Appeals as of right in federal courts were non-existent for the first century of our Nation, and appellate review of any sort was “rarely allowed.” The States, also, did not generally recognize an appeal as of right until Washington became the first to constitutionalize the right explicitly in 1889. There was similarly no right to appeal in criminal cases at common law, and appellate review of any sort was “limited and rarely “used.” . . . . As we have recognized, “[t]he right of appeal . . . is purely a creature of statute.”

*Id.* (internal citations omitted) (alteration in original).

Nevertheless, the *right* to appeal a valid final judgment or appealable order does not presume the *propriety* of every appeal. “[A] defendant has no right to file a *frivolous* appeal,”<sup>2</sup> and the decision “whether to appeal from an order of the District Court is not a matter to be taken lightly by either a losing party or her counsel.”<sup>3</sup> As a consequence, the federal courts of appeal possess the power under Federal Rule of Appellate Procedure 38 (Rule 38) and other sources of authority to sanction appellants who pursue completely meritless or vexatious petitions for review. Historically, though, courts have been reluctant to rigorously announce findings of frivolity or to impose full Rule 38 sanctions, for fear of chilling zealous advocacy or impeding novel claims. And even courts with a greater propensity to sanction under Rule 38 traditionally have refrained from imposing sanctions on pro se appellants. Mounting caseloads, however, have increased the pressures on courts of appeal in recent years. This has led to increased willingness by courts to identify and penalize frivolous appeals, as well as provoking calls by some scholars and practitioners for substantially stricter imposition of Rule 38 sanctions.

In this changing environment, inconsistencies among circuits in determining when an appeal is frivolous and when to impose sanctions have a significant impact on appellants, particularly vulnerable pro se appellants, who remain subject to the same rules of procedure, rules of the court, and statutes applicable to represented parties. While interests of judicial economy are certainly substantial, access to appellate review must be safeguarded for all tenable claims, even those of marginal merit. The assurance of thoughtful consideration by a court of last resort must not become merely a myth of last resort.

This article argues for adoption of consistent standards across the circuits for determining the frivolity of appeals, as well as for consideration of different criteria for sanctioning frivolous appeals by pro se appellants. Part II provides an overview of the function and purpose of Rule 38. It also clarifies the relationships among Rule 38, other sources of authority for finding frivolity, and analogous rules, such as Federal Rule of Civil Procedure 11, which operates to identify

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2. United States v. Bullion, 466 F.3d 574, 575 (7th Cir. 2006) (emphasis in original).

3. Beam v. Bauer, 383 F.3d 106, 108 (3d Cir. 2004).

sanctionable frivolous suits at the trial-court level. Part III discusses the interest of courts in stemming an “avalanche of appeals,” as well as the competing interest in not applying Rule 38 so strictly as to chill legitimate advocacy. Part IV explores the implementation of Rule 38 by various circuits and identifies an increasing trend in the federal courts of appeal towards stricter implementation and stronger sanctions for frivolity, including against certain categories of pro se appellants. Part IV also notes inconsistencies in how frivolous appeals are determined in general and with respect to pro se appellants, and it examines how an appellant’s pro se status affects the factors courts consider in deciding whether to exercise their discretion to impose sanctions for filing a frivolous appeal.

Part V argues that indeterminacy and varying standards among the circuits hinders both the efficiency of courts and the access of pro se litigants to appellate review. In conclusion, this article recommends that federal appellate courts adopt a standardized process for Rule 38 review based on the combined best practices of the circuits. Determination of frivolity should be objective and limited to consideration of the merits of the appeal as filed. Then, courts should decide whether to sanction by taking into consideration the totality of the circumstances, including subjective factors such as bad faith on the part of the appellant and whether the appellant is proceeding pro se. In this analysis, appellate courts should retain a presumption against imposing sanctions in the case of a pro se appellant and should be required to provide an explicit advance-warning requirement before sanctioning pro se appellants. Courts should retain their historical caution and reserve Rule 38 for cases of objective and unquestionable frivolity, remaining mindful of other avenues of sanctioning for delay or vexatious litigation.

## II. GENERAL APPLICATION AND FUNCTION OF FEDERAL RULE OF APPELLATE PROCEDURE 38

### A. TWO-PART BASIC OPERATION OF RULE 38

In the federal system, Rule 38 is the primary authority governing determination of frivolous appeals and authorizing the court’s discretionary imposition of sanctions. The original Rule 38 was adopted in 1968 as one of the initial provisions of

the Federal Rules of Appellate Procedure.<sup>4</sup> Rule 38 provides, “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”<sup>5</sup> Thus, it is a two-part process to invoke and implement Rule 38.<sup>6</sup> As an initial matter, determination that an appeal is frivolous may be made either on a formal motion for sanctions by the appellee<sup>7</sup> or sua sponte by the court.<sup>8</sup> In most cases, frivolity is raised by motion.<sup>9</sup> Next, a finding of frivolity triggers the court’s discretion to impose sanctions in the form of damages and a maximum penalty of double costs. Sanctions are merely authorized—not mandated. Thus, “finding an appeal frivolous does not necessitate that damages be imposed . . . .”<sup>10</sup> In practice, however, sanctions are almost always applied when frivolity is found. Rule 38 also authorizes the award of sanctions only to prevailing appellees—a prevailing appellant by definition would have a meritorious

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4. 20A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 338 App. 100 (3d ed. 2008). The original rule read, “If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.” FED. R. APP. P. 38 (amended 1994).

5. FED. R. APP. P. 38.

6. See, e.g., MOORE ET AL., *supra* note 4, at § 338.30.

7. A mere allegation of frivolity within an appellee’s brief does not provide adequate notice and is insufficient to trigger formal consideration of frivolity by the court. See *infra* Part II.C. (discussing notice provision of Rule 38); see also THOMAS J. COSTAKIS, NAT’L INST. FOR TRIAL ADVOCACY COMMENTARY: FEDERAL RULES OF APPELLATE PROCEDURE, VII: GENERAL PROVISIONS (2008) (emphasizing that “the practitioner should take language of the rule requiring a ‘separately filed motion’ quite literally and seriously[;] . . . a separate motion should be filed [and] you should follow all of the formal requirements for filing motions generally in the court of appeals”). Even a more specific request within appellee’s brief, such as making the argument of frivolity in a discrete section with its own heading, is not advised. *Id.*; see also *Preboor v. Collins (In re I Don’t Trust)*, 143 F.3d 1, 4 (1st Cir. 1998) (holding that a separate motion for sanctions must be filed in order to invoke Rule 38; simply requesting sanctions for frivolous appeal in a brief is inadequate); MOORE ET AL., *supra* note 4, at § 338.33; see also *infra* note 21 and accompanying text.

8. See, e.g., *Romala Corp. v. United States*, 927 F.2d 1219, 1225-26 (Fed. Cir. 1991); *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562, 566 (5th Cir. 1990), *cert. denied*, 498 U.S. 970 (1990); *Reis v. Morrison*, 807 F.2d 112, 113 (7th Cir. 1986) (*per curiam*).

9. MOORE ET AL., *supra* note 4, at § 338.33.

10. S. Jay Plager et al., *The Federal Circuit and Frivolous Appeals*, 13 FED. CIR. B.J. 373, 387 (2003).

claim.<sup>11</sup> As described in detail in Part IV, the various circuit courts employ a divergent range of standards, both for determining frivolity and for deciding whether to impose discretionary sanctions under Rule 38. These standards grow even muddier with regard to pro se appellants.

### B. Individual and Systemic Functions of Rule 38

Broadly speaking, Rule 38 serves two overarching functions—one individual and one systemic. First, Rule 38 operates to provide compensation to the appellee and to impose an individual penalty against the appellant. As the notes of the advisory committee on the 1968 adoption of the rule indicate, “[D]amages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.”<sup>12</sup> As an individual remedy, Rule 38 serves to compensate the injured appellee who has suffered the expense and time of defending a meritless appeal. As a penalty, the rule authorizes the court to subject the frivolous appellant to sanctions as punishment for causing this individualized injury. The individual compensatory function of Rule 38 is largely captured by the language of the rule establishing that determination of frivolity may be made on a motion for sanctions by the appellee, although the court may act *sua sponte* in the interest of individual compensation of an injured appellee.

A second purpose of Rule 38 is to deter future frivolous appeals and to penalize waste of appellate resources.<sup>13</sup> This

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11. *See, e.g.*, Reynolds v. Roberts, 207 F.3d 1288, 1301 (11th Cir. 2000); Walker v. City of Bogalusa, 168 F.3d 237, 241 (5th Cir. 1999) (holding that appellants may not recover sanctions under Rule 38).

12. FED. R. APP. P. 38, advisory committee’s notes; *see also* Burlington N. R. R. Co. v. Woods, 480 U.S. 1, 4 (1987); Huck *ex rel.* Sea Air Shuttle Corp. v. Dawson, 106 F.3d 45, 52 (3d Cir. 1997), *cert. denied*, 520 U.S. 1276 (1997) (stating that the first purpose of Rule 38 is to compensate appellees who are forced to defend against appeals that are wholly without merit); Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993), *cert. denied*, 510 U.S. 1215 (1994); Clarion Corp. v. Am. Home Prods. Corp., 494 F.2d 860, 865-66 (7th Cir. 1974) (stating that “Rule 38 was designed to penalize litigants for [frivolous and obstructive tactics] and to compensate [appellees for] the expense of answering such wholly frivolous appeals”).

