

UNPLEASANT DUTIES: IMPOSING SANCTIONS FOR FRIVOLOUS APPEALS

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Faced with ever growing caseloads, federal and state appellate judges often decry the number of truly frivolous appeals that lawyers file each year. Frivolous appeals clog dockets, divert increasingly scarce judicial resources from meritorious appeals and inflict unnecessary expense and burden on those who must defend against them. Though federal and state courts possess ample authority to impose sanctions for frivolous appeals—in order to punish those who file them, deter others from doing likewise, and compensate the victims of such tactics—appellate judges have long shown a surprising reluctance to use the tools at their disposal. As Judge Roger J. Miner of the Second Circuit has observed of his colleagues: “[I]t is a rare case in which we sanction even those who take frivolous appeals.”¹ Moreover, when appellate courts do impose sanctions, their awards often fail adequately to compensate the party that has had to defend against the frivolous appeal. In particular, awarding “double costs” alone—a relatively common sanction—has absolutely no deterrent, punitive or

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1. Roger J. Miner, *Professional Responsibility in Appellate Practice: A View From the Bench*, 19 Pace L. Rev. 323, 341 (1999). Judicial reluctance to grant sanctions for frivolous appeals is not new. In a 1984 article, Professor Robert J. Martineau made a similar observation about federal appellate courts, attributing this reluctance, at least in part, to confusion regarding the standards for imposing sanctions. See Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 Duke L.J. 845. See also Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 Am. U. L. Rev. 603 (1985) (examining the approach of each federal circuit in assessing sanctions for frivolous appeals).

compensatory value. Such minimal awards only contribute to a nagging sense that seeking sanctions for a frivolous appeal may be more trouble (and expense) than it is worth.²

Doubtless, some of this judicial reluctance to impose meaningful sanctions for frivolous appeals rightly derives from a desire not to deter legitimate appeals or penalize those who seek to convince courts to adopt new principles or novel positions. Justice John Paul Stevens has thus cautioned, "Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means."³ Appellate courts are properly leery of allowing parties to abuse the rules governing appellate sanctions in the same manner in which Rule 11 was once misused.⁴ Difficulties in defining frivolity with precision may also contribute to an unwillingness to penalize parties or lawyers for pursuing an appeal of right.⁵

2. *But see* Scott A. Martin, *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, 1156 (2002) (suggesting that "[m]ore than ever, judges are willing to impose sanctions for abuses of federal court processes, including frivolous appeals"). Some state appellate courts have adopted summary procedures that, among other things, may allow those courts to eliminate frivolous appeals more promptly from their dockets and reduce the concomitant burden that those appeals impose on the judicial system and parties. *See generally Expedited Appeals in Selected State Appellate Courts*, 4 J. App. Prac. & Process 191 (2002).

3. *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1071 (1985) (Stevens, J., concurring) (footnote omitted). While acknowledging that courts should not "tolerate gross abuses of the judicial process," Justice Stevens suggested that there should be a "strong presumption . . . against the imposition of sanctions for invoking the processes of the law." *Id.* at 1071-72. *See also Orr v. Turco Mfg. Co.*, 512 N.E.2d 151, 152 (Ind. 1987) (imposing appellate sanctions "will discourage innovation and inhibit the opportunity for periodic reevaluation of controlling precedent").

4. For a discussion of some of the experiences under Rule 11 that ultimately led to the 1993 changes to that rule, see Elizabeth C. Wiggins, Thomas Willging & Donna Stienstra, *Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States* (Fed. Jud. Ctr. 1991); Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse*, Ch. 1, § 2 (3d ed. LEXIS Law Pub. 2000); and Joseph Solovy, *The Federal Law of Sanctions* (Butterworth Legal Pub. 1991).

5. *See Gilbert v. City of Salinas*, 2002 WL 118609, at *8 (Cal. App. 6th Dist. Jan. 29, 2002) ("[T]he borderline between a frivolous appeal and one which simply has no merit is vague indeed. . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be

However, the case law—much of which involves truly egregious conduct in briefing or argument, or claims that are completely without merit under any standard—suggests that other factors are also at work. Certainly, the judiciary’s well known distaste—dare I say disdain?—for the task of adjudicating requests for sanctions plays some role. One need not be a cynic to come away from the case law with at least a slight suspicion that some appellate judges view the imposition of sanctions as an unpleasant (perhaps even demeaning) task that they would prefer to avoid. As one judge has candidly written, “Of all the duties of the judge, imposing sanctions on lawyers is perhaps the most unpleasant. A desire to avoid doing so is understandable.”⁶

