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Sanctions for Frivolous Civil Appeals in Louisiana

Gail S. Stephenson*

*“[T]he courts are too busy, and the cost of litigation is too high, to play games through appellate procedure”*¹

I. INTRODUCTION

Frivolous appeals burden overcrowded courts, diminish the opportunity for careful consideration of nonfrivolous appeals, and delay access for litigants with meritorious claims.² Rules sanctioning frivolous appeals can deter unnecessary appeals,³ preserve the courts’ time and resources,⁴ and leave more time for meritorious appeals.⁵

Appeals are favored in Louisiana,⁶ and courts are loath to punish appellants for fear of chilling the appellate process.⁷ Still, frivolous appellants, like pro se litigants, should have “neither an impenetrable shield nor a license to harass others, clog the judicial machinery with meritless [appeals], or abuse already overloaded court dockets.”⁸

Louisiana judges possess authority under Louisiana Code of Civil Procedure article 2164 to “curb apparent abuses of process by imposing sanctions . . . for frivolous appeals.”⁹ Article 2164, enacted in 1960 and effective January 1, 1961, gives Louisiana

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1. Schnatz v. Schnatz, 501 So. 2d 318, 320 (La. Ct. App. 1987).

2. Asberry v. U.S. Postal Serv., 692 F.2d 1378, 1382 (Fed. Cir. 1982).

3. See *State ex rel. Muse v. Ross*, 651 So. 2d 364, 366 (La. Ct. App. 1995).

4. Kurt M. Saunders, *Plying the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals*, 21 GA. L. REV. 653, 682 (1987).

5. Michael S. Oberman, *Coping with Rising Caseload II: Defining the Frivolous Civil Appeal*, 47 BROOK. L. REV. 1057, 1058 (1981).

6. See, e.g., *Thomas v. Bridges*, 144 So. 3d 1001, 1010 (La. 2013); *Kite Bros., LLC v. Kite RV, LLC*, 150 So. 3d 608, 609 (La. Ct. App. 2014).

7. See *Doe v. Jo Ellen Smith Med. Found.*, 115 So. 3d 655, 665 (La. Ct. App. 2013); *Vincent v. Vincent*, 95 So. 3d 1152, 1160 (La. Ct. App. 2012).

8. *Bankston v. Alexandria Neurosurgical Clinic*, 659 So. 2d 507, 511 (La. Ct. App. 1994).

9. *Borel v. Borel*, 624 So. 2d 1279, 1284 (La. Ct. App. 1993). See also LA. CODE CIV. PROC. art. 2164 (2015).

courts broad discretion to sanction frivolous civil appeals.¹⁰ It provides:

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.¹¹

Despite this broad discretion, during the past 30 years, frivolous-appeal sanctions have been imposed in less than 10% of the cases in which sanctions were sought.¹²

This Article reviews the jurisprudence from 1985 to 2015 applying article 2164¹³ and examines the standard applied by Louisiana courts, the circumstances under which frivolous-appeal sanctions will be awarded, the procedural issues attorneys encounter, the types of sanctions awarded, the treatment of pro se litigants, and the ethical issues that arise. It concludes with recommendations for action by the courts and the Louisiana Legislature that could ultimately reduce the number of frivolous appeals.

II. LOUISIANA'S STANDARD FOR IMPOSING FRIVOLOUS-APPEAL SANCTIONS

Four years after its effective date, the Louisiana Supreme Court rendered a decision interpreting article 2164 and severely limiting its application. In *Parker v. Interstate Life & Accident Insurance Co.*,¹⁴ the court set forth an extremely subjective test, permitting sanctions for frivolous appeals only when "it is obvious that the appeal was taken solely for delay or that counsel is not sincere in

10. Act No. 15, 1960 La. Acts 22.

11. LA. CODE CIV. PROC. art. 2164 (2015).

12. Sanctions were imposed in 83 of 834 cases between 1985 and 2015. These figures are based on a chart compiled by the author listing the history, result, and reasoning from every civil case that sought frivolous-appeal sanctions between 1985 and 2015. The chart is on file with the author. The author conducted a Westlaw search using the terms "frivolous /s appeal % Anders & da(aft 1984)." *Anders* was excluded from the search terms to filter criminal frivolous appeals, as this Article discusses only civil appeals. *Anders v. California*, 386 U.S. 738 (1967), is the fountainhead case on frivolous criminal appeals.