13. *See, e.g.*, Huck, 106 F.3d at 52 (“The purpose of an award of attorneys’ fees under Rule 38 is ‘to compensate appellees who are forced to defend judgments awarded them in the trial court from appeals that are wholly without merit, and to preserve the

reflects an interest in overall judicial efficiency and conservation of already overextended judicial resources. The original advisory committee's notes do not specifically address this purpose, and there is debate whether the systemic concerns of Rule 38 are equivalent in importance to the rule's individual compensatory functions.<sup>14</sup>

For instance, the Third Circuit declined to award damages *sua sponte* after finding an appeal frivolous, stating that it was rarely the practice of the court to award damages *sua sponte* under Rule 38.<sup>15</sup> The *Huck* court additionally offered a detailed "note of instruction":

[Rule 38] is not just a sanctions provision, arguably raising an obligation upon the court to act to protect its own integrity or that of a party . . . . [Rather,] the remedy this rule offers an injured party is more in the nature of an award upon a finding of liability in tort, [and] the more sound jurisprudential approach is to stay our hand and await a request for redress . . . .<sup>16</sup>

The court reasoned that a more hands-off approach allowed the opportunity for extrajudicial demand, discussion, and settlement between the parties to occur before the court potentially would be required to step in.<sup>17</sup> Rule 38 damages also may only be awarded to the financially injured party—courts may not impose a fine under Rule 38 that is payable directly to

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appellate court calendar for cases worthy of consideration.”) (quoting *Nagle*, 8 F.3d at 145); *Westcott Constr. Corp. v. Fireman's Fund of N.J.*, 996 F.2d 14, 17 (1st Cir. 1993) (stating that the reasons for penalizing frivolous appeals include deterrence “to ease the burden on the courts of appeal”); *Coghlan v. Starkey*, 852 F.2d 806, 815 (5th Cir. 1988) (stating that Rule 38 may function as a penalty for waste of appellate resources); *Clarion Corp.*, 494 F.2d at 865-66 (stating that Rule 38 is also designed to penalize tactics nonconductive to judicial economy).

14. *Compare Huck*, 106 F.3d at 52 (explaining that the sounder jurisprudential approach is to wait for an appellee's motion for sanctions, because Rule 38 sanctions are more a compensatory award rather than tool for the court to protect its own integrity), *with Coghlan*, 852 F.2d at 815 (explaining that penalizing waste of appellate resources justifies Rule 38 sanctions as much as compensation for damages suffered by parties).

15. *Huck*, 106 F.3d at 52.

16. *Id.*

17. *Id.*

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the court.<sup>18</sup> This restriction supports an understanding of the core function of Rule 38 as one of individual compensation.

On the other hand, many courts have considered the penalizing waste of judicial resources as an equivalently compelling function of Rule 38.<sup>19</sup> These courts seek to deter vexatious litigants and mitigate the perceived crowding of appellate dockets with utterly meritless appeals. In contrast to the Third Circuit approach, courts such as the Seventh Circuit have not hesitated to raise an appeal's frivolity sua sponte and have explicitly held that it is immaterial whether a party moves for sanctions.<sup>20</sup> Without a doubt, the courts of appeal are extremely concerned about swollen dockets and with preserving their attention for disputes of genuine merit. As will be discussed further in Part III, there appears to be an increasingly aggressive tendency in appellate courts to act both on motion and sua sponte to sanction frivolous appeals, including those by certain classes of pro se appellants.

### C. Notice Provision of Rule 38

Sanctions under Rule 38 may be imposed only "after a separately filed motion or notice from the court and reasonable opportunity to respond."<sup>21</sup> The original Rule 38 as adopted in 1968 did not contain this phrase, providing merely that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."<sup>22</sup> The notice provision was added in 1994 in response to due-process concerns and remains the only substantive amendment ever made to Rule 38.<sup>23</sup>

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18. See, e.g., *Prosser v. Prosser*, 186 F.3d 403, 407 (3d Cir. 1999). One exception would be in the instance of a frivolous petition for mandamus, where the injured appellee would be the court itself.

19. See Scott A. Martin, Note, *Keeping Courts Afloat in a Rising Sea of Litigation: An Objective Approach to Imposing Rule 38 Sanctions for Frivolous Appeals*, 100 MICH. L. REV. 1156, 1179 & n.132 (2002) ("At its core, Rule 38 is an instrument for discouraging attorneys from filing frivolous appeals.").

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

21. FED. R. APP. P. 38.

22. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 407 (1990) (quoting FED. R. APP. P. 38).

23. FED. R. APP. P. 38, advisory committee's notes on 1994 Amendments.

The advisory committee's notes to the 1994 amendment explain that the change was made to clarify the necessity of notice and opportunity to respond before a court of appeals may impose sanctions,<sup>24</sup> in keeping with the basic due-process notice requirement enunciated in the United States Supreme Court's 1980 opinion in *Roadway Express, Inc. v. Piper*.<sup>25</sup> The committee emphasized that because sanctions requests have become common place, only a separately filed motion to request sanctions constitutes sufficient notice. A statement inserted in a party's brief is not adequate. "If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion."<sup>26</sup>

#### D. Scope of Rule 38 and Relation to Other Sources of Authority

##### 1. Authority of Courts of Appeal to Invoke Rule 38 and Impose Sanctions for Frivolity

As a preliminary matter, Federal Rule of Appellate Procedure 1(a)(1) states that the rules apply exclusively to proceedings in the United States Courts of Appeal.<sup>27</sup> As a result, and by the express terms of Rule 38, only federal courts of appeal have jurisdiction to determine and sanction frivolous appeals.<sup>28</sup> Most obviously, Rule 38 applies to all appeals filed in the federal circuit courts of appeal. In addition, Rule 38 applies in the less-common instance of district courts serving as

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24. FED. R. APP. P. 38, advisory committee's notes on 1994 Amendments.

25. 447 U.S. 752, 767 (1980).

26. *Id.*

27. FED. R. APP. P. 1(a)(1).

28. *See, e.g.,* Conner v. Travis County, 209 F.3d 794, 799-802 (5th Cir. 2000) (holding that a district court lacks power to sanction frivolous appeals); Williamson v. Kay (*In re Villa W. Assocs.*), 146 F.3d 798, 808 (10th Cir. 1998) (holding that the power to award appellate sanctions is reserved to the appellate court); Schoenberg v. Shapolsky Publishers, Inc., 971 F.2d 926, 935 (2d Cir. 1992) (stating it is improper for a district court to impose appellate sanctions); *In re AOL Time Warner, Inc., Sec. & "ERISA" Litig.*, No. 1500, 02 Cv. 5575 (SWK), 2007 U.S. Dist. LEXIS 69510, at \*19 (S.D.N.Y. Sept. 19, 2007) ("Sanctioning appellants under Appellate Rule 38 is a matter for the court of appeals . . .").

appellate bodies, and a materially identical rule applies to bankruptcy appeals.<sup>29</sup>

By any measure, “Frivolity is frowned upon in the world of civil litigation.”<sup>30</sup> But because “a court of appeals is better positioned to determine whether an appeal is so frivolous as to justify Appellate Rule 38 sanctions,”<sup>31</sup> it is well established that district courts may not, in their function as courts of first instance, sanction a party for filing a frivolous appeal.<sup>32</sup> Any determination of frivolity by the district court largely occurs under Federal Rule of Civil Procedure 11 (Rule 11), which operates to identify sanctionable frivolous suits—not appeals—at the trial level.<sup>33</sup>

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29. See FED. R. BANKR. P. 8020. “Rule 8020 is patterned after and materially identical to Rule 38, and courts considering Rule 8020 motions have applied case law interpreting Rule 38.” *Kadish v. Kmart Corp.*, No. 05 C 4847, 2006 U.S. Dist. LEXIS 10597, at \*3-4 (N.D. Ill. Mar. 13, 2006); see also FED. R. BANKR. P. 8020, advisory committee’s notes on 1997 Amendment (“By conforming to the language of Rule 38 Fed. R. App. P., this rule recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and courts of appeals.”).

30. Charles M. Yablon, Essay, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 65 (2002).

31. *AOL Time Warner*, 2007 U.S. Dist. LEXIS 69510, at \*20.

32. See, e.g., *Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988) (“[A] trial judge cannot sanction a party or lawyer for taking an appeal . . . .”); cf. FED. R. CIV. P. 1 (stating that the Federal Rules of Civil Procedure only “govern the procedure in the United States district courts”).

33. FED. R. CIV. P. 11. In pertinent part, section (b) of Rule 11 states:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

## 2. Comparison of Rule 38 to Federal Rule of Civil Procedure 11 and Other Sources of Authority

The fact that a suit may have been found frivolous under Rule 11 by the district court does *not* mean that an appeal from the trial court's determination is per se frivolous. It is true that:

in the course of a lawsuit, the proceedings often take place in both the trial and appellate courts, and that some motions or other actions . . . may have impacts at both levels. Nevertheless, the sanction statutes, the rules, and the case law provide for fairly clear separation between conduct on appeal sanctionable by the appellate court and conduct in the trial court sanctionable by the trial court.<sup>34</sup>

A court of appeals may take note of the imposition of Rule 11 sanctions in finding frivolity on appeal under Rule 38—certainly it is a factor cited by many courts as strong evidence that an appellant should have been aware that an appeal was likely to also be deemed frivolous.<sup>35</sup> In terms of the comparative scope

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(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11(b). Section (c) of Rule 11 contains detailed provisions for sanctions. FED. R. CIV. P. 11(c); *see also* Yablon, *supra* note 30, at 65 (“Although the term ‘frivolous’ never appears in the text of Rule 11 of the Federal Rules of Civil Procedure, the determination that a claim is frivolous, and an *objective* determination at that, has been a primary criterion for imposing liability under Rule 11 . . . .”) (emphasis in original).

34. *Webster*, 846 F.2d at 1040 (noting the impropriety and deterrent effect on the right to appeal a district court's threat to sanction defendants under Rule 11 for filing a motion to stay its order pending an appeal the district court considered frivolous and citing to cases from the First and Fifth Circuits).

