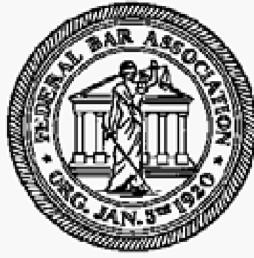

# SideBAR

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## Opening Statements

### *Editor's Notes*

**Robert E. Kohn**

In our last issue (*SideBAR*, Spring 2011), John McCarthy and I reviewed a proposal in Congress to amend Rule 11 of the Federal Rules of Civil Procedure. The bill is called the "Lawsuit Abuse Reduction Act of 2011" (H.R. 966). If passed into law, it would repeal the current "safe harbor" provision that allows opponents to withdraw a challenged pleading before a sanctions motion may be filed; it would repeal judicial discretion over monetary sanctions by making them mandatory; and it would authorize additional punitive fines in the court's discretion. On July 7, the H.R. 966 bill was reported from the House Judiciary Committee, and it is expected to receive a vote by the House of Representatives before the end of this session of Congress. Stay tuned to *SideBAR* for news of any further developments on the issue of amending Rule 11—brought to you by the Committee on Federal Rules of Civil Procedure and Trial Practice.

In Chicago during the FBA Annual Meeting & Convention, several members of the Federal Litigation Section's board will join with judges and other experts to explain and consider recent Supreme Court developments in four separate cases affecting class actions in federal courts. Full details are printed on the back page of this issue. Please plan to attend this important CLE on Thursday afternoon, Sept. 8.

Later on Sept. 8, the Federal Litigation Section will host a Hospitality Hour in the Columbus Room, adjacent to the lobby of the convention hotel. Fed. Lit. hospitality knows no peer, and we are thrilled to continue that tradition this year in Chicago. All FBA members and their guests are welcome. Speaking on a very personal basis, I am looking forward to seeing many old friends, and making new ones, throughout our time in Chicago. Please be one of them. **SB**

**_About the Editor_**

*Robert E. Kohn litigates entertainment, business, and intellectual property disputes in the Los Angeles area. He also argues appeals in federal and state courts at all levels. A former clerk to the Hon. Joel F. Dubina of the Eleventh Circuit, Kohn attended Duke Law School. He is the secretary and treasurer of the Federal Litigation Section and co-chairs the committee on Federal Rules of Procedure and Trial Practice. He can be reached at rkohn@kohnlawgroup.com.*

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## *Appeals from Judicial Criticism of Lawyers*

**By Timothy J. Miller**

If you have been described in unflattering terms by a federal district court judge, you should seriously consider whether the criticism is justified. If, however, the criticism is unjustified, you may wish to seek redress from a higher court. Whether you have any recourse to judicial criticism depends, in part, on where the judge who criticized you is sitting. The chart below lists various judicial findings about lawyers and whether the lawyer was allowed to appeal from the finding.

| Finding | Appealable |
|---|---|
| Formal Reprimand | Yes |
| Admonition | Yes |
| Violated Rules 11, 26, and 37 and constituted civil contempt | No |
| Violated Rules of Professional Conduct | Yes |
| Violated Federal Rules | Yes |
| "Reprehensible" | No |
| "Blatant misconduct" | Yes |
| "Pure baloney" | No |
| "A lack of professionalism and good judgement" | No |

*Id.* As apparent from the chart, the content of criticism does not alone determine whether an appeal is possible. The apparent disparity between not allowing an appeal from a finding that an attorney violated specific rules and committed civil contempt, but allowing an appeal from a finding that an attorney committed "blatant misconduct" is explained by the fact that the circuit within which a court is located is a key factor in determining whether judicial criticism is appealable At the extremes, one circuit holds that judicial criticism that does not involve a monetary penalty is not appealable, while another circuit apparently holds that criticism that affects a lawyer's reputation is appealable. Most circuits permit appeal from a "sanction" (e.g., a formal reprimand), but do not allow an appeal from mere criticism.