A related factor appears to be a seeming unwillingness among appellate judges to appreciate (or at least acknowledge in a tangible way) the real costs that frivolous appeals inflict on parties forced to respond to them. Courts are not the only victims of frivolous appeals and the mere fact that an appeal lacks all merit does not mean that it was, or even should have been, easy and inexpensive to defend. Yet, often judges seem to forget this simple truth. Even if appellate courts are reluctant to protect their own institutional interests and values by punishing and deterring those who file frivolous appeals, they should at least provide a greater measure of justice for the parties who were compelled to bear the costs of defending against those appeals.⁷

used.”) (citation and internal quotation omitted). See generally Martineau, *supra* n. 1; Martin, *supra* n. 2.

6. William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 205 (1985). See also *Anderson v. Lindgren*, 360 N.W.2d 348, 353 (Minn. App. 1984) (describing the decision to impose sanctions as “distasteful”).

7. The focus of this essay is primarily on civil appeals, and primarily those involving private parties represented by counsel. Criminal, habeas and prisoner appeals, as well as appeals involving the government, all present different and more complex considerations. So, too, do *pro se* appeals, where a litigant’s unfamiliarity with the rules or inability to pay a sanctions award may properly influence a court’s sanctions decision. See Joseph, *supra* n. 4, at § 32(C); Martin, *supra* n. 2, at 1182. That said, many sanctions cases also involve *pro se* litigants who are quite familiar with the rules and have been properly warned by courts about their conduct but who nonetheless seek to use their *pro se* status as a shield to protect against sanctions. See *Ferguson v. MBank Houston*, 808 F.2d 358, 359 (5th Cir. 1986) (“one acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets”). See generally Joseph,

I do not speak of close questions, arguable claims or borderline cases but, rather, of patently frivolous appeals. Much has been written by commentators and courts about the standards for determining whether an appeal is frivolous, a topic that is beyond the scope of this essay.⁸ Suffice it to say that although “frivolity, like obscenity, is difficult to define,”⁹ most of us know it when we see it. For purposes of this essay, an appeal can be frivolous in two respects—either as filed or as argued. By the former, I mean that an appeal can be frivolous because the judgment below is so clearly correct and the legal authority so overwhelmingly contrary to the appellant’s position that there really is no legitimate basis on which to file the appeal in the first place. By the latter, “as argued” category, I mean that regardless whether arguable grounds for reversal exist at the time the appeal is filed, the conduct of the appeal itself may also support an award of sanctions when, for example, the appellant—or more likely, appellant’s counsel—fails to make any coherent argument, misrepresents facts or case law or fails to bring contrary authority to the court’s attention. In either case, the standard for frivolity is properly quite high,¹⁰ and merely losing on appeal, even badly, is not a sufficient basis for labeling an appeal frivolous.

State and federal appellate courts possess ample authority to impose sanctions on parties and lawyers who file frivolous appeals or pursue frivolous arguments and accordingly, to compensate the victims of those tactics. The sources of that authority are varied—from statutes and appellate rules to the

supra n. 4, at 488 (collecting cases in which circuits have awarded sanctions against *pro se* litigants).

8. See generally Martineau, *supra* n. 1, at 850-855; Martin, *supra* n. 2, at 1165-1173. This brief essay is not intended as a treatise on the law of sanctions for frivolous appeals. Comprehensive and scholarly commentary on that subject already exists, and any lawyer wishing to obtain sanctions for a frivolous appeal would be well advised to consult those sources. See e.g. Joseph, *supra* n. 4; Solovy, *supra* n. 4; Wright & Miller, *Federal Practice and Procedure* § 3984 (2d ed., West Publ. 1996); Moore’s *Federal Practice* § 338 (3d ed., Matthew Bender 1997); Annotation, *The Award of Damages for Dilatory Tactics in Prosecuting Appeal in State Court*, 91 A.L.R.3d 661 (Lawyers Co-op. Pub. Co. 1979 & Supp. 2001).