35. *See, e.g.*, *Walker v. City of Bogalusa*, 168 F.3d 237, 241 (5th Cir. 1999) (“Although Rule 11 does not directly apply to appellate proceedings, we look to Rule 11 for guidance in imposing Rule 38 sanctions.”) (internal citations omitted) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990); *Lyddon v. Geothermal Props., Inc.*, 996 F.2d 212, 214 (9th Cir. 1993); *Mortell v. Mortell Co.*, 887 F.2d 1322, 1328 (7th Cir. 1989)). Professor Martineau has suggested that Rule 38 should be amended by means of a provision that identically mirrors Rule 11, “so that the same type of improper conduct will receive equal treatment in the court of appeals and in the district court. Cases interpreting one rule may serve as precedent for interpretations of the other.” Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845, 881-82 (1984). This proposal, however, ignores the dangers of conflating trial and appellate frivolity and the differences that may arise between claims brought at trial and on appeal. *See infra* notes 38-40 and accompanying text. Martineau later seems to change course and implicitly undermines his own suggestion in a subsequent article with Patricia A. Davidson, in which

of review, the appellate court “exercise[s its] own independent judgment in assessing a possible Rule 38 violation, [while it] defer[s] to the trial judge’s judgment when reviewing Rule 11 sanctions.”<sup>36</sup> The two inquiries are distinct. Thus, a trial court’s imposition of Rule 11 sanctions is not determinative of the appropriateness of Rule 38 sanctions, and courts of appeal generally have rejected any argument to the contrary.<sup>37</sup>

An appellant may present a more nuanced argument on appeal that deserves review, or the trial court may simply have been wrong on the law or otherwise committed error in finding the original suit wholly without merit. Furthermore, if the district court were granted the final word on the issue of frivolity, the right to appeal would be rendered largely meaningless and result in a draconian chill of advocacy.<sup>38</sup> In sum, “[A]lthough a frivolous claim made before a trial court is unlikely to be rescued on appeal, the argument on appeal might

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he notes with approval a Ninth Circuit decision delineating “between claims that are frivolous at the trial level and cases that become frivolous on appeal.” Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 AM. U. L. REV. 603, 625 (1985). Martineau and Davidson state, “This distinction is important because it shows the court considering all aspects of frivolous litigation and recognizing that the frivolous nature of a lawsuit is not a static characteristic that remains constant throughout the litigation.” *Id.* at 625-26.

36. *Roger Edwards, LLC v. Fiddes & Son Ltd.*, 437 F.3d 140, 145 (1st Cir. 2006); *see also Topalian v. Ehrman*, 3 F.3d 931, 935 (5th Cir. 1993) (affirming the trial court’s imposition of Rule 11 sanctions while appeal was pending, notwithstanding that the appellate court declined to impose Rule 38 sanctions for the appeal, and stating that to conflate the two decisions “confuses our discretionary sanctioning power under Rule 38 with the standard by which we review sanctions imposed by a district court”).

37. *But see Berwick Grain Co. v. Ill. Dep’t of Agric.*, 217 F.3d 502, 505 (7th Cir. 2000) (“We owe substantial deference to district courts in Rule 11 matters, and when sanctions are challenged without any ‘reasonable prospect of meeting the difficult standard of abuse of discretion,’ the appeal is necessarily frivolous.”) (citing *Cooter*, 496 U.S. at 408); *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 438 (7th Cir. 1989) (stating in a patent-infringement case that “the appeal of a litigant whose position in the district court was correctly adjudged frivolous is frivolous per se. . . . An appeal by a party whose claim or defense was frivolous is, in the absence of special circumstances nowhere disclosed in this record, frivolous within the meaning of Rule 38”).

38. *See White v. Gen. Motors Corp.*, 908 F.2d 669, 675 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991).

We decline to hold that an appeal is frivolous per se if the presentation of the issues in district court was bad enough to be sanctionable. Such a draconian rule would make sanctions available in nearly every appeal of a case dismissed for failure to state a claim, unless the appellant is successful. This would constitute too great a chill of advocacy.

*Id.*

sometimes be different and more promising . . . .”<sup>39</sup> That being said, “[T]he fact that sanctions may have been uncalled for at the district level should not deter an appellate court from sanctioning the appeal in appropriate cases.”<sup>40</sup>

At the appellate level, other rules and statutes may come into play in lieu of or in tandem with Rule 38. Although “[i]n federal practice, the primary recourse against frivolous appeals is Rule 38,”<sup>41</sup> courts of appeal frequently fail to explicate which among a variety of sources of authority they are relying on to sanction for frivolity.<sup>42</sup> Serious violations of attorney conduct, including vexatious litigation, are sanctionable against the attorney personally under 28 U.S.C. § 1927.<sup>43</sup> Further, 28

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39. *Roger Edwards*, 437 F.3d at 145.

40. *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 761 (1st Cir. 1988). The independence of sanctioning decisions at each level goes both ways. Some courts have also held that imposition of Rule 11 sanctions may be proper even where Rule 38 sanctions were not imposed by the appellate court. Compare *Henry v. Farmer City State Bank*, 127 F.R.D. 154, 157 (C.D. Ill. 1989) (providing for Rule 11 sanctions notwithstanding that the court of appeals declined to impose Rule 38 sanctions, and characterizing the Rule 38 standard as “much more rigorous” than Rule 11, because the Seventh Circuit interpretation of Rule 38 required subjective bad faith), with *McMahon v. Shearson/Am. Express, Inc.*, 896 F.2d 17, 24 (2d Cir. 1990) (holding that appeal could not be considered frivolous where Rule 11 and § 1927 sanctions were reversed on appeal).

41. Benjamin G. Shatz & Christopher D. LeGras, *Frivolous Appeals*, DAILY JOURNAL, Jul. 30, 2007.

42. See, e.g., *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 472 (1st Cir. 1985) (“Although [28 U.S.C.] § 1912 and Rule 38 differ slightly—the former speaking of ‘delay’ while the latter concerns ‘frivolous’ appeals—courts have typically ignored this distinction and imposed sanctions under the rule *and* the statute.”) (emphasis in original). Section 1912 and Rule 38 are the most frequently conflated of the sources of authority mentioned in this Part. Martineau contends that § 1912 and Rule 38 are essentially duplicative. Martineau, *supra* note 35, at 873. Such an assessment, however, is overbroad. Unlike § 1912, Rule 38 is not exclusively concerned with delay. Rather, the primary function of Rule 38 is and should be—as this article argues—the objective legal merit of a petition for review. Under the proposed analysis, evidence of bad-faith purposeful delay in taking an appeal may be considered under Rule 38 in the determination of whether to impose sanctions on an appellant for taking an objectively frivolous appeal. See *infra* Part V and Conclusion. A more detailed discussion of the similarities and differences between § 1912 and Rule 38 is beyond the scope of this article.

43. 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.

28 U.S.C. § 1927.

U.S.C. § 1912<sup>44</sup> provides for sanctions for appeals that are taken for the purpose of delay.<sup>45</sup> Pro se appellants, of course, are not subject to sanctions for attorney conduct, unless the pro se appellant also happens to be a licensed attorney. Therefore, § 1927 is inapplicable to pro se appellants, and similar findings of “vexatiousness” that might be sanctionable against an attorney under § 1927 instead may be found sanctionable directly against pro se appellants under Rule 38 or § 1912. Also, “unlike Appellate Rule 38, section 1927 does not vest exclusive authority to award sanctions in the court of appeals,”<sup>46</sup> although the Second Circuit has “warned district courts not to chill appeals by imposing section 1927 awards too liberally.”<sup>47</sup>

Less coterminously, Federal Rule of Appellate Procedure 30(b) (Rule 30(b)) grants the authority to courts of appeal to sanction parties or attorneys “who unreasonably and vexatiously increase litigation costs.”<sup>48</sup> Rule 38 also shares the implicit purpose of discouraging frivolous appeals<sup>49</sup> with Federal Rule of Appellate Procedure 7, which authorizes district courts to

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44. 28 U.S.C. § 1912 (2000) (“Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.”).

45. For discussion of the unique purposes of §§ 1912 and 1927, see Martineau, *supra* note 35, at 872-73:

[S]ections 1912 and 1927 of the Judicial Code were developed separately and had different purposes. Section 1912 was intended to remedy injury to the appellee resulting from the delay caused by an appeal, while section 1927 was concerned with abuse of the judicial process by attorneys, primarily at the trial level.

*Id.* Martineau also contends that § 1912 and Rule 38 are essentially duplicative, an overgeneralization not adopted by this article. See *infra* Part V.

46. *In re AOL Time Warner, Inc., Sec. & “ERISA” Litig.*, No. 1500, 02 Cv. 5575 (SWK), 2007 U.S. Dist. LEXIS 69510, at \*20-21 (S.D.N.Y. Sept. 19, 2007) (“Additionally, just as a court of appeals is better positioned to determine whether an appeal is so frivolous as to justify Appellate Rule 38 sanctions, it is also better able to determine whether an attorney’s conduct on appeal warrants an award under section 1927.”) (citing *In re Cardizem CD Antitrust Litig.*, 481 F.3d 355, 362 (6th Cir. 2007) (stating that “[t]he frivolity predicate of an Appellate Rule 38 order parallels the unreasonableness and vexatiousness determinations required by § 1927,” and that only the court of appeals may determine whether § 1927 costs are available because “[appellee’s] additional expenses were caused not by the filing of the notice of appeal, but by the pursuit of that appeal in the [circuit court]”) (internal citations omitted)).