### *Monetary Sanction Required*

In the Seventh Circuit, the rule is simple: judicial criticism of a lawyer's conduct that is not accompanied by a monetary penalty is not appealable. For example, in *Clark Equipment Co. v. Lift Parts Mfg. Co. Inc.*, the court reviewed a district court's finding that a lawyer's "conduct violated Federal Rules of Civil Procedure 11, 26 and 37 and constituted civil contempt … ."[1] The Seventh Circuit held that "an attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects."[2]

### *Verbal Sanction Enough*

The majority of circuits reject the Seventh Circuit's rule that only a monetary sanction is appealable. In most circuits, an order that is labeled a "sanction" or that finds that a specific rule was violated is appealable. Nonetheless, mere criticism is not appealable.

For example, in *Precision Specialty Metals, Inc. v. United States*, the Federal Circuit considered whether it had jurisdiction to review an unpublished order of the Court of International Trade. The lower court found that an attorney violated Rule 11 and "reprimanded" her because she had misquoted and selectively edited the authorities she cited in her brief. The judge wrote: "An attorney before this court violated USCIT Rule 11 in signing motion papers which contained omissions/misquotations. Accordingly, the court hereby formally reprimands her."[3] No monetary penalty was imposed.

The Federal Circuit concluded that the lower court's order was reviewable. The court reviewed other decisions and concluded that:

> a trial court's reprimand of a lawyer is immediately appealable even though the court has not also imposed monetary or other sanctions upon the lawyer. This principle reflects the seriously adverse effect a judicial reprimand is likely to have upon a lawyer's reputation and status in the community and upon his career. On the other hand, judicial statements that criticize the lawyer, no matter how harshly, that are not accompanied by a sanction or findings, are not directly appealable.[4]

The court thus drew a distinction between a reviewable "reprimand" and unreviewable "criticism."

Like the Federal Circuit, in the First Circuit, reprimands of attorneys, even without a monetary penalty, are appealable, but critical comments, by themselves, are not. For example, in *In Re Williams*, a judge's characterization of a lawyer's conduct as "pure baloney" was held to be unappealable.[5] The First Circuit held, however, that if the lower court had explicitly labeled its criticism a "reprimand," the order would have been appealable.[6] The First Circuit reasoned that only "decisions, judgments, orders, and decrees" are appealable, whereas "opinions, factual findings, reasoning, or explanations" are not. [7] The court held that criticism that amounted to a decision, such as a "sanction," was appealable, but criticism that did not amount to a sanction was not. The First Circuit held that the reputational effect of a formal sanction justified allowing an appeal:

> It is trite, but true, that a lawyer's professional reputation is his stock in trade, and blemishes may prove harmful in a myriad of ways. Yet not every criticism by a judge that offends a lawyer's sensibilities is a sanction.[8]

Nonetheless, the court held that "a jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a sanction."[9] Thus, regardless of the reputational effect of calling a lawyer's conduct "baloney," no appeal was allowed because the lower court did not formally reprimand the lawyer.

The Ninth Circuit also focuses on the formality of the criticism leveled at a lawyer. In *Weissman v. Quail Lodge Inc.*, the lower court found that a lawyer's conduct "reflects a serious lack of professionalism and good judgment."[10] The Ninth Circuit followed the First Circuit's decision in *Williams* and held that because the lower court had not expressly identified its finding as a reprimand, the order was not appealable. In contrast, in *United States v. Talao*, the lower court found that a lawyer violated the California Rules of

Professional Conduct. Although the lower court did not formally "reprimand" the lawyer, the Ninth Circuit held that such an order was appealable. The court held:

> The district court in the present case, however, did more than use 'words alone' or render 'routine judicial commentary.' Rather, the district court made a finding and reached a legal conclusion that Harris knowingly and wilfully violated a specific rule of ethical conduct. Such a finding, *per se*, constitutes a sanction. The district court's disposition bears a greater resemblance to a reprimand than to a comment merely critical of inappropriate attorney behavior … . We do not invite appellate review of every unwelcome word uttered or written by the district courts. Indeed, a formal finding of a violation eliminates the need for difficult line drawing in much the same way as a court's explicit pronouncement that its words are intended as a sanction.[11]

Similarly, in *Butler v. Biocare Med. Techs. Inc.*, the Tenth Circuit addressed a district court order that found that an attorney violated the rules of professional conduct, and it ordered its finding mailed to every court where the attorney was admitted to practice. The Tenth Circuit held the district court's order was appealable, even though it "neither expressly identified itself as a reprimand nor imposed any sanction, monetary or otherwise."[12] The Tenth Circuit reviewed other opinions on the subject and held that "an order finding attorney misconduct but not imposing other sanctions is appealable under §1291 even if not labeled as a reprimand[.]"[13] While the court noted that "not every negative comment or observation from a judge's pen about an attorney's conduct or performance" is appealable, the court did not provide guidance as to how to distinguish appealable from unappealable criticism.[14]