9. See *WSM, Inc. v. Tenn. Sales Co.*, 709 F.2d 1084, 1088 (6th Cir. 1988).

10. See *Vess Beverages, Inc. v. Paddington Corp.*, 941 F.2d 651, 656 (8th Cir. 1991) (noting that “[i]f sanctions were imposed every time briefs strayed from the question before the court, few litigants would escape”).

inherent power of all appellate courts to control the judicial process and the parties who appear before them. In federal courts, the principal vehicles for imposing appellate sanctions are Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1912.¹¹ Rule 38 has existed for 65 years; section 1912 traces its roots to the Judiciary Act of 1789.¹²

By their terms, both the rule and the statute are permissive, not mandatory. Rule 38 provides that “[i]f a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee.” Section 1912 allows a court of appeals “in its discretion” to “adjudge to the prevailing party just damages for his delay, and single or double costs.” Although the statute and rule differ slightly—the latter speaks of “delay” while the former refers to “frivolous” appeals—courts have long ignored this distinction and construed both as authorizing sanctions for frivolous appeals.¹³ No showing of delay is needed. As a result, most federal courts routinely cite both section 1912 and Rule 38 and treat them identically. They seem also to agree that the “just damages” that federal appellate courts may award under either the rule or the statute may include reasonable attorneys’ fees as well as “double costs.”¹⁴

11. On occasion, federal appellate courts also invoke their inherent powers. See *Chambers v. Nasco*, 501 U.S. 32, 44 (1991); 28 U.S.C. § 1927 (1980). Section 1927 authorizes federal district or circuit courts to require “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” See generally *Roadway Express v. Piper*, 447 U.S. 752, 759-61 (1980) (reviewing the legislative history of section 1927). See also 26 U.S.C. § 7482(c)(4) (1997) (authorizing courts of appeals and the Supreme Court to impose sanctions for any frivolous appeal from a Tax Court decision); Sup. Ct. R. 42 (2) (authorizing the award of damages for frivolous appeals or certiorari petitions).

12. See Section 23 of the Judiciary Act of 1789, 1 Stat. 73, 85; Martineau, *supra* n. 1, at 857 n. 68.

13. See e.g. *Whitehead v. Paramount Picture Corp.*, Nos. 99-7137 & 99-7197, 2000 U.S. App. LEXIS 11716, at *4 (D.C. Cir. Apr. 19, 2000); *In re B.C. Enters., Ltd.*, No. 94-16027, 1996 U.S. App. LEXIS 8959, at *18 (9th Cir. Apr. 10, 1996); *Doyle v. Okla. Bar Assn.*, 998 F.2d 1559, 1571 (10th Cir. 1993); *Bonfiglio v. Nugent*, 986 F.2d 1391, 1394 (11th Cir. 1993); *Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985).

14. Costs are itemized in Rule 39 of the Federal Rules of Appellate Procedure and in 28 U.S.C. § 1920 (1978). Section 1920 lists the following as recoverable costs: (1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for the case; (3) printing and witness fees and disbursements; (4) fees for exemplification and copies of necessary papers; (5) docket fees;

For a time there was some question whether Rule 38 and section 1912 applied to lawyers, but courts now construe these provisions as authorizing sanctions against *either* appellants (including *pro se* appellants) *or* their counsel, *or both*.¹⁵ Appellees, however, cannot be punished under Rule 38 or section 1912, no matter how frivolous their position on appeal, a regrettable anomaly in the federal rules.¹⁶

A large and increasing number of state appellate courts also now recognize their authority to levy sanctions, including attorneys' fees, for a frivolous appeal, gleaned from statutes, court rules and their own inherent power.¹⁷ Thus, in a decision fairly typical of state court rulings on appellate sanctions, the Idaho Supreme Court recently noted that

and (6) compensation for interpreters, salaries, fees, expenses, and costs of interpretation services, and compensation of court-appointed experts. See 28 U.S.C. § 1920. Federal courts often award a lump sum, without distinguishing between attorneys' fees and costs. See e.g. *Smith v. Kitchen*, 156 F.3d 1025, 1030 (10th Cir. 1997).

15. See e.g. *Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1583 (Fed. Cir. 1995) (imposing sanctions on attorney); *Osuch v. Immigration & Naturalization Serv.*, 970 F.2d 394, 396 (7th Cir. 1992) (indicating that sanctions could be imposed on attorney); *Quiroga v. Hasbro, Inc.*, 943 F.2d 346, 347 (3d Cir. 1991) (imposing sanctions on attorney); *In re Lowell H. Becraft, Jr.*, 885 F.2d 547, 548 (9th Cir. 1989) (noting that sanctions might be imposed against *pro se* litigants, litigants represented by counsel, and appellate counsel); *Coghlan v. Starkey*, 852 F.2d 806, 818 (5th Cir. 1988) (indicating that sanctions can be imposed upon either attorney or attorney and client together, and imposing responsibility for attorneys' fees on attorney and responsibility for costs on client); *Braley v. Campbell*, 832 F.2d 1504, 1511 (10th Cir. 1987) (*en banc*) (imposing sanctions against attorney).