47. *Id.*

48. FED. R. APP. P. 30(b).

49. See, e.g., *Vickery v. Cavalier Home Builders, LLC*, 405 F. Supp. 2d 1352, 1355 (N.D. Ala. 2005).

require civil appellants to post a bond on appeal.<sup>50</sup> Local court rules may also provide for the court to dismiss or sanction frivolous appeals on a party motion or sua sponte.<sup>51</sup> The federal courts of appeal also possess inherent authority to sanction frivolous appeals.<sup>52</sup> This power is rarely exercised, though, due to the practicality of relying on Rule 38, § 1912, and § 1927 to sanction frivolity.<sup>53</sup> Finally, the option exists for federal courts of appeal to affirm a lower-court decision without issuing an opinion.<sup>54</sup> This alternative is useful for economical disposition of cases of minimal merit.

### III. BALANCING INTERESTS OF JUDICIAL ECONOMY AGAINST THE DANGER OF CHILLING THE RIGHT TO APPEAL

#### A. Courts Understandably Desire Relief from an “Avalanche of Appeals”

Courts of appeal are rightfully concerned with workload. Rising numbers of appellate petitions strain an already overburdened system, and judges, attorneys, and litigants suffer the consequences of limited judicial resources to cope with the persistent demands placed upon the system. Furthermore, courts have an interest in discouraging abuse of the appellate system to preserve their docket for cases of legitimate merit. As one court emphasized in 2004:

An appeal is not just the procedural next step in every lawsuit. Neither is it an opportunity for another “bite of the apple,” nor a forum for a losing party to “cry foul” without legal or factual foundation. An appeal is a serious matter because it is a claim of error by the

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50. FED. R. CIV. P. 7 (“In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.”).

51. *See, e.g.*, 1ST CIR. R. 38.0 (providing for sanctions for vexatious litigation, including filing a frivolous brief); 5TH CIR. R. 35.1; 5TH CIR. R. 42.2 (“If upon the hearing of any interlocutory motion or as a result of a review under 5th Cir. R. 34, it appears to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.”); 8TH CIR. R. 35A(2).

52. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

53. *See Martineau, supra* note 35, at 861-62 (discussing the inherent authority of a federal appeals court to sanction for frivolity or abusive tactics).

54. *See, e.g.*, FED. CIR. R. 36.

District Court and an attack on the validity of its order. Consequently, if the appeal is wholly lacking in merit, there are consequences.<sup>55</sup>

Appellate scholar Judge Ruggero J. Aldisert of the Third Circuit Court of Appeals has pointedly referred to the current pressure on the federal courts as an “avalanche of appeals,”<sup>56</sup> with the proportionate increase in appeals vastly outpacing the increase of trial-court filings in recent decades.<sup>57</sup> As a 1983 Sixth Circuit opinion memorably described the already overtaxed situation, courts are “struggling to remain afloat in a constantly rising sea of litigation,”<sup>58</sup> and under the circumstances “a frivolous appeal can itself be a form of obscenity.”<sup>59</sup> Around the same time, Martineau noted that the caseload in the federal courts of appeal had skyrocketed from 4204 in 1961 to 29,630 in 1983—an increase of 705%.<sup>60</sup>

By any measure, the demands on the federal courts of appeal have only continued to balloon over the subsequent years. Although the number of *published* federal appellate opinions has dropped after a peak of 65,333 in 1991, the total number of opinions has continued to increase when one considers the rise in unpublished opinions since that time.<sup>61</sup> Judicial caseload indicators, published annually by the Administrative Office of the United States Courts, also bear out

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55. *Beam v. Bauer*, 383 F.3d 106, 108 (3d Cir. 2004).

56. RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* 7 (2d ed. 2003).

57. *Id.* at 10.

[T]he increase of appeals has not been directly related to the increase of trial court filings. . . . [I]n the fiscal year ending in 1969, the district courts terminated 73,354 cases. By 2002, this figure had increased to 248,886 or an increase of 339 percent. By comparison, the appeals terminated in 1969 numbered 9,014; in fiscal 2002 there were 57,555 appeals, or an increase of 639 percent. Although the raw numbers are smaller, the rate of appeals increased much more drastically.

*Id.*

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

59. *Id.*

60. Martineau, *supra* note 35, at 845 & n.1; *see also* Martineau & Davidson, *supra* note 35, at 604 & n.1.

61. ALDISERT, *supra* note 56, at 7.

an overall increase in all categories over time, despite occasional downward fluctuations from year to year.<sup>62</sup>

Judge Aldisert also comments, “The reason for the avalanche is not only the expansion of trial and appellate litigation, but also because today there is no institutional inhibition against the paper storm.”<sup>63</sup> He contends that emotion-laden, nonprevailing parties have little to lose by appealing, especially given the minimal court costs associated with taking an appeal.<sup>64</sup> Further, “[I]n federal appeals the boy-who-cried-wolf syndrome runs rampant. Far too many petitions and suggestions are filed . . . . [J]udges are universally aggravated.”<sup>65</sup> Judge Roger J. Miner of the Second Circuit Court of Appeals concurs that “far too many frivolous appeals and far too many non-meritorious issues are presented to appellate tribunals . . . . Pressing appeals that have no merit in these times of limited appellate court resources and burgeoning caseloads is especially irresponsible, for it delays the disposition of meritorious cases and issues.”<sup>66</sup> The view is widely shared that unfettered access to appellate review encourages routine abuse of the system by appellants with meritless claims.<sup>67</sup> Predictably, the rise in appeals has provoked calls for stricter measures for deterring and sanctioning frivolous appeals.<sup>68</sup> Because courts have no authority to limit their own jurisdiction, they are taking a growing interest in sanctions for frivolity as a limiting measure.<sup>69</sup>

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62. See JUDICIAL CASELOAD INDICATORS 2006, available at <http://www.uscourts.gov/stats/dec06/Dec06indicators.pdf>; see also STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 2006, available at <http://www.uscourts.gov/stats/dec06/index.html#USCA>.

63. ALDISERT, *supra* note 56, at 7.

64. *Id.* at 8, 10.

65. *Id.* at 297 (discussing frivolous petitions for rehearing en banc).

66. *Id.* at 292.

67. *Westcott Constr. Corp. v. Fireman’s Fund of N.J.*, 996 F.2d 14, 17 (1st Cir. 1993) (stating that reasons for penalizing frivolous appeals include deterrence to ease the burden on courts of appeal).

68. See, e.g., Mark R. Kravitz, Essay, *Unpleasant Duties: Imposing Sanctions for Frivolous Appeals*, 4 J. APP. PRAC. & PROCESS 335, 348 (2002); Martin, *supra* note 19, at 1183; Martineau, *supra* note 35, at 886; Martineau & Davidson, *supra* note 35, at 662-63.

69. Martineau, *supra* note 35, at 847.

The federal courts of appeals are unable to change their own jurisdiction and thus can impose no major limitation on the number of appeals coming to them. In the past several years, however, these courts have relied increasingly upon the authority granted to them by

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B. Over-Deterrence of Frivolous Appeals May Chill  
Legitimate Exercise of Appeal as of Right

The interest of courts in curtailing this “avalanche of appeals,” must be balanced against the competing interest of allowing legitimate advocacy. As Judge S. Jay Plager of the Federal Circuit emphasizes, “Parties have an appeal of right to the court and generally should not feel insecure in that right . . . .”<sup>70</sup> Therefore, calls for increased imposition of Rule 38 sanctions for frivolity, as a strategy for deterring frivolous appeals and conserving appellate-court resources, can come into conflict with the principle of open courts.

A myopic focus on aggressively deterring frivolous appeals runs the risk of deterring a much wider range of appeals. Excessive deterrence through harsh sanctions may impede access to justice by discouraging meritorious and novel claims, close cases, and issues of first impression. The traditional hesitancy of many courts to rigorously enforce Rule 38 is rooted in this concern, as numerous appellate opinions reveal.

For instance, the Seventh Circuit in 1975 refused to “impos[e] a penalty because of a failure to prevail in the litigation.”<sup>71</sup> The court stated:

[N]otwithstanding the overburdened condition in which the courts now find themselves we would not desire to take action which could become the basis of chilling the assertion of rights reasonably held in good faith . . . . [L]itigants should not be deterred from good faith and reasonable efforts to show the lack of any proper support for a credibility determination.<sup>72</sup>

The Seventh Circuit subsequently changed its tune, stating ten years later that sanctions on those who “abuse their right of access to these courts” would now be enforced “to the hilt” in

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[Rule 38 and §§ 1912 and 1927] to impose sanctions upon parties or attorneys taking frivolous appeals or using abusive tactics during the pendency of an appeal.

*Id.*

70. Plager et al., *supra* note 10, at 393.

71. NLRB v. Lucy Ellen Candy Div. of F & F Labs., Inc., 517 F.2d 551, 555 (7th Cir. 1975).

72. *Id.*

light of rising federal caseloads.<sup>73</sup> But many courts have remained attentive to this concern even when imposing sanctions. The Fifth Circuit has stated that “this court has no desire to deter any litigant from advancing any claim or defense which is arguably supported by existing law, or any reasonably based suggestion for its extension, modification, or reversal.”<sup>74</sup> The Third Circuit similarly stipulated that it is “well aware that injudicious awards of Rule 38 damages may have the potential to chill the zeal for pursuing novel questions and difficult appeals.”<sup>75</sup>

Finally, the concern with chilling advocacy applies with even greater force to the criminal context. As a general guideline, courts must exercise caution in applying the rule in criminal cases, “to avoid discouraging convicted defendants from exercising their right to appeal.”<sup>76</sup> As a result, Rule 38 is most often applied in civil appeals, although nothing in the language of the rule restricts a court of appeals from sanctioning the frivolous appeal of a criminal conviction.