13. This author reviewed the jurisprudence applying article 2164 from its effective date in 1961 through 1984 in an earlier work. See Gail Sweeney Stephenson, Comment, *Damages for Frivolous Appeal*, 45 LA. L. REV. 137 (1984).

14. 179 So. 2d 634 (La. 1965).

the view of the law he advocates even though the court is of the opinion that such view is not meritorious.”¹⁵ The court explained that if the appellant’s counsel “proclaim[ed] his sincerity,” the court could not “disbelieve [it] unless, and only unless, the proposition advocated is so ridiculous or so opposed to rational thinking that it is evident beyond any doubt that it is being deliberately professed for ulterior purposes.”¹⁶

This author decried the *Parker* test 30 years ago as “tip[ping] the balance too far in favor of the appellant” and suggested that the Legislature amend the article to set forth a more objective standard.¹⁷ The only legislative change in the last 54 years, however, has been an amendment in 2010 to specify that attorney fees can be included as damages and to make the article applicable to writ applications.¹⁸

The Louisiana Supreme Court has been as disinclined as the Legislature to make changes. In the 50 years since *Parker*, the Supreme Court has ruled on only six cases involving frivolous-appeal sanctions—*Hampton v. Greenfield*, its only full opinion,¹⁹ and five memorandum opinions. In *Hampton*, the court simply reiterated the *Parker* standard.²⁰ In four of the memorandum opinions, it summarily reversed awards of sanctions.²¹ In the fifth, it summarily remanded the case to the court of appeal “to award damages and attorney fees for a frivolous appeal.”²²

The intermediate appellate court found that the appeal in *Hampton* was sanctionable because the appellant’s arguments were “identical to those already adjudicated” and simply ignored the court’s prior holding.²³ The Supreme Court reversed.²⁴ The court began its analysis of the frivolous-appeal argument by repeating language Louisiana courts had used for 80 years: “Appeals are always favored and, unless the appeal is unquestionably frivolous,

15. *Id.* at 636.

16. *Id.* at 637.

17. Stephenson, *supra* note 13, at 147.

18. Act No. 184, 2010 La. Acts 1391.

19. *Hampton v. Greenfield*, 618 So. 2d 859, 863–64 (La. 1993).

20. *Id.* at 863.

21. *Landry v. Broussard*, 108 So. 3d 760 (La. 2013); *Cajun Contractors, Inc. v. Lafayette Consol. Gov’t*, 723 So. 2d 968 (La. 1998); *G.B.M., Inc. v. Juna Corp.*, 614 So. 2d 1249 (La. 1993); *Arnoult v. Arnoult*, 498 So. 2d 749 (La. 1986).

22. *Bouzon v. Bouzon*, 532 So. 2d 1386, 1387 (La. 1988) (remanding case to appellate court).

23. *Hampton v. Greenfield*, 602 So. 2d 327, 329 (La. Ct. App. 1992), *aff’d in part & rev’d in part*, 618 So. 2d 859 (La. 1993).

24. *Hampton*, 618 So. 2d at 864.

damages will not be allowed.”²⁵ It then quoted the *Parker* standard: An appeal is frivolous only if “it is obvious that the appeal was taken solely for delay or that counsel is not sincere in the view of the law he advocates even though the court is of the opinion that such view is not meritorious.”²⁶ The court stated the appeal did not fall into the first category, delay, because “nothing in the record suggest[ed] that the appeal was filed solely for delay.”²⁷

To determine whether the appeal fell into the second category, insincerity, the court again relied on *Parker*, stating that when “counsel proclaims his sincerity, a court finds itself without just cause to disbelieve unless, and only unless, the proposition advocated is so ridiculous or so opposed to rational thinking that it is evident beyond any doubt that it is being deliberately professed for ulterior purposes.”²⁸ The court found the appeal was not insincere because the appellant “sincerely advocated its legal arguments on appeal” and stated in its brief that it was “acting in ‘good faith.’”²⁹ The court further stated that the appellant “raised legitimate issues,” leading the court to believe that “the appeal was not taken for ulterior purposes.”³⁰