In *Sullivan v. Comm. on Admissions and Grievances of the U.S. Dist. Ct. for the Dist. of Columbia*, the D.C. Circuit concluded that an order finding that an attorney had violated cannons of ethics but dismissing the charges with an "admonition" was appealable. The court held:

> [T]he District Court has determined that Appellant was guilty of proscribed conduct and this determination plainly reflects adversely on his professional reputation. In a sense, Appellant's posture is not unlike that of an accused who is found guilty but with penalties suspended. We conclude this gives him standing to appeal. [15]

The Second and Third Circuits appear to take the same approach.[16]

***Criticism Appealable***

The Fifth Circuit appears to be at the other end of the spectrum from the Seventh Circuit. In *Walker v. City of Mesquite*, the trial court found an attorney "guilty of 'blatant misconduct.'"[17] No monetary penalty was imposed and no magic words such as "reprimand" or "sanction" were used by the lower court. Nor did the court find that a specific rule had been violated. Nonetheless, the Fifth Circuit held that the lower court's order was appealable.

> In the case at bar Peebles was reprimanded sternly and found guilty of blatant misconduct. That reprimand must be seen as a blot on Peebles' professional record with a potential to limit his advancement in governmental service and impair his entering into otherwise inviting private practice. We therefore conclude and hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct.[18]

Recently, the Fifth Circuit recognized that its view of appealability is "expansive." The Court held that because a lower court made factual findings that "negatively impacted" a lawyer's "professional reputation," an order was appealable. [19] Thus, it allowed an appeal from a lower court's recommendation that a state bar investigate a lawyer for possible discipline, but that did not sanction the lawyer or find that any particular rule had been violated.[20] The court also allowed an appeal from a finding that the lawyer committed civil contempt, but it analyzed the appealability of the recommendation to the state bar separately from the finding of contempt.[21]

***Outcomes***

In the chart at the top of this article, five cases allowed an appeal. In two, the criticism/sanction was affirmed,[22] in two it was reversed[23] and one was remanded for further proceedings.[24] The author has not endeavored to do a complete survey of such appeals, but these rates of reversal imply that, if one is permitted to appeal a judicial criticism, the chances of success are reasonable. On the other hand, the two lawyers who appealed and lost are now faced with published decisions at the appellate level confirming their misdeeds. Beware!

***Conclusion***

Judges occasionally criticize lawyers. Frequently, such criticism is justified. On the other hand, judges have been known to err and/or overreact. In some Circuits, depending on what the court says, a lawyer may be able to appeal from a critical judicial comment. The lawyer will, of course, have to decide whether the costs and risks of the appeal (*e.g.*, the possibility of a published appellate court decision affirming a critical comment) are justified. **SB**

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***Endnotes***

[1]972 F.2d 817, 818 (7th Cir. 1992).

[2]*Id.* at 820. *See also Bolte v. Home Ins. Co.*, 744 F.2d 572,572-573 (7th Cir. 1984) (order describing lawyer's conduct as "reprehensible" not appealable).

[3]315 F.3d 1346, 1350 (Fed. Cir. 2003)

[4]*Id.* at 1352.

*Criticism continued on page 27*

*False Claims continued from page 24*

undefined terms and there is no clear legislative guidance and very little case law applying these provisions.

For both named and potential defendants, these uncertainties are daunting and could potentially result in significant, and unexpected, liability. For example, although the FFCA and the state FCAs specifically define many of their key terms, such as "claim," "knowingly," and even "material," neither the IB provisions nor any case-law construing these provisions defines who may be included as a "beneficiary" of an inadvertently submitted false claim—the predicate to liability under these provisions. Without a statutory definition, the term "beneficiary" may be argued to take any of a number of over-broad meanings—including, conceivably, anyone who receives *any* benefit, however slight or remote, arising from the submission of a false claim. Not only would this class of persons be nearly limitless, leading to absurd results in contradiction of any plausible legislative intent, but the great majority of entities and persons engaged in ordinary business would simply have no means to ascertain their risk of being held liable.