#### IV. VARIANT IMPLEMENTATION OF FEDERAL RULE OF APPELLATE PROCEDURE 38 AMONG CIRCUIT COURTS OF APPEAL AND TREATMENT OF PRO SE APPELLANTS

##### A. Trends and Variations Among Circuits Invoking Rule 38

Rule 38 is much less frequently invoked or litigated than Rule 11, its analog governing frivolous suits at the trial-court level. Historically, many courts have been hesitant to impose sanctions for frivolous appeals for fear of chilling legitimate advocacy.<sup>77</sup> As a consequence, there is a relative dearth of both

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73. *Dreis & Krump Mfg. Co. v. Int’l Ass’n of Machinists & Aerospace Workers*, Dist. No. 8, 802 F.2d 247, 255 (7th Cir. 1986).

74. *Coghlan v. Starkey*, 852 F.2d 806, 810-11 (5th Cir. 1988) (quoting *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986)).

75. *Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993) (citing *Hilmon Co. (V.I.) Inc. v. Hyatt Int’l*, 899 F.2d 250, 253 (3d Cir. 1990)).

76. *United States v. Cooper*, 170 F.3d 691, 691-92 (7th Cir. 1999); *see also* MOORE ET AL., *supra* note 4, at § 338.10.

77. *See* Roger J. Miner, Lecture, *Professional Responsibility in Appellate Practice: A View From the Bench*, 19 PACE L. REV. 323, 341 (1999). Judge Miner, of the Second Circuit Court of Appeals remarks that it is “a rare case in which we sanction even those who take frivolous appeals.” *Id.*

case law and legal scholarship on the topic of frivolous appeals. In an era of increasing willingness by courts of appeal to find frivolity and impose sanctions under Rule 38, the issue of differing standards among the circuits and the potential consequences for pro se appellants is steadily gaining importance.

Although the topic of frivolous appeals remains minimally dealt with in the academic literature, some prior scholarship provides a helpful background in this area. In 1985, Martineau and Davidson first identified the problem of conflict and inconsistency among the circuits in their methods of addressing frivolous appeals, and they published a survey of standards in the federal courts of appeal for determining and sanctioning frivolous appeals.<sup>78</sup> At that time, Martineau and Davidson variously categorized the circuits as “reluctant,” “aggressive,” or “uncertain,” based on the willingness and consistency with which the judges of that circuit had imposed sanctions for frivolity.<sup>79</sup> These scholars took the position, contrary to that of this article, that increased use of substantial sanctions is the proper way to deter frivolous appeals. Their calls for circuit consistency remain relevant, however, and their research provides a useful baseline from which to examine the contemporary situation.

Martineau and Davidson identified the Third Circuit as “the most reluctant to impose a sanction for a frivolous appeal.”<sup>80</sup> At the time of their research, the authors found that the Third Circuit had *never* sanctioned for frivolity under Rule 38 and had not done so under § 1912 since 1961.<sup>81</sup> Other circuits in the “reluctant” category included the Fourth Circuit (only two instances of sanctions for frivolous appeals),<sup>82</sup> the Eighth Circuit (four instances, three of which had occurred in the most recent two years—1983 and 1984),<sup>83</sup> and the District of Columbia

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78. Martineau & Davidson, *supra* note 35, at 605.

79. *Id.* at 605-06.

80. *Id.* at 606.

81. *Id.*

82. *Id.* at 607-09.

83. Martineau & Davidson, *supra* note 35, at 609-11. The Eighth Circuit imposed these sanctions under Rule 38 in three cases and under an internal circuit rule in the fourth case. *Id.*

Circuit (only two reported cases).<sup>84</sup> On the other hand, “aggressive” circuits—including the First, Ninth, Fifth, Sixth, and the recently created Eleventh and Federal Circuits<sup>85</sup>—more liberally exercised their authority to sanction for frivolity under Rule 38 or other sources of authority.<sup>86</sup> Of the “aggressive” circuits, the Ninth Circuit showed willingness to strictly sanction pro se appellants, as well as attorneys for frivolity.<sup>87</sup> In contrast, the Sixth Circuit suggested that a more lenient standard should apply for pro se litigants than for attorneys.<sup>88</sup> The remaining circuits—the Second, Seventh, and Tenth—lacked a consistent pattern of opinions regarding frivolous appeals and were therefore classified as “uncertain.”<sup>89</sup>

Over twenty years have passed since Martineau and Davidson’s study, and the use of Rule 38 to find and sanction for frivolity has increased in frequency throughout the circuits.<sup>90</sup> Even the most “reluctant” Third Circuit has ventured into the exercise of Rule 38, while still remaining relatively sparing in its imposition of sanctions and cautious in its language. Moreover, the formerly “uncertain” Seventh Circuit has made a marked shift to become very aggressive in the imposition of sanctions for frivolous appeals, even for pro se appellants.

One exception appears to be the Federal Circuit, classified in 1985 by Martineau and Davidson as “aggressive.” The Federal Circuit began to reconsider its initial hard-line approach in the early 1990s and subsequently experienced a sharp decrease in the number of appeals it found frivolous.<sup>91</sup> Judge

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84. *Id.* at 611-14.

85. The Eleventh Circuit was created by Congress in 1981 by splitting the former Fifth Circuit into the new Fifth and Eleventh Circuits. *Id.* at 634-35. The Federal Circuit was created by Congress in 1982 and combined the appeals division of the Court of Claims with the Court of Custom and Patent Appeals. *Id.* at 640.

86. *Id.* at 613-43.

87. *Id.* at 622-23.

88. Martineau & Davidson, *supra* note 35, at 637.

89. *Id.* at 643-57.

90. See, e.g., Anastasia Parnham Campbell, *Frivolous Civil Appeals: How to Avoid Sanctions*, 25 J. LEGAL PROF. 135, 136-37 (2001) (“[A]s the number of appeals continues to rise in both federal and state courts, a growing number of courts are beginning to use sanctions more frequently . . . . Overall, there is a move away from the reluctance [*sic*] of imposing sanctions under Rule 38 in federal appellate courts.”).

91. See generally Plager et al., *supra* note 10. The authors noted that “over the last ten years there has been a dramatic decline in the number of appeals declared frivolous by

Plager of the Federal Circuit has explained that the court “expressed concerns that imposing sanctions frequently could chill otherwise legitimate advocacy, making parties hesitant to appeal. Such effect would be contrary to the intended structure of our legal system, which is centered on maintaining open courts for parties to fully litigate their rights.”<sup>92</sup> Judge Plager also posited that the Federal Circuit’s decline in findings of frivolous appeals may be related to the court’s reluctance to expend the time and effort required to raise frivolity *sua sponte*.<sup>93</sup>

As outlined above, determination of frivolity and imposition of sanctions under Rule 38 is a two-step process. Variance occurs among the circuit courts of appeal at both stages, with attendant consequences for pro se appellants in particular. A sampling of how various circuits have invoked Rule 38 and implemented the two-step process reveals that more frequent use of Rule 38 in the past few decades has not led to greater consistency in the standards for determining frivolous appeals. Basically, “In assessing whether an appeal is frivolous, the courts of appeals differ over whether the standard is an objective one, or whether intent or bad faith is a factor in sanctionability.”<sup>94</sup> The United States Supreme Court has not

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the Federal Circuit . . . roughly equat[ing] to an 85% decline in this decade alone.” *Id.* at 391.

92. *Id.* at 391-92. Judge Plager and his coauthors also pointed out that the Federal Circuit has not used Rule 38 as frequently since the 1994 amendment, and they identified the increased procedural burdens resulting from the addition of the notice and opportunity to respond provision as a possible factor in the decline in frivolous appeals findings. *Id.* at 377, 392; *see also supra* Part III.C.

93. Plager et al., *supra* note 10, at 377, 392; *see also supra* Part III.C.

94. Plager et al., *supra* note 10, at 384-85; *see also* Martineau, *supra* note 35, at 870.

The courts of appeals have often confused two distinct issues[:] . . . whether an appeal should be classified as frivolous because of its lack of merit [and] . . . whether, given that an appeal is frivolous on its merits, the conduct of the appellant or the attorney is such that a sanction should be imposed on one or both. Often courts determine that an appeal is frivolous by examining the conduct of the appellant or attorney, rather than by looking at the merits of the appeal. . . . This approach causes the courts to vacillate between objective and subjective standards and obscures the extent to which the intent or the appellant of the attorney determines whether an appeal is frivolous.

*Id.*

addressed this issue, leaving each circuit court free to decide its process individually.<sup>95</sup>

### B. Initial Determination of Frivolity—"No Litmus Test"

As introduced in Part II, the first step of Rule 38 is the initial finding that an appeal is frivolous. By the language of the rule, determination of frivolity may be made either on a formal motion for sanctions by the appellee or sua sponte by the court. When Rule 38 is invoked by motion, courts have warned that an "allegation of a frivolous appeal should not be made cavalierly . . . . '[U]nfounded requests for sanctions are themselves frivolous and sanctionable.'"<sup>96</sup> While courts unquestionably possess the authority to raise frivolity sua sponte, some jurisdictions have suggested that the compensatory function of the sanctions provision is more important than redressing the burden on the court itself, and, therefore, the sounder jurisprudential approach is to await a request for redress.<sup>97</sup>

In any event, "[T]he only language set forth in the rule in terms of a standard is that the appeal must be determined to be frivolous. There is no litmus test for defining frivolous."<sup>98</sup> While courts agree that a frivolous appeal is something more than an unsuccessful appeal,<sup>99</sup> how and where to draw this line is unclear. The Third Circuit, for instance, has cautioned that "sometimes a questionable appeal may be due to mere overzealousness or inexperience of counsel, and it is sometimes difficult to draw the line 'between the tenuously arguable and

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95. Plager et al., *supra* note 10, at 385.