16. See e.g. *Walker v. City of Bogalusa*, 168 F.3d 237, 241 (5th Cir. 1999).

17. See generally Alan Stephens, *Attorney's Liability Under State Law for Opposing Party's Counsel Fees*, 56 A.L.R.4th 486, 491-95 (1987). Some state courts have adopted the federal rules, including Rule 38 of the Federal Rules of Appellate Procedure. See e.g. Ala. R. App. P. 38; Colo. App. R. 38(d); Haw. R. App. P. 38 (reflecting some minor differences in wording from federal Rule 38). Many other states have adopted their own rules, which accomplish much the same purpose as Rule 38. For example, Indiana Appellate Rule 66(E) provides: "The court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution." Indiana's provision is similar to rules adopted in many other states, as demonstrated by the following illustrative, but not comprehensive, list. See e.g. Cal. Code Civ. P. § 907; 2001 Kan. S. Ct. R. 7.07(c); Mo. R. App. P. 84.19; Pa. R. App. P. 2744; Tex. R. App. P. 45; Wash. R. App. P. 18.9. In addition to awarding attorneys' fees, California appellate courts have required parties who have pursued frivolous appeals to pay to the court clerk an amount equal to the cost to the court system of processing the average civil appeal, an amount that California appellate judges have "conservatively estimated" to be \$6,000. See e.g. *Keitel v. Heubel*, 120 Cal. Rptr. 2d 216, 227 (2002) (awarding \$7,400), *review granted, depublished, and transferred*, 54 P.3d 258 (Cal. 2002); *Pierotti v. Torian*, 96 Cal. Rptr. 2d 553, 564 (1st App. Dist. 3d Div. 2000).

“[r]easonable attorneys fees . . . ordinarily will be awarded to the prevailing party on appeal when this Court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably, or without foundation.”¹⁸ Many state appellate courts also have held that they possess discretion to impose sanctions not only on parties but also on lawyers who bring or pursue frivolous appeals or positions.¹⁹ However, unlike federal courts, some state appellate courts are restricted by statutory or rule-based limits on the amount of sanctions, particularly attorneys’ fees, they may award.²⁰

Both state and federal courts have repeatedly proclaimed that an award of sanctions is supposed to serve three purposes. At the most basic level, an award of sanctions imposes punishment for appellate misconduct or for causing appellate judges and parties to waste their valuable time on claims that should never have been pursued. When he was a federal circuit judge, Justice Stephen G. Breyer explained in an oft-cited decision the institutional reasons for levying penalties against frivolous appeals:

[W]e believe that penalizing frivolous appeals, or those interposed for purposes of delay, may help, at least marginally, with the burden that an increasing case load has placed on the courts of appeals. The nature of this “burden” is sometimes misunderstood as if it referred to the workload of an individual judge. In fact, it refers to the general systemic problem of less judicial time to spend on each individual case. . . . [A]s a general matter, the more time we spend on frivolous cases, the less time we have for

18. *Sacred Heart Med. Ctr. v. Nez Perce County*, 35 P.3d 265, 268 (Idaho 2001).

19. See e.g. *Eberly v. Eberly*, 489 A.2d 433, 449 (Del. 1985); *Kukui Nuts of Haw., Inc. v. R. Baird & Co., Inc.*, 789 P.2d 501, 517 (Haw. App. 1990), superseded by statute on other grounds as stated in *Molokai Advertiser-News v. Anderson*, 2000 Haw. App. LEXIS 208, at *9 (Haw. App. Nov. 29, 2000); *First Fed. Sav. Bank v. Drivers Natl. Bank*, 606 N.E.2d 1253, 1256-57 (Ill. App. 2d Dist. 1992); *Commonwealth v. Rogers*, 703 N.E.2d 1199, 1203 n.6 (Mass. App. 1999); *State v. Baca*, 896 P.2d 1148, 1151 (N.M. 1995); *In re Estate of Reimer*, 427 N.W.2d 293, 296 (Neb. 1988); *Barnard v. Wassermann*, 855 P.2d 243, 248-49 (Utah 1993); *Pritt v. Suzuki Motor Co., Ltd.*, 513 S.E.2d 161, 165-66 (W. Va. 1998).