Further, the IB provisions require a beneficiary of an inadvertently submitted false claim to report *the claim* to the government if the beneficiary "subsequently discovers the falsity of the claim." Yet, this element again raises more questions than it answers: On their face, the IB provisions do not purport to impose any duty to investigate suspected "false claims" and there are *thousands* of governmental entities in the states of the U.S. that have adopted IB provisions. Is a company with a suspicion that a false claim might have been submitted downstream to an unknown governmental entity liable? If so, why? Who at the company needs to hold that suspicion? Is broad awareness that some "claims" among many *may* have been false sufficient, or is actual and specific knowledge of a particular false claim required? Presumably, since the IB provisions are—at heart—disclosure statutes, the "discovery" element must require the defendant to have actually discovered enough basic information about *the* underlying false claim, including most importantly to whom the "claim" for payment had been submitted and how it was false, to have had the *ability* to "disclose" such false claim to *the affected government entity*. However, to date, there is no clear guidance on this issue—opening the door for creative *qui tam* attorneys to name as defendants persons and companies that never actually "discovered" that any particular false claim for payment had, in fact, been submitted or acquired enough information to have made the requisite disclosures.

Thus, not only may it be uncertain in many cases whether an IB provision applies to a putative defendant at all, it is also not clear what actions the statutes require—or which omissions they punish—even if a provision does apply. With increased pressure on state and local governments to find additional and varied sources of public revenue, creative *qui tam* lawyers may try to invoke these unique IB provisions against unsuspecting companies with no direct link to government purchasers. All companies should be aware of the potential for increased FCA liability, institute compliance programs and seek the advice of counsel if potential liability is suspected. **SB**

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***Endnote***

[1]The IB language of the CFCA was emulated in these other states. As a result, the statutes are substantially the same as to the elements, and the content of each element, required to be established to show a violation. *See* Cal. Gov't Code § 12651(a)(8); D.C. ST § 2-308.14(a)(8)-(9); Haw. Rev. Stat. §§ 661-21(a)(8); K.S.A. 75-7503(a)(7); Mass. Gen. Laws ch. 12 § 5B(9); Mont. Code Ann. §§ 17-8-403(1)(h); N.H. Rev. Stat. Ann. § 167:61-b(1)(f); Nev. Rev. Stat. Ann. § 357.040(l)(h); N.M. Stat. Ann. §44-9-3(A)(9); Or. Stat. § 180.755(1)(i) (using slightly different language); Tenn. Code Ann. 4-18-103(a)(8); and Wisc. Stat. § 20.931(2)(h) (does not use the term "inadvertent.").

*Criticism continued from page 23*

[5]*In Re Williams*, 156 F.3d 86, 88(1st Cir. 1998).
[6]*Id.* at 92.
[7]*Id.* at 90.
[8]*Id.* at 90.
[9]*Id.* at 92.
[10]179 F.3d 1194, 1196 (9th Cir. 1999).
[11]222 F.3d 1133, 1137-38 (9th Cir. 2000).
[12]348 F.3d 1163, 1167 (10th Cir. 2003).
[13]*Id.* at 1168.
[14]*Id.* (quoting *United States v. Gonzales*, 344 F.3d 1036, 1047 (10th Cir. 2003) (Baldock J., dissenting)).
[15]130 U.S. App. D.C. 16 (D.C. Cir. 1967).
[16]*Keach v. County of Schenectady*, 593 F.3d 218, 223 (2d Cir. 2010) (mere critical commentary not appealable);_*Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-44 (3d Cir. 2007) (order granting motion for sanctions but not imposing monetary penalty was appealable.
[17]129 F.3d 831, 832 (5th Cir. 1997).
[18]*Id.* at 832-33.
[19]*United States v. Woodberry*, 405 Fed. App. 840, 843 (5th Cir. 2010).
[20]*Id.* at 844-45.
[21]*Id.* at 845.
[22]*Precision Specialty Metals*, 315 F.3d at 1358; *Butler*, 348 F.3d at 1175.
[23]*United States v. Talao*, 222 F.3d at 1141; *Walker*, 129 F.3d at 831.
[24]*Sullivan*, 130 U.S. App. D.C. at 957.