96. *Nordberg, Inc. v. Telsmith, Inc.*, 82 F.3d 394, 398 (Fed. Cir. 1996); *see also* *Meeks v. Jewel Cos.*, 845 F.2d 1421, 1422 (7th Cir. 1988) (holding that a frivolous motion for Rule 38 sanctions may itself be sanctioned where counsel repeatedly requested Rule 38 sanctions without proper investigation into whether appellant's Title VII claims were actually frivolous).

97. *See supra* notes 13-18 and accompanying text.

98. *COSTAKIS*, *supra* note 7; *see also* *MOORE ET AL.*, *supra* note 4, at § 338.20 ("There is no formula for determining whether an appeal is frivolous.").

99. *See, e.g.*, *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 6-7 (1986); *NLRB v. Lucy Ellen Candy Div. of F & F Labs., Inc.*, 517 F.2d 551, 555 (7th Cir. 1975) ("A frivolous appeal means something more to us than an unsuccessful appeal."). Conversely, however, if the appellant prevails on the appeal, then the appeal was clearly not frivolous.

the frivolous.”<sup>100</sup> The Sixth Circuit, too, has wryly observed that “[f]rivolity, like obscenity, is often difficult to define.”<sup>101</sup> The applicable standard of review can play a role in a finding of frivolity by setting the threshold over which a successful appellant must pass. As Judge Plager pointed out, “[T]he greater the deference owed to the lower tribunal, the more susceptible weak arguments are to being found frivolous.”<sup>102</sup>

A majority of federal courts of appeal have defined frivolity using a baseline of solely “objective” criteria,<sup>103</sup> guided by what Martineau characterizes as “various indicia of hopelessness.”<sup>104</sup> A succinct description by the Third Circuit states that “[d]amages under Rule 38 are appropriate when an appeal is ‘wholly without merit.’ Our inquiry is an objective one, focusing ‘on the merits of the appeal regardless of good or bad faith.’”<sup>105</sup> Multiple circuits have similarly ruled that “[a]n appeal is frivolous if the result is obvious or the arguments of error are wholly without merit,”<sup>106</sup> or have characterized an “objectively frivolous” appeal as one “without legal or factual basis.”<sup>107</sup> Claims on which the United States Supreme Court has

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

101. WSM, Inc. v. Tenn. Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983) (holding appeal frivolous but declining to impose sanctions in consideration of appellant’s pro se status).

102. Plager et al., *supra* note 10, at 375; *see also id.* at 386 (discussing the role of the standard of review).

103. *See, e.g.*, Wilton Corp. v. Ashland Castings Corp., 188 F.3d 670, 676-77 (6th Cir. 1999) (citing Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993); *In re* Drexel Burnham Lambert Group, Inc., 995 F.2d 1138, 1147 (2d Cir. 1993); *In re* Perry, 918 F.2d 931, 934 (Fed. Cir. 1990); Asbury v. Brougham, 866 F.2d 1276, 1283 (10th Cir. 1989); Coghlan v. Starkey, 852 F.2d 806, 814 (5th Cir. 1988); Hill v. Norfolk & Western Ry. Co., 814 F.2d 1192, 1207 (7th Cir. 1987); Reliance Ins. Co. v. Sweeney Corp., Maryland, 792 F.2d 1137, 1139 (D.C. Cir. 1986); Moore v. City of Des Moines, 766 F.2d 343, 346 (8th Cir. 1985)).

104. Martineau, *supra* note 35, at 850.

105. Nagle, 8 F.3d at 145 (internal citations omitted).

106. George v. City of Morro Bay (*In re* George), 322 F.3d 586, 588 (9th Cir. 2003); Lorentzen v. Anderson Pest Control, 64 F.3d 327, 331 (7th Cir. 1995); Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir. 1988). The Ninth and Seventh Circuits have often taken additional, subjective factors into consideration in their findings of frivolity on appeal, but they share this common initial language with the Third Circuit and other circuits.

107. Lozano v. Banco Central y Economias, 865 F.2d 15, 16 (1st Cir. 1989). The terminology of “merit” is blurry, with some courts such as the Federal Circuit stating that an argument may lack merit but still be “sufficiently colorable to bring the appeal itself just inside the border of frivolity.” Plager et al., *supra* note 10, at 384 & nn. 81-86.

ruled on or repeatedly rejected as classic examples of wholly meritless arguments.<sup>108</sup>

Differences arise among circuits when some choose to establish standards that include subjective factors. The Federal Circuit, for instance, has clearly separated its initial determination of frivolity into two varieties: “frivolous as filed” and “frivolous as argued.”<sup>109</sup> “Frivolous as filed” objectively exists where “the judgment by the tribunal below was so plainly correct and the legal authority contrary to appellant’s position so clear that there really is no appealable issue.”<sup>110</sup> “Frivolous as argued” integrates subjective factors, where “genuinely appealable issues *may* exist, [but] the appellant’s contentions in prosecuting the appeal are frivolous,”<sup>111</sup> including legal or factual misrepresentation, repeated litigation of the same issue before the same court, or other abuse of the legal process.

Other courts have eschewed such specific delineation but have factored in the good or bad faith of the appellant or conduct of the attorney in determining whether an appeal is frivolous.<sup>112</sup> Evidence of bad faith leading to determination of frivolity in such jurisdictions may include having no reasonable expectation of prevailing before the court of appeals when filing a meritless petition and taking multiple meritless appeals on the same issue. Additionally, bad faith may include dilatory tactics such as filing an appeal to avoid paying damages imposed by a trial-court ruling, and other abusive or harassing practices.

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108. *See, e.g.*, *Nunley v. Comm’r*, 758 F.2d 372, 373 (9th Cir. 1985) (holding a tax-protestor appeal frivolous where the arguments raised had been repeatedly rejected); *Paulson v. United States*, 758 F.2d 61, 62 (2d Cir. 1985) (holding an appeal frivolous where the Supreme Court had previously ruled on the question on appeal).

109. *See Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1578-80 (Fed. Cir. 1991) (finding frivolity as filed); *see also* *Plager et al.*, *supra* note 10, at 380-84 (explaining the *Finch* analysis and how it is still currently followed).

110. *Finch*, 926 F.2d at 1579.

111. *Id.*

112. *See, e.g.*, *Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670, 677 (6th Cir. 1999) (listing circuits that take bad faith or other subjective factors into consideration when determining frivolity, including *Hirschfeld v. Spanakos*, 104 F.3d 16, 20 (2d Cir. 1997) (“holding that standard for sanctioning party for bringing appeal or motion is whether sanctioned party acted in bad faith, vexatiously, wantonly, etc.”); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1134 (9th Cir. 1995); *Ross v. City of Waukegan*, 5 F.3d 1084, 1090 (7th Cir. 1993) (“holding that imposition of sanctions for frivolous appeal requires some evidence of bad faith”).

### C. Court's Discretion to Award Sanctions After an Appeal is Determined Frivolous

After a finding by the court of frivolity, the court is empowered to impose monetary sanctions in the form of damages and a maximum penalty of double costs after notice and an opportunity for the appellant to respond. While Martineau has suggested that sanctions should be mandatory upon a finding of frivolity,<sup>113</sup> the decision whether to impose sanctions under Rule 38 remains a matter of judicial discretion.<sup>114</sup> In other words, as Judge Plager pointed out, “[A] finding that an appeal is frivolous does not mean that sanctions will be automatically imposed.”<sup>115</sup> In practice, however, it is uncommon for courts to determine that an appeal is frivolous without also awarding sanctions.<sup>116</sup> The case of pro se appellants has been the notable exception to this trend. Many courts have historically chosen not to impose sanctions on a pro se appellants, even after a finding of frivolity.<sup>117</sup>

The factors that courts consider in deciding whether to award sanctions under Rule 38 typically vary with regard to whether bad faith is required. For example, the Second Circuit has stated that the standard for imposing sanctions for a frivolous appeal is whether the appellant acted “in bad faith, vexatiously, wantonly, etc.”<sup>118</sup> More jurisdictions eschew bad faith as a requirement, however, holding that Rule 38 sanctions

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113. Martineau, *supra* note 35, at 880 (stating that imposition of a sanction for taking a frivolous appeal should be mandatory, with the size and type of sanction remaining discretionary).

114. *See, e.g.*, First Commercial Trust Co., N.A. v. Colt's Mfg. Co., 77 F.3d 1081, 1084 (8th Cir. 1996) (holding that whether to sanction for a frivolous appeal is a matter of discretion by the court).

115. Plager et al., *supra* note 10, at 387; *see also* Nat'l Mass Media Telecomm. Sys., Inc. v. Stanley (*In re* Nat'l Mass Media Telecomm. Sys., Inc.), 152 F.3d 1178, 1181 (9th Cir. 1998) (holding that a court has discretion to not award damages, even if appeal is frivolous).

116. *See, e.g.*, Plager et al., *supra* note 10, at 387 (noting that the Federal Circuit “in recent years has made little distinction between finding frivolity and imposing sanctions”).

117. *See, e.g.*, WSM, Inc. v. Tenn. Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983); Lonsdale v. Comm'r, 661 F.2d 71, 72 (5th Cir. 1981) (refusing to impose Rule 38 sanctions against pro se tax protestor despite clearly frivolous and long-settled contentions).