20. See e.g. *Wyo. R. App. P. 10.05* (limiting attorneys’ fees for frivolous appeal to no more than \$5,000). See also *White v. Hardegee*, 378 S.E.2d 877, 880 (Ga. App. 1989) (assessing maximum statutory penalty of \$500 for frivolous appeal); *Fraser Employees Fed. Credit Union v. Labbe*, 708 A.2d 1027, 1030 (Me. 1998) (awarding treble costs, the maximum allowed by the appellate rules, and \$500 “to be applied to . . . attorney fees”).

problems of more serious litigants. Thus, the “frivolous” appeal hurts other litigants and interferes with the courts’ overall mission of securing justice.²¹

Sanctions should also deter. Sanctions “encourage self-policing by attorneys and strengthen the hand of those attorneys who would discourage clients from taking legal positions totally lacking in merit.”²² As one court warned long ago, “[c]ounsel must realize that the decision to appeal should be a considered one, taking into account what the district court has said, and not a knee-jerk reaction to every unfavorable ruling.”²³

Finally, in addition to these institutional purposes, sanctions should also compensate the prevailing party for the expense of having to defend against the frivolous appeal. Frivolous appeals are easy to file but often difficult and expensive to defend. There is, therefore, a good reason why court rules and statutory provisions authorizing appellate sanctions speak of “damages”: That is precisely what frivolous appeals inflict on innocent parties. Indeed, the Advisory Committee Notes to Rule 38 expressly state that sanctions imposed under that rule are intended to provide “justice to the appellee.”

Justice Breyer thus observed in *Natasha* that “despite the merits of the American system, under which each party must pay its own attorney, that system arguably creates incentives for . . . undesirable types of behavior.”²⁴ As is relevant to appeals, that system may encourage a plaintiff to file an appeal that has no merit but which a plaintiff hopes the defendant will settle by paying the plaintiff less than what it would cost to defend the appeal. Likewise, a defendant, who rightly owes money to the plaintiff, may be motivated to file a frivolous appeal in the belief that the costs and delay of having to defend against that appeal will encourage the plaintiff to take less than

21. *Natasha, Inc. v. Evita Marine Charters*, 763 F.2d 468, 471 (1st Cir. 1985).

22. *Id.*; accord *Nagle v. Shertzer*, 8 F.3d 141, 145 (3d Cir. 1993); *Abastillas v. Kekona*, 958 P.2d 1136, 1139 (Haw. 1998) (“[A]wards of attorneys’ fees induce people to reconsider and ensure that refusals to surrender do not burden the innocent.”) (quoting *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1098 (7th Cir. 1987)).

23. *Simon & Flynn, Inc. v. Time, Inc.*, 513 F.2d 832, 835 (2d Cir. 1975); accord *Glanzman v. Uniroyal, Inc.*, 892 F.2d 58, 61 (9th Cir. 1989) (quoting *Dewitt v. W. P. R.R. Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983)).

24. *Natasha, Inc.*, 763 F.2d at 471.

the full amount owed.²⁵ The imposition of sanctions for frivolous appeals therefore compensates parties who have been victimized by such “undesirable behavior.”

Judge Frank Easterbrook of the Seventh Circuit has written of the compensatory aspect of appellate sanctions as follows:

An award of attorneys’ fees under Fed. R. App. P. 38 should be fully compensatory. In most activities, a person bears the costs of his decisions. In the judicial system, one party’s decisions cause the opponent to incur costs and consume judicial time as well. Most legal systems shift the costs at the end so that the winner—the person in the right, who ought to have been left in peace—is not the worse for the litigation, and the person who caused the costs to be incurred bears them. Fee-shifting, when authorized under an exception to the American Rule, should achieve the same end.²⁶

Despite universal agreement on the purposes of sanctions, including compensation to the victims of frivolous appeals, decisions on requests for appellate sanctions often fail to serve those goals.²⁷ Indeed, one of the most striking aspects of both state and federal court decisions discussing sanctions for frivolous appeals is how modest court awards are in relation to the gravity of the appellant’s conduct.

The Second Circuit’s decision in *Warner Brothers, Inc. v. Dae Rim Trading, Inc.*,²⁸ is illustrative. There, the court found that the appellant’s attorney had “demonstrated a blatant disregard of the rules and regulations which permit the judicial

25. *Id.* at 471-72.