Justice Revius Ortique vehemently dissented from the application of *Parker*’s sincerity standard, asserting that “[a]ny attorney schooled in the art of advocacy may interpose sincerity in the position he advocates on appeal, under threat of the imposition of damages against him or his client.”³¹

As the Louisiana Supreme Court has been steadfast in applying an extremely subjective standard, appellate courts tend to give short shrift to requests for sanctions. In addition to the language of *Parker* and *Hampton*, courts tend to use the following boilerplate statements when denying sanctions:

- This provision is penal in nature and must be strictly construed.³²

25. *Id.* at 862 (citing *City of Shreveport v. U.S.F. & G. Co.*, 60 So. 621, 622 (La. 1913)).

26. *Id.* (quoting *Parker v. Interstate Life & Acc. Ins. Co.*, 179 So. 2d 634, 636–37 (La. 1965)).

27. *Id.*

28. *Id.* at 863 (quoting *Parker*, 179 So. 2d at 637).

29. *Id.* at 863.

30. *Id.* at 864.

31. *Id.* at 866 (Ortique, J., dissenting).

32. *See, e.g.*, *Reasonover v. Lastrapes*, 40 So. 3d 303, 310 (La. Ct. App. 2010); *Davis v. Davis*, 997 So. 2d 149, 159 (La. Ct. App. 2008).

- Penalties for frivolous appeal will not be imposed unless clearly due.³³
- Penalties for frivolous appeal will not be imposed unless the appeal is “unquestionably frivolous.”³⁴
- The slightest justification precludes frivolous-appeal damages.³⁵
- Lack of merit does not necessarily mean an appeal is frivolous.³⁶
- Sanctions will be awarded only in “rare” cases.³⁷
- Courts do not want to “chill” the appellate process.³⁸
- Courts are very reluctant to grant frivolous-appeal damages.³⁹

Some courts go beyond the boilerplate. Some ask whether the appeal “present[s] a substantial legal question,”⁴⁰ and some look for bad faith of the appellant.⁴¹ One court even *required* a finding

33. *See, e.g.*, Walker v. Smith, No. 2010-CA-0721, 2010 WL 4273091, at *12 (La. Ct. App. Oct. 29, 2010); Rivera v. Blossom, 872 So. 2d 541, 544 (La. Ct. App. 2004).

34. *See, e.g.*, Akers v. Bernhard Mech. Contractors, Inc., 137 So. 3d 818, 831 (La. Ct. App. 2014); Franklin v. Enter. Rent-A-Car, 104 So. 3d 720, 725 (La. Ct. App. 2012); Mott v. Brister’s Thunder Karts, Inc., 663 So. 2d 233, 236 (La. Ct. App. 1995).

35. *See, e.g.*, Courtney v. Fletcher Trucking, 111 So. 3d 411, 419 (La. Ct. App. 2012); Dukes v. Sherwood Acres Apartments, 898 So. 2d 416, 418 (La. Ct. App. 2004).

36. *See, e.g.*, Franklin, 104 So. 3d at 725; Hershell Corp. v. Fireman’s Fund Ins. Co., 743 So. 2d 698, 707 (La. Ct. App. 1999).

37. *See, e.g.*, Flemings v. State, 19 So. 3d 1220, 1233 (La. Ct. App. 2009); Yarnell Ice Cream Co. v. Allen, 867 So. 2d 969, 973 (La. Ct. App. 2004).

38. *See, e.g.*, Haney v. Davis, 925 So. 2d 591, 598 (La. Ct. App. 2006); Alden v. Lorning, 904 So. 2d 24, 30–31 (La. Ct. App. 2005).

39. *See, e.g.*, Billiot v. Big Wheels Travel Ctr., No. 2010-CA-1503, 2011 WL 1103034, at *3 (La. Ct. App. Mar. 25, 2011); Bracken v. Payne & Keller Co., 970 So. 2d 582, 591–92 (La. Ct. App. 2007).