118. Hirschfield v. Spanakos, 104 F.3d 16, 20 (2d Cir. 1997); *see also* Schiff v. Simon & Schuster, Inc., 766 F.2d 61, 62 (2d Cir. 1985) (explaining that Rule 38 sanctions are a warning to a vexatious appellant not to abuse the processes of court).

may attach irrespective of a finding of bad faith.<sup>119</sup> These courts believe that once frivolity has been determined, sanctions are appropriate regardless of the subjective motive of the appellant. Such an interpretation makes sense considering the important compensatory function of Rule 38—to make the appellee whole for the damages incurred in the course of defending against a frivolous appeal. This is in contrast to sanctions for unreasonable and vexatious attorney conduct under § 1927, which generally requires a finding of bad faith.<sup>120</sup>

In any event, a finding of bad faith can certainly bolster a court's inclination to award Rule 38 sanctions. This is especially true when dealing with pro se appellants. For instance, a history of repetitive meritless claims is a common reason cited by courts as an indicator of bad faith justifying the imposition of sanctions against both pro se and represented appellants alike.<sup>121</sup>

One standard that is gaining acceptance in determining whether to impose sanctions under Rule 38 for appellants represented by counsel is the “reasonable attorney” test. As the Third Circuit has articulated it, the test “is whether, following a thorough analysis of the record and careful research of the law, a reasonable attorney would conclude that the appeal is frivolous.”<sup>122</sup> This is an objective test, taking into consideration the unique circumstances of each case.

Therefore, a reasonable attorney conducting due diligence should be able to professionally scrutinize the legal and factual basis for the lawsuit and conclude whether an appeal would be wholly devoid of merit under the circumstances. Proceeding with a petition under such conditions is frivolous. Even so, in consideration of not wanting to chill zealous advocacy, some courts have shown leniency where an appeal's objective lack of merit was due to counsel's “excessive advocacy and

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119. See, e.g., *Pimentel v. Jacobsen Fishing Co.*, 102 F.3d 638, 640-41 (1st Cir. 1996); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir. 1987).

120. See generally *MOORE ET AL.*, *supra* note 4, at § 338.31 & nn.7-9.

121. See, e.g., *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 212 (9th Cir. 1987); *Shuffman v. Hartford Textile Corp. (In re Hartford Textile Corp.)*, 659 F.2d 299, 305 (2d Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) (awarding Rule 38 sanctions against an attorney for pursuing more than 100 frivolous appeals).

122. *Beam v. Bauer*, 383 F.3d 106, 109-10 (3d Cir. 2004); *Quiroga v. Hasbro, Inc.*, 943 F.2d 346, 347 (3d Cir. 1991).

inexperience.”<sup>123</sup> Nevertheless, the reasonable-attorney test is a sensible benchmark for determining when sanctions for frivolity are most appropriate, and it is a familiar standard for courts to apply. Pro se appellants, however, present a complication.

#### D. Considerations When Imposing Sanctions on Pro Se Appellants

In addition to the growth in appeals, there has been an increase in recent years in pro se litigation, which poses an additional challenge for the courts. As a result, reformers hoping to enhance pro se access to justice face the challenge of bench and bar resistance.<sup>124</sup> Many courts of appeal are showing less patience towards pro se petitioners.

A pro se litigant is one “who represents oneself in a court proceeding without the assistance of a lawyer.”<sup>125</sup> Pro se litigants at both the trial and appellate levels are generally subject to all the same rules of procedure, rules of court, and statutes applicable to parties that enjoy the benefit of representation.<sup>126</sup> But additional considerations do come into play when an allegedly frivolous appeal is brought by an appellant appearing pro se. Pro se pleadings are viewed less stringently and must be more liberally construed than formal pleadings drafted by lawyers.<sup>127</sup> Accordingly, courts of appeal historically have displayed a strong presumption against imposing strict Rule 38 sanctions on pro se petitioners.

But pro se appellants have never been categorically exempt from the reach of Rule 38. The lack of counsel will not shield pro se parties from sanctions when deemed appropriate.<sup>128</sup>

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123. *Beghin-Say Int’l, Inc. v. Ole-Bendt Rasmussen*, 733 F.2d 1568, 1573 (Fed. Cir. 1984) (choosing not to sanction counsel under Rule 38 despite appeal that did “border the ragged edge of frivolity”).

124. Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 37 (2002).

125. BLACK’S LAW DICTIONARY 1258 (8th ed. 2004).

126. *See Lefebvre v. Comm’r*, 830 F.2d 417, 419 (1st Cir. 1987) (“While pro se pleadings are viewed less stringently, a petitioner who elects to proceed pro se must comply with the applicable procedural and substantive rules of law.”) (citing *Casper v. Comm’r*, 805 F.2d 902, 906 n.3 (10th Cir. 1986)).

127. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

128. *See, e.g., Haworth v. Royal*, 347 F.3d 1189, 1192 (10th Cir. 2003) (holding that appellant’s pro se status does not prohibit court from sanctioning for frivolity); *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986) (“[O]ne acting pro se has no

Courts of appeal have used stern language and stated that a “pro se litigant has a duty to determine whether his claim is worth pursuing and may not ‘prostitute the process of the court,’”<sup>129</sup> and that “one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.”<sup>130</sup>

Still, courts have traditionally conceded that pro se appellants ought not to be subjected to the same criteria as those represented by counsel. The Seventh Circuit has suggested that sanctions should be imposed when a pro se appellant persists in an appeal after a reasonable *person* would know the cause was hopeless.<sup>131</sup> The Fifth Circuit has contributed that sanctions are appropriate when pro se litigants have received a specific prior warning from the court that their claims were frivolous.<sup>132</sup>

While Judge Aldisert of the Third Circuit has emphasized that the excesses of meritless appellants “are not restricted to any economic or social class,”<sup>133</sup> there is a perception among many courts and commentators that a large percentage of meritless suits and appeals are brought by pro se and in forma pauperis litigants.<sup>134</sup> Certain categories of pro se appellants have garnered particular concern and tend to especially exasperate the judiciary. Chief among them are tax resisters.<sup>135</sup>

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license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.”); *Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (stating that while reluctant to impose sanctions, especially against a pro se, the court will do so where appropriate).

129. *Harlow v. Bergson*, 893 F.2d 187, 187 (8th Cir. 1990) (quoting *Galvan v. Cameron Mut. Ins. Co.*, 831 F.2d 804, 805-06 (8th Cir. 1987)).

130. *Ferguson*, 808 F.2d at 359.

131. *Bacon v. Am. Fed. Employers Council*; # 13, 795 F.2d 33, 35 (7th Cir. 1986).

132. *Stelly v. Comm’r*, 761 F.2d 1113, 1116 (5th Cir. 1985).

133. ALDISERT, *supra* note 56, at 8.

134. *Cf. Mary Van Vort, Controlling and Deterring Frivolous In Forma Pauperis Complaints*, 55 *FORDHAM L. REV.* 1165, 1165 (1987) (discussing filing of frivolous complaints at trial level, and noting that “the courts are flooded with growing numbers of meritless complaints, many of which are brought by plaintiffs proceeding in forma pauperis”).

135. Prisoners and civil-right litigants are also often cited as burdensome classes of pro se appellants, although a full discussion of the unique issues raised by the appeals of these litigants is beyond the scope of this article. Courts have taken steps to restrict the tide of prisoner appeals in particular, but also give consideration to the unique needs of pro se prisoners trying to access appellate review, such as by offering greater flexibility regarding the filing provisions for a notice of appeal. *See* ALDISERT, *supra* note 56, at 51.

Courts faced with a deluge of virtually identical petitions contesting the appellants' obligation to pay taxes—based on the contention that the Sixteenth Amendment is unconstitutional and that wages are not taxable income—exhibited rapidly declining patience for adjudicating these long-settled arguments. Thus, despite the recognized need for even greater caution in imposing Rule 38 in criminal appeals, it is increasingly common for courts of appeal to impose sanctions in the case of especially pernicious pro se tax resisters found to be frivolously appealing their convictions for tax fraud.<sup>136</sup> As the Eighth Circuit noted in 1985, the “filing of frivolous appeals from Tax Court decisions apparently is on the rise everywhere, and several courts of appeals, including this court, have resorted with increasing frequency . . . to awarding costs and damages under [Rule 38] in an attempt to stem these appeals.”<sup>137</sup> The Seventh Circuit, in imposing Rule 38 sanctions on two pro se tax resisters in *Coleman v. Commissioner*, remarked that it is “an important function of the legal system to induce compliance with rules that a minority firmly believes are misguided . . . [and] it is often necessary to impose steep penalties on those who refuse to comply.”<sup>138</sup> Due to the sheer number of similar cases “many circuits have adopted a flat sanction” for frivolous appeals of tax cases.<sup>139</sup>

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Courts give extra consideration to the difficulty encountered by pro se prisoners in filing a notice of appeal and hold that the delivery to prison officials for mailing of a notice of appeal by a prisoner, rather than its receipt by the clerk of the district court, constitutes the time of its filing.

*Id.* (citing *Houston v. Lack*, 487 U.S. 266 (1988)). Another pernicious, though less numerous, appellant class consists of repeat objectors to class-action settlements, who “can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal).” *Barnes v. FleetBoston Fin. Corp.*, C.A. No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, at \*3 (D. Mass. Aug. 22, 2006); *see also Scolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (involving another professional objector described as a “litigious pro se who has filed numerous lawsuits in state court”).

136. *See, e.g., United States v. Cooper*, 170 F.3d 691, 691-92 (7th Cir. 1999).

137. *May v. Comm’r*, 752 F.2d 1301, 1305-06 & n.5 (8th Cir. 1985) (listing cases of Rule 38 sanctions imposed against tax resisters from the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits).

138. 791 F.2d 68, 69 (7th Cir. 1986).

139. *Shatz & LeGras*, *supra* note 41.