26. *In re Central Ice Cream Co.*, 841 F.2d 732, 735 (7th Cir. 1988). Judge Easterbrook has also commented about Rule 11 sanctions that “[l]itigation gives lawyers opportunities to impose on their adversaries costs much greater than they impose on their own clients. The greater the disparity, the more litigation becomes a predatory instrument rather than a method of resolving honest disputes.” *In re TCI, Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985).

27. Federal appellate courts frequently refuse to impose sanctions on the ground that the appellee included a request for sanctions only in its brief and did not file a separate motion. *See e.g. Onossian v. Block*, 175 F.3d 1169, 1172 (9th Cir. 1999). Rule 38 of the Federal Rules of Appellate Procedure expressly allows courts to impose sanctions *only* after either “a separately filed motion or notice from the court and reasonable opportunity to respond.” The Advisory Committee Notes to the rule explicitly warn that “[a] statement inserted in a party’s brief that the party moves for sanctions is not sufficient notice,” a warning that nonetheless appears to be frequently ignored. *See* Fed. R. App. P. 38, Advisory Comm. Notes to 1994 Amendments.

28. 877 F.2d 1120 (2d Cir. 1989).

machinery to function smoothly.”²⁹ The attorney’s tactics included citing in his brief to 150 cases, many of which had not been concluded but were only in the process of being litigated, and relying on evidence not admitted below. The court complained, “We are not informed which, if any, of the cited cases were finally adjudicated and what questions, if any, were considered by the adjudicating court.”³⁰ As a result, the Second Circuit concluded that the attorney’s conduct had made “a farce and mockery of the entire briefing and legal memorandum process and place[d] an *intolerable and almost insurmountable burden* on both opposing counsel and the Court.”³¹ Nevertheless, the court sanctioned the attorney a grand total of \$1,000, plus double costs.

More recently, the Seventh Circuit confronted an equally frivolous appeal in *Grove Fresh Distributors, Inc. v. John Labatt Ltd.*³² In that case, an attorney found in civil contempt for disclosing confidential information had filed a series of appeals and lengthy appellate pleadings challenging various aspects of the contempt order. Each time, the court of appeals concluded that his appeals and pleadings were frivolous, and on one occasion the court referred the attorney’s conduct on appeal to the state disciplinary commission. After the third appellate filing in this years-long saga, the court explicitly warned the attorney that if he continued to file frivolous papers, the court would impose sanctions. The attorney persisted, however, filing two more appeals in the Seventh Circuit after receiving the formal warning. Though no sanctions attended the first post-warning appeal, the court’s patience had worn thin by the second appeal, though perhaps not thin enough. For even though the court concluded that the attorney had merely “repackage[d] his prior appeals,” had “engaged in an attempt to manipulate the legal system,” and had “failed to heed [the court’s] warning,” it awarded sanctions of only \$1,500 for what it concluded was a frivolous appeal.³³ Given the abusive nature of this attorney’s conduct and the multiple appeals he had spawned, it is

29. *Id.* at 1128.

30. *Id.*

31. *Id.* (emphasis added).

32. 299 F.3d 635 (7th Cir. 2002).

33. *Id.* at 642.

impossible to believe that \$1,500 fully compensated the prevailing party for its attorneys fees and costs in defending against this appellate barrage.

Similar examples abound in the federal courts, and it is not my purpose to catalog them all. However, appellate courts send the wrong message when they describe an appellant as “repeatedly advanc[ing] arguments on appeal that have been squarely rejected by [governing] case law, even after being alerted to the unfavorable authority in the district court,” but award sanctions of only \$700,³⁴ or announce that a party’s appeal gave “new meaning to the term ‘frivolous,’” but then award sanctions of only \$500 in addition to double costs.³⁵ These decisions do nothing to punish or deter misconduct, and they seriously disserve parties who spent far more than \$500 or \$700 defending against frivolous claims.

Perhaps even more remarkable than these modest awards is the startling fact that many federal appellate courts limit their sanctions to double costs alone (without *any* fee award). Recoverable costs in most appeals today are virtually nonexistent. This is particularly true for the appellee in federal court, who does not have responsibility for compiling and filing the joint appendix. Because many law firms now print and bind their own briefs, reproduction costs are also quite small. As a consequence, an appellee’s taxable costs might total only \$100 or less. An award of twice such minimal costs can hardly be said to fulfill the punishment, deterrence or compensatory goals of