40. Blackledge v. Sol’s Pipe & Steel, Inc., 59 So. 3d 564, 568 (La. Ct. App. 2011). *See also* Schnatz v. Schnatz, 501 So. 2d 318, 320 (La. Ct. App. 1987).

41. *See, e.g.*, Warren v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll., No. 2014-CA-0310, 2014 WL 6492186, at *7 (La. Ct. App. Nov. 20, 2014); Daisey v. Time Warner, 761 So. 2d 564, 569 (La. Ct. App. 1999).

of bad faith, stating that “implicit in those few cases finding appeals to be frivolous is an element of bad faith.”⁴²

An example of just how reluctant courts are to penalize frivolous appeals is *Hicks v. Hicks*, in which the appellee sought sanctions against a party who appealed a consent judgment that specifically incorporated an agreement by the parties not to appeal.⁴³ The court dismissed the appeal, but with no analysis whatsoever, the court found that the appeal was not frivolous.⁴⁴ Another court expressed what seems to be the prevailing attitude after reciting the boilerplate that lack of merit does not equal frivolity and that damages should be awarded when appeals are taken solely for delay.⁴⁵ In denying sanctions, the court stated: “We note that all appeals result in delay and that many appeals lack merit. Such is obviously the case here. However, we find that this appeal is not frivolous.”⁴⁶

When courts go beyond the boilerplate and analyze whether sanctions are due, they look at the “nature of the appeal itself rather than to the actions of the appellant” giving rise to the suit.⁴⁷ Among the considerations are the quality of the appellant’s brief and his oral argument. A sincere appeal is one where the appellant files a “quality” brief,⁴⁸ with citations of authority⁴⁹ and “serious and thought-provoking arguments”⁵⁰ in the “spirit of zealous advocacy.”⁵¹ The appellant then demonstrates that his appeal is sincere by appearing at oral argument⁵² and seriously arguing his position.⁵³ The court also considers whether an argument is *res nova*⁵⁴ as well as the

42. *Haney v. Davis*, 925 So. 2d 591, 598 (La. Ct. App. 2006).

43. *Hicks v. Hicks*, 561 So. 2d 188, 188 (La. Ct. App. 1990).

44. *Id.*

45. *LePrettre v. Progressive Land Corp.*, 820 So. 2d 1240, 1247 (La. Ct. App. 2002).

46. *Id.*

47. *Jordan v. City of Baton Rouge*, 652 So. 2d 701, 705–06 (La. Ct. App. 1995); *Guy v. Madison Parish Sch. Bd.*, 579 So. 2d 1108, 1113 (La. Ct. App. 1991).

48. *Guy*, 579 So. 2d at 1113. *See also* *Vernon v. Vernon*, 624 So. 2d 1295, 1299 (La. Ct. App. 1993) (noting appellant’s position was “briefed extensively”).

49. *Dear v. Mabile*, 637 So. 2d 745, 748 (La. Ct. App. 1994).

50. *Harvey v. Ouachita Parish Sch. Bd.*, 545 So. 2d 1241, 1245 (La. Ct. App. 1989).

51. *City of Baton Rouge v. Douglas*, 984 So. 2d 746, 750 (La. Ct. App. 2008).

52. *See Dear*, 637 So. 2d at 748.

53. *See Guillot v. Union Bank*, 617 So. 2d 1343, 1347 (La. Ct. App. 1993).

54. *Boudreau v. Boudreau*, 563 So. 2d 1244, 1246 (La. Ct. App. 1990). *See also* *Johnson & Placke v. Norris*, 571 So. 2d 702, 707 (La. Ct. App. 1990) (first reported case on the presented issue).

amount of available jurisprudence,⁵⁵ it will not consider an appeal frivolous if the argument is “innovative.”⁵⁶ Courts do not require all of these characteristics, however; any one of these is usually sufficient to defeat a request for frivolous-appeal sanctions.