V. STRICTER IMPOSITION OF RULE 38 SANCTIONS  
CARRIES RISKS FOR PRO SE APPELLANTS AND MAY  
NOT BEST SERVE JUDICIAL ECONOMY

A number of commentators have called for more aggressive findings of frivolity and imposition of harsher sanctions by courts of appeal in order to deter frivolous appeals.<sup>140</sup> Overall, these writers mention but generally minimize the imperative of safeguarding access to the courts, including exercise of appeal as of right. Martineau, for instance, acknowledged that “[t]he fear of a sanction may discourage a person with a valid claim from pursuing it on appeal.”<sup>141</sup> This danger is considerably higher when multiple sources of authority and multiple purposes exist for the sanction, “when varying standards are used in judging whether an appeal is frivolous,” and “when the procedure varies for initiating consideration of a sanction.”<sup>142</sup>

Martineau, however, believes that any deterrent effect on the good-faith appellant or an attorney with a legitimate appeal “is, at most, a theoretical problem.”<sup>143</sup> This article does not share such a dismissive attitude. Despite a long history of minimal use of sanctions for frivolity by the federal courts of appeal (and perhaps *because* of this undisturbed history), the contemporary fact of rising caseloads and greater willingness by many judges to impose sanctions raises the risk that the authority to do so may be abused. Pro se appellants proceeding without counsel are particularly vulnerable to any misuse or overuse of sanctions for frivolous appeals. Indeed, courts’ increased comfort with sanctioning pro se appellants for frivolity, combined with the sharp language cropping up in several such opinions, is sufficient to justify concern about safeguarding pro se appellants’ rights.

The reasonable-attorney test is a sensible benchmark for determining when sanctions for frivolity are appropriate in the case of a represented party, and it is a familiar objective standard for courts to apply. It remains appropriate, however, for differing standards to attach when considering sanctions for

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140. See, e.g., Kravitz, *supra* note 68, at 348; Martin, *supra* note 19, at 1183; Martineau, *supra* note 35, at 886; Martineau & Davidson, *supra* note 35, at 662-63.

141. Martineau, *supra* note 35, at 848-49.

142. *Id.* at 849.

143. *Id.* at 879.

litigants pursuing an appeal pro se. There are multiple areas where pro se appellants are at a disadvantage when subjected to the same Rule 38 standards—objective or subjective—as appellants represented by counsel. Most significantly, appeals have been found frivolous for reasons including the failure to state issues properly in an appellant’s initial brief,<sup>144</sup> citation of inapplicable precedent or failure to cite relevant authority,<sup>145</sup> or presenting an incoherent legal theory.<sup>146</sup> These are all potentially valid reasons for finding an appeal frivolous when taken by counsel. Even fairly knowledgeable pro se appellants, however, often lack the ability, in the absence of legal training, to understand and follow basic procedural and substantive legal principles.

Some scholars take the absolutist position that, “[w]ith regard to the rules, self-represented litigants should be treated neither better, nor worse, than parties with attorneys,” and that procedural and substantive judgments ought to be based “on a strict, logical application of legal rules, without regard for the result.”<sup>147</sup> The paradoxical truth, though, is that such “equality of application” rhetoric “reflects bias—not merely in appearance, but in fact—in favor of the represented party, who is already advantaged unfairly by knowing the rules of the game while the pro se adversary does not.”<sup>148</sup> The result of such “blind justice” may be to foreclose meaningful access to the courts for unrepresented parties. Such an end poses a greater threat to the legitimacy of the justice system than does appropriate consideration of a litigant’s pro se status at every

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144. See, e.g., *Kurzweg v. Marple*, 841 F.2d 635, 641 (5th Cir. 1988).

145. See, e.g., *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 111-13 (2d Cir. 1999) (per curium); *Newhouse v. McCormick & Co.*, 130 F.3d 302, 304-05 (8th Cir. 1997); *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1441 (9th Cir. 1995); *Greco v. Stubenberg*, 859 F.2d 1401, 1404 (9th Cir. 1988); *Coghlan v. Starkey*, 852 F.2d 806, 809 (5th Cir. 1988); *Borowski v. DePuy, Inc.*, 850 F.2d 297, 305 (7th Cir. 1988); *Chalfy v. Turoff*, 804 F.2d 20, 23 (2d Cir. 1986); *Des Vignes v. Dep’t of Transp., FAA*, 791 F.2d 142, 143-44 (Fed. Cir. 1986), cert. denied, 479 U.S. 453 (1986); *Hilgeford v. Peoples Bank*, 776 F.2d 176, 179 (7th Cir. 1985), cert. denied, 475 U.S. 1175 (1986).

146. See, e.g., *Moore v. Time, Inc.*, 180 F.3d 463, 463-64 (2d Cir. 1999) (per curium), cert. denied, 538 U.S. 932 (1999); *Ernst Haas Studio*, 164 F.3d at 111-13; *Hamblen v. County of Los Angeles*, 803 F.2d 462, 465 (9th Cir. 1986).

147. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1591 (2005).

148. *Goldschmidt*, supra note 124, at 37.

level of the judicial process, including on appeal.<sup>149</sup> Subjecting pro se appellants to the same criteria as those represented by counsel is illogical and unacceptable. They cannot fairly be held to the high standard of a reasonable attorney.

Certainly there exist pernicious and vexatious pro se appellants, but overuse of Rule 38 and harsh penalties thereunder can have a severe impact on pro se appellants at large. Care is advisable even in the sanctioning of flagrant pro se tax resisters, as at least one circuit has concluded. In *May v. Commissioner*, the Eighth Circuit counseled that “judges must exercise cautiously and prudently the power to impose sanctions against parties for cluttering the courts with frivolous actions and appeals because of the chilling effect which the spectre of the exercise of that power may spread.”<sup>150</sup> The *May* court decided that sanctions were proper for the bringing of frivolous tax appeals “only in those instances in which it is incontrovertible that the taxpayer did not institute the action or bring an appeal in good faith because he knew or should have known that the claim or argument was frivolous or because he sought to delay payment of taxes.”<sup>151</sup> In other words, a bad-faith determination, while not generally required for imposition of Rule 38 sanctions, is an appropriate additional requirement before sanctioning a pro se appellant.

In addition to the chilling effect on pro se appellants posed by stricter imposition of Rule 38, the process of implementing Rule 38 is not in itself necessarily conducive to judicial economy. The notice and opportunity to respond requirements added by the 1994 amendment to Rule 38,<sup>152</sup> while affording greater protection of due process, also necessitate greater workload and time commitment for courts. Courts may choose to “ignore frivolous appeals issues rather than raise them sua sponte to avoid the time and effort required to comply with the 1994 amendment.”<sup>153</sup> Instead, courts of appeal have at their disposal the alternative of affirming without issuing an opinion

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149. Goldschmidt, among other commentators, advocates for broad relaxation of the rules of procedure and evidence for pro se litigants. *See id.* at 51-53.

150. 752 F.2d 1301, 1306 (8th Cir. 1985).

151. *Id.*

152. *See supra* Part II.C.

153. Plager et al., *supra* note 10, at 392.

for cases of extremely low merit.<sup>154</sup> Judge Plager pointed out that “[w]ith an already overcrowded docket, the court in an obviously meritless case may choose to ask whether it is useful to *sua sponte* take on a peripheral issue that requires further proceedings, especially when the outcome in the appeal is already preordained.”<sup>155</sup> Entering judgment of affirmance without opinion enables a court to dispose of the appeal without further burdening judicial time.

## VI. CONCLUSION

Despite the “dramatic recent increase of appellate filings”<sup>156</sup> and the overwhelming caseloads of federal appellate courts, the answer to relieving the burden on federal courts of appeal does not lie in increased use of Rule 38 to find frivolity and impose sanctions. The historical “unwillingness of appellate panels to invoke the full potential force of Rule 38”<sup>157</sup> is justified by the strong imperative of not chilling access to appellate review. Indeterminacy and varying standards among circuits hinders both the efficiency of courts and the access of litigants to appellate review.

Adoption of a standardized process for Rule 38 that adequately takes *pro se* appellants into consideration is necessary. First, initial determination of frivolity should be objective, limited strictly to consideration of the merits of the appeal as filed. As long as there is some justifiable chance of reversal of the lower-court decision, albeit remote, an appeal should not be found frivolous, even if the petition is eventually found unpersuasive after due consideration by the court of appeal. Matters of first impression or issues not adequately covered by case law and those with arguable factual basis (even if weak) are not properly considered frivolous, regardless of whether the appellants’ arguments ultimately do not prevail.

Next, the discretionary decision whether to sanction should take into consideration the totality of the circumstances, including subjective factors such as bad faith on the part of the appellant and whether the appellant is acting *pro se*. In this

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154. *See, e.g.*, FED. CIR. R. 36.

155. Plager et al., *supra* note 10, at 393.

156. ALDISERT, *supra* note 56, at 10.

157. Shatz & LeGras, *supra* note 41.

analysis, there should remain a presumption against imposing sanctions in the case of a pro se appellant. There should also be an explicit advance-warning requirement before sanctioning pro se appellants. For parties represented by counsel (or attorneys proceeding pro se), the reasonable-attorney standard will best guide courts in deciding when to sanction.

Courts should reserve Rule 38 only for cases of objective and unquestionable frivolity, remaining mindful of other avenues for sanctioning of delay or vexatious litigation. For instance, sanctions based on taking a wholly meritless appeal must be distinguished from those “imposed for abusive litigation tactics during the pendency of an appeal with merit.”<sup>158</sup> The second category is insufficient to support Rule 38 sanctions. Vexatiousness and delay may be sanctioned under §§ 1927 and 1912 and under Rule 30(b). Additionally, for cases of extremely low merit, courts of appeal should consider the alternative of issuing an affirmance without an opinion under local court rules providing for summary disposition.

Litigants presently enjoy the confidence that another judicial body is available to review contested decisions. Appeal as of right, especially for pro se petitioners, is at risk of being eroded by overaggressive findings of frivolity and imposition of harsher sanctions under Rule 38. Such costs of stricter implementation are high, and the benefits to judicial economy are debateable. A continuing cautious attitude by courts in imposing Rule 38 under this proposed framework is in keeping with historical practice and best preserves Rule 38 sanctions for cases of objective frivolity without overdetering access to appellate review.

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158. Martineau, *supra* note 35, at 849.