34. See *Macklin v. City of New Orleans*, 300 F.3d 552, 554 (5th Cir. 2002).

35. See *Buren v. U.S. Postal Serv.* 883 F.2d 429, 430 (5th Cir. 1989). See also *Top Entertainment, Inc. v. Ortega*, 285 F.3d 115 (1st Cir. 2002) (finding appeal frivolous and in bad faith but, without explanation, granting attorneys fees of only \$2,000 and double costs); *In re Property Movers, LLC*, 31 Fed. Appx. 81, 89 (4th Cir. 2002) (finding appellant’s arguments “irrelevant, illogical and utterly without any good-faith factual basis,” court awards sanctions against appellant and counsel of \$3,675 plus double costs); *In re 60 East 80th Street Equities*, 218 F.3d 109, 119-20 (2d Cir. 2000) (awarding trustee only \$5,000 and double costs for defending against appeal involving “baseless arguments,” “repetitive bad faith in this case, and against the background of . . . questionable conduct in another case”); *Cronin v. Town of Amesbury*, 81 F.3d 257, 261 (1st Cir. 1996) (describing appellant as pressing “bizarre and irrelevant” arguments, but awarding sanctions of only \$2,725); *S.R. Mercantile Corp. v. Maloney*, 909 F.2d 79, 82, 84 (2d Cir. 1990) (finding that the conduct of the appellant and his attorney constituted a “textbook example of abuse of the appellate process,” but imposing sanctions of only \$1,000 in light of sanctioned attorney’s professed poverty).

appellate sanctions. These awards are, at best, an essentially meaningless “slap on the wrist.”

As but one example of this “double cost” phenomenon, consider the following. In a recent case, a federal district court awarded the plaintiff \$16,000 in attorneys’ fees under Rule 11 because the arguments of defendant’s counsel in the trial court were made in bad faith and were patently frivolous. When the defendant raised the identical arguments on appeal, the appellate court had little difficulty in also rejecting them as frivolous. But when it came time to award sanctions, the appellate court awarded the plaintiff only double costs for having to brief and orally argue the same frivolous arguments that had prompted the district court to award the plaintiff its full attorneys’ fees.³⁶ Since the lawyer who prepared the plaintiff’s appellate brief and conducted the oral argument did not do so for free, it is apparent that the real loser in that frivolous appeal was the plaintiff itself.

State appellate judges appear to be at least as hesitant as their federal counterparts to use sanctions to compensate fully the victims of frivolous appeals. Nominal sanctions, or none at all, are commonplace, even when the court concludes that an appeal is frivolous and the appellant’s tactics have imposed substantial costs on the appellee and the court itself. Thus, in *Avery v. Steele*, the Massachusetts Supreme Judicial Court labeled an appeal “egregious” but awarded as a sanction only double costs.³⁷ And in *In re Will of Rub*, the North Dakota

36. See *Doctor’s Assoc., Inc v. Kroll*, 94 CV 1738 (PCD) (D. Conn. 1995), *aff’d*, *Doctor’s Assoc., Inc v. Kroll*, Nos. 95-7804 and 96-7048, 1996 U.S. App. LEXIS 12273 (2d Cir. Apr. 29, 1996). The author’s law firm (though not the author himself) represented the plaintiff in that case. See also *SEC v. Recile*, 10 F.3d 1093, 1099 (5th Cir. 1993) (awarding double costs alone after finding appeal was “nothing more than a frivolous play for time, delaying the inevitable by wasting the resources of this court and the [appellee] alike”); *Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 456 (6th Cir. 1991) (imposing sanctions of double costs only); *In re Continental Invest. Corp.*, 642 F.2d 1, 5 (1st Cir. 1980) (even though the court described appellant’s arguments as “captious, patently frivolous, fatuous at best and deliberately misleading at worst, and so brazenly misleading as to evoke awe,” it awarded sanctions of double costs alone).

37. 608 N.E.2d 1014, 1018 (Mass. 1993). See also *Steadman v. Steadman*, 559 S.E.2d 291, 292 (N.C. App. 2002) (awarding double costs as the only sanction for what the court described as a second premature and improper appeal); *Barnett Bank v. Hazel*, 555 S.E.2d 195, 198 (Ga. App. 2d Div. 2001) (awarding sanctions of only \$1000 for frivolous appeal); *Fraser Employees Fed. Credit Union v. Labbe*, 708 A.2d 1027, 1030 (Me. 1998) (finding appeal to be “frivolous” and “intended only for delay,” but awarding sanctions of only \$500).