A primary reason asserted for the courts’ reluctance to impose sanctions is a fear of chilling the appellate process. This fear justifies denying sanctions when the appellant puts forth novel or creative arguments. As Justice Ortique stated in his *Hampton* dissent: “Imaginative and creative lawyering has been and must be encouraged. The genius of a lawyer in a free society, must not be curtailed or stilted.”⁵⁷ The difficulty is distinguishing between a sincerely creative lawyer who is trying to convince the court to change its interpretation of the law and one who is creatively abusing the judicial process.

III. WHEN FRIVOLOUS-APPEAL SANCTIONS WILL BE AWARDED

Even though courts are reluctant to award sanctions and the standard is high, sanctions were awarded in a total of 83 cases in the last 30 years, including eight cases involving pro se appellants. Those cases, the collective antithesis of the sincere appeals described above, fall into four broad categories: (1) appeals filed to gain a benefit from delay; (2) harassment appeals; (3) repetitive filings; and (4) cases with no serious issue either at trial or on appeal, usually characterized by bad or nonexistent briefs and a paucity of evidence introduced at trial.

A. *Solely for Delay*

Appeals sanctioned as taken solely for delay are those where the appellant has something to gain by the delay. In eviction suits, appellants have sought delays in order to avoid being removed from possession of property.⁵⁸ In divorce suits involving alimony pending litigation, as explained in Part VI.A, *infra*, spouses have

55. See *Jessen v. Dr. Kenneth W. Wimberly*, D.D.S., 610 So. 2d 252, 258 (La. Ct. App. 1992) (holding appeal was not frivolous “given the scant jurisprudence available”).

56. See *Stroud v. Morrison Nursery*, 899 So. 2d 840, 844 (La. Ct. App. 2005).

57. *Hampton v. Greenfield*, 618 So. 2d 859, 866 (La. 1993) (Ortique, J., dissenting).

58. See, e.g., *Wilson v. Fuqua*, 553 So. 2d 926, 928 (La. Ct. App. 1989); *La. Home Builders, Inc. v. Fontenot*, 546 So. 2d 325, 328 (La. Ct. App. 1989); *Arnona v. Arnona*, 497 So. 2d 9, 10 (La. Ct. App. 1986); *Dixie Sav. & Loan Ass’n v. Neal*, 491 So. 2d 708, 709 (La. Ct. App. 1986).

appealed so that alimony payments would continue and, in some cases, so they could continue living in the family home.⁵⁹ In suits with money judgments, some appellants simply sought to “delay the inevitable result” of having to pay the judgment.⁶⁰

The flip side of the divorce case in which a spouse seeks to keep alimony flowing is the appeal to delay paying alimony, a community-property settlement,⁶¹ or child support.⁶² Those cases usually contain elements of harassment and bad faith.

B. Harassment Appeals

When an appeal is filed primarily to harass the opponent and becomes “a predatory instrument rather than a method of resolving honest disputes,”⁶³ the courts are more likely to impose sanctions. The most infamous series of harassment appeals arose in a family-law context. Mr. Hester, an attorney, and his wife separated in 1988 and divorced in 1992; his wife was awarded alimony and support for their three children,⁶⁴ including one child who was severely disabled.⁶⁵ Between 1989 and 2004, Mr. Hester filed innumerable lawsuits, motions, writs, and appeals in an attempt to avoid paying alimony and child support.⁶⁶ Mrs. Hester was denied sanctions on two of Mr. Hester’s early appeals because she failed to file an answer or cross-appeal, even though the court found his appeals to be frivolous.⁶⁷ She was, however, awarded sanctions

59. See, e.g., *Lupberger v. Lupberger*, 805 So. 2d 264, 275 (La. Ct. App. 2001); *Bouzon v. Bouzon*, 537 So. 2d 822, 823 (La. Ct. App. 1989); *Roland v. Roland*, 519 So. 2d 1177, 1180 (La. Ct. App. 1987).

60. *Politz v. Randy Key Constr., Inc.*, 836 So. 2d 168, 172 (La. Ct. App. 2002). Defendants in Louisiana are discouraged from appealing to delay paying the judgment, however, by Louisiana’s relatively high judicial interest rate. See *Judicial Interest Rates Through 2015*, 62 LA. B.J. 251, 253 (2015) (listing judicial interest rates from 1980 through 2015).