Supreme Court described an appeal as “so boldly and patently frivolous as to approach contemptuous behavior,” but that behavior resulted in a sanction of only \$1,000 and costs.³⁸ These are but two of many examples of the unwillingness of state appellate judges to award meaningful sanctions in the face of frivolous arguments or egregious conduct.³⁹

Some appellate judges may suppose that it should not cost much to defend against an appeal that is truly frivolous. But any such supposition is unrealistic and unfounded. Processing appeals in state and federal appellate courts typically requires participation in court-sponsored settlement efforts, the filing of at least one brief and, in most state appellate courts, attendance at oral argument. These tasks cannot possibly be accomplished for \$500 or \$700 or even \$1,500. Moreover, if, as often occurs in frivolous appeals, the appellant has cloaked unmeritorious arguments in the garb of close questions or respectability, has proliferated the number of claims and arguments, or has misrepresented the record or case law, it may take substantial effort to reveal the frivolous nature of the appeal to the appellate court. As discussed at the outset of this essay, there may be valid reasons for not imposing appellate sanctions at all. However, if a court concludes that sanctions are warranted, there seems little justification for failing to award the full extent of the costs reasonably incurred in responding to a frivolous appeal.⁴⁰

In fairness, there are many exceptions in state and federal appellate courts to this seeming pattern of miniscule sanctions

38. 510 N.W.2d 583, 583 (N.D. 1994).

39. See e.g. *Karnes v. Karnes*, 2001 Ohio App. LEXIS 3678, at *8 (Ohio App. 4th Dist. Aug. 17, 2001) (declining to award any sanctions against *pro se* appellant for frivolous appeal); *Surratt v. Watts Trucking*, 541 N.W.2d 41, 44 (Neb. 1994) (labeling appeal “meritless,” yet awarding no sanctions); *In re Sherman Hollow*, 641 A.2d 753, 757 (Vt. 1993) (awarding no sanctions, even though appellant’s arguments had “little foundation” and were “inadequately briefed”).

40. Federal District Judge Jack Weinstein would undoubtedly disagree with this sentiment. He has suggested that it is overly simplistic to speak of claims as either frivolous or nonfrivolous. “Reality is more complicated. In the legal world, claims span the entire continuum from overwhelmingly strong to outrageously weak. . . . Attorney fee awards of the full market value of services should be reserved for extremely frivolous cases, while more moderate awards should be given for frivolous filings near the border.” *Eastway Constr. Co. v. City of New York*, 637 F. Supp. 558, 574 (E.D.N.Y. 1986).

for frivolous appeals.⁴¹ In fact, in many instances, appellate courts simply announce an award of “attorneys’ fees and double costs” in their decision without specifying a particular amount, leaving that determination to later proceedings, court staff or even the district court.⁴² In those cases, it is possible that the prevailing party is ultimately fully compensated for the attorneys’ fees it incurred in defending against the frivolous appeal. Nonetheless, the sheer number of relatively modest awards in published decisions remains noteworthy.

Appellate judges continue to complain that they are flooded with frivolous appeals that divert time and attention from cases that truly warrant consideration. In view of the reported decisions, however, appellate courts may well be victims of their own timidity. Were courts the only ones hurt by frivolous appeals, that would be reason enough for change. But the judiciary is not the only victim of frivolous appeals. Imposing sanctions is undoubtedly an unpleasant duty for most appellate judges. However, to those who have been forced to bear the expense of defending against a frivolous appeal, sanctions are as important to providing complete justice as the affirmance itself.

41. See e.g. *Central Ice Cream*, 841 F.2d at 734-35 (acknowledging that an award of attorneys’ fees should be “fully compensatory” and awarding fees of \$20,000, but discounting appellee’s statement showing that it had incurred \$64,000 of fees in defending the appeal); *Bank of Cal. v. Varakin*, 265 Cal. Rptr. 666, 670-71 (Cal. App. Dist. 1 Div. 2 1990) (imposing sanctions of \$37,000 and recounting three separate California decisions granting sanctions of \$14,000, \$118,909 and \$50,000, respectively).

42. See e.g. *George v. City of Morro Bay*, 298 F.3d 1160, 1164, (9th Cir. 2002) (awarding attorneys fees for frivolous appeal but directing appellate commissioner to determine amount of fees); *Beilue v. Intl. Bhd. of Teamsters*, 13 Fed. Appx. 810, 815 (10th Cir. 2001) (remanding to district court to determine amount of sanction); *Bramwell v. South Rigby Canal Co.*, 39 P.3d 588, 592 (Idaho 2001) (awarding “reasonable” attorneys fees for frivolous appeal without specifying amount).