61. See *McDonald v. McDonald*, 10 So. 3d 780, 784 (La. Ct. App. 2009).

62. See, e.g., *Johnson v. Johnson*, 986 So. 2d 797, 802 (La. Ct. App. 2008) (husband refused to pay private-school tuition agreed upon in a consent judgment); *Hester v. Hester (Hester IV)*, 752 So. 2d 269, 273 (La. Ct. App. 2000) (multiple suits and appeals to avoid child support and alimony obligations).

63. *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985).

64. *Hester IV*, 752 So. 2d at 270.

65. *Hester v. Hester (Hester V)*, 874 So. 2d 859, 860 (La. Ct. App. 2004).

66. His actions are summarized in the five reported appeals with full decisions: *Hester V*, 874 So. 2d 859; *Hester IV*, 752 So. 2d 269; *Hester v. Hester (Hester III)*, 708 So. 2d 462 (La. Ct. App. 1998); *Hester v. Hester (Hester II)*, 699 So. 2d 1099 (La. Ct. App. 1997); *Hester v. Hester (Hester I)*, 680 So. 2d 1232 (La. Ct. App. 1996).

67. *Hester III*, 708 So. 2d at 468 n.5; *Hester I*, 680 So. 2d at 1235–36.

against Mr. Hester for his three other appeals, with the court finding that his repetitious filings were intended to harass Mrs. Hester and increase her litigation expenses.⁶⁸ In the court's final opinion in this case, the Louisiana Fourth Circuit Court of Appeal stated: "This Court has no more tolerance for appellant's repeated abuse of the judicial system in light of the extensive history of the case and the tactics Mr. Hester has employed throughout the litigation."⁶⁹

Other harassment appeals have involved former romantic partners,⁷⁰ feuding neighbors,⁷¹ and opposing counsel in a lawsuit.⁷² Notably, all but one of the parties sanctioned for filing harassment appeals were attorneys.

C. Repetitive Filings

Appellants who try the courts' patience by filing repetitive appeals of previously litigated issues tend to be sanctioned. Judge Miriam Waltzer aptly described this tactic as attempting "to litigate the same old issues in new dress."⁷³ Family-law cases are the most common in this category,⁷⁴ but attorneys who file repetitive appeals have also been sanctioned in cases involving workers' compensation,⁷⁵ succession property,⁷⁶ torts,⁷⁷ construction contracts,⁷⁸ and a recalcitrant witness.⁷⁹

68. *Hester V*, 874 So. 2d at 862; *Hester IV*, 752 So. 2d at 273; *Hester III*, 708 So. 2d at 468.

69. *Hester V*, 874 So. 2d at 862.

70. *See, e.g.*, *Echelon, Inc. v. Cassidy*, No. CA 11-1517, 2012 WL 1142280, at *1 (La. Ct. App. Apr. 4, 2012); *Bandaries v. Cassidy*, 86 So. 3d 125, 133 (La. Ct. App. 2012) (calling the actions of appellant, an attorney, "delusive and disingenuous" having "no other purpose than to harass" his former romantic partner).

71. *See, e.g.*, *Rockett v. Neupert*, Nos. 2010 CA 1311-1312, 2011 WL 1260069, at *1 (La. Ct. App. Mar. 25, 2011).

72. *McMaster v. Progressive Sec. Ins. Co.*, No. 2013-CA-1411, 2014 WL 1260979, at *5-6 (La. Ct. App. Mar. 26) (appellant made allegations against his opposing counsel that were "thoughtless and needlessly cruel" and "were essentially premised on barbershop gossip"), *writ granted*, 147 So. 3d 687 (La. 2014) (denying *sanctions* for frivolous writ application, but awarding *damages* of \$10,000 and assessing against the applicant all "legal fees, costs, and expenses" in connection with the writ application).

73. *Gardner v. Gardner*, 616 So. 2d 1280, 1281 (La. Ct. App. 1993) (attempting to relitigate issues decided in two other final judgments).

74. *See, e.g.*, *Nesbitt v. Nesbitt*, 79 So. 3d 347 (La. Ct. App. 2011) (three appeals); *Hester V*, 874 So. 2d at 861 (five published and numerous unpublished appeals); *Gardner*, 616 So. 2d at 1281 (three appeals).

75. *See, e.g.*, *Yarnell Ice Cream Co. v. Allen*, 867 So. 2d 969, 973 (La. Ct. App. 2004) (three appeals).

D. No Serious Legal Issue

“No serious legal issue” is the catch-all category for cases where little or no evidence was introduced at trial⁸⁰ or where the appellant files poorly written appellate briefs that lack citation to authority.⁸¹ “No serious legal issue” is also the reason given for sanctioning an appeal when the appellant fails to file a brief.⁸² One court explained that because the “appellant has not filed a brief specifying any error, it is difficult for us to find that he seriously believed in the merits of his position.”⁸³ It is also used when attorneys raise issues that are long settled without a sincere argument for change.⁸⁴

76. *See, e.g., In re Succession of Horn*, 827 So. 2d 1241, 1247–48 (La. Ct. App. 2002) (noting the trial court sought to deter “repetitious filing and pursuit of meritless, duplicative claims”).

77. *See, e.g., Olympia Roofing Co. v. Henican*, 534 So. 2d 16, 18–19 (La. Ct. App. 1988) (noting the previous frivolous appeal in federal court and stating appellant and its counsel were “no strangers to the frivolous appeal”).

78. *See, e.g., James A. Teague Rental Equip., Inc. v. Audubon Park Comm’n*, 631 So. 2d 1299, 1301 (La. Ct. App. 1994) (stating appellant “persist[ed] in attempting to relitigate an issue that has been decided by a judgment that is final and definitive”).

79. *See, e.g., Johnson v. Nguyen*, 793 So. 2d 370, 375 (La. Ct. App. 2001) (“It is entirely unreasonable that an attorney can believe that his position is reasonable when the court to which he is appealing has already decided the identical issues *and* he was counsel for the appellant in the previous appeal.” (emphasis altered)).

80. *See, e.g., Broussard v. Union Pac. Res. Co.*, 778 So. 2d 1199, 1205 (La. Ct. App. 2001) (appellant had produced no witnesses at trial and introduced no exhibits).

81. *See, e.g., Smith v. Clement*, 797 So. 2d 151, 159 (La. Ct. App. 2001); *Mitchell v. Accent Constr. Co.*, 785 So. 2d 864, 866 (La. Ct. App. 2001) (brief “failed to include any authority”); *Zeringue v. Zeringue*, 654 So. 2d 721, 723 (La. Ct. App. 1995) (appellant’s “brief contained only two pages of argument” and did not attempt to distinguish the case relied on by the trial court); *Valet v. City of Hammond*, 577 So. 2d 155, 164 (La. Ct. App. 1991) (brief did “not even discuss the applicable law”); *Owens v. Jackson*, 550 So. 2d 359, 366 (La. Ct. App. 1989) (brief “was at best, poor” and “cited inadequately few cases or legal authorities”); *Roland v. Roland*, 519 So. 2d 1177, 1179 (La. Ct. App. 1987) (the assignments of error “were scantily briefed”).

82. *See, e.g., Capital-Union Savings, F.A. v. Williams*, 528 So. 2d 187, 188 (La. Ct. App. 1988); *Succession of Chapman*, 699 So. 2d 916, 916 (La. Ct. App. 1997); *Succession of Pauli*, 688 So. 2d 98, 98–99 (La. Ct. App. 1997).

83. *Arnona v. Arnona*, 497 So. 2d 9, 10 (La. Ct. App. 1986) (quoting *Ecopur, Inc. v. C.E. McCloud*, 432 So. 2d 380, 381 (La. Ct. App. 1983)).

84. *See, e.g., I.D.C., Inc. v. Natchitoches Dev. Co.*, 482 So. 2d 958, 961 (La. Ct. App. 1986) (appellant sanctioned who “raise[d] an issue that has long been buried by the weight of judicial opinion and scholarly treatise”).

IV. PROCEDURAL PROBLEMS THWARTING THE
AWARD OF SANCTIONS

Even when a case fits into one of the categories just described, the Louisiana lawyer still faces a hurdle that has tripped many seeking frivolous-appeal sanctions—following the proper procedure. In approximately 17% of the cases where frivolous appeals were denied in the past 30 years, the reason given by the appellate court was the failure of the appellee to follow the proper procedure.⁸⁵ Procedural problems that arise occasionally include asking for frivolous-appeal damages prematurely when there was no final judgment;⁸⁶ asking for frivolous-appeal damages under Louisiana Code of Civil Procedure article 863, which applies only in the trial court;⁸⁷ and asking the trial court, rather than the appellate court, to award damages for a frivolous appeal.⁸⁸ The two most common procedural mistakes, however, are failing to file a cross-appeal or answer to appeal,⁸⁹ and filing a cross-appeal or answer to appeal too late.⁹⁰

A. Failure to File Answer to Appeal

Louisiana Code of Civil Procedure article 2133(A) requires that a party answer an appeal within 15 days of the return date⁹¹ or

85. The courts gave procedural flaws as the reason for not awarding damages under article 2164 in 128 out of 751 cases where sanctions were denied between 1985 and 2015. For a description of the methodology used in calculating these statistics, see *supra* note 12.

86. See *Stephens v. Strahan*, 62 So. 3d 894, 897 (La. Ct. App. 2011). The bulk of the procedural blame in this case was on the appellant, who appealed prematurely.

87. See *Hornot v. Cardenas*, No. 2010 CA 1569, 2011 WL 1103151, at *5 (La. Ct. App. Mar. 25, 2011); *Calahan v. Midland Risk Ins. Co.*, 743 So. 2d 690 (La. Ct. App. 1999).

88. See *Schmitt v. Schmitt*, 28 So. 3d 537, 543 (La. Ct. App. 2009) (appellee filed answer to appeal in trial court); *Clement v. Graves*, 924 So. 2d 196, 201–02 (La. Ct. App. 2005) (appellee filed motion to dismiss the appeal and for damages in trial court).

89. Requests for frivolous-appeal sanctions were denied for failure to file a cross-appeal or answer to appeal in 118 of 751 cases where sanctions were denied between 1985 and 2015.

90. Requests for frivolous-appeal sanctions were denied as untimely in six cases between 1985 and 2015.

91. The return date, which the trial court sets in the order for appeal, is the deadline for the record to be filed with the appellate court. See LA. CODE CIV. PROC. art. 2121 (2015); LA. CT. APP. R. 2-2.3.

the date the record is lodged with the appellate court,⁹² whichever is later,⁹³ if he seeks modification of the judgment or damages against the appellant. The answer must be filed in the court of appeal, not in the trial court.⁹⁴ Alternatively, the appellee seeking modification of the judgment or damages may also file a separate cross-appeal.⁹⁵ Louisiana courts have long held that this requirement applies to parties seeking damages for frivolous appeal.⁹⁶

In many cases where sanctions were denied for procedural reasons, the attorney asked for sanctions only in the appellate brief or at oral argument.⁹⁷ Although some courts have treated a motion

92. The lodging date is the date the record is actually filed with the court of appeal.

93. Article 2133(A) provides in pertinent part:

An appellee shall not be obliged to answer the appeal unless he desires to have the judgment modified, revised, or reversed in part or unless he demands damages against the appellant. In such cases, he must file an answer to the appeal, stating the relief demanded, not later than fifteen days after the return day or the lodging of the record whichever is later. The answer filed by the appellee shall be equivalent to an appeal on his part from any portion of the judgment rendered against him in favor of the appellant and of which he complains in his answer.

LA. CODE CIV. PROC. art. 2133(A) (2015).

94. In *Schmitt v. Schmitt*, the appellee's request for frivolous-appeal damages was denied because he filed the answer in the trial court. *See* 28 So. 3d 537, 543 (La. Ct. App. 2009).

95. In *Scramuzza v. River Oaks, Inc.*, the first appellant moved to dismiss the cross-appeal, contending that the second appellant was limited to filing an answer to appeal under Louisiana Code of Civil Procedure article 2133. *See* 871 So. 2d 522, 528 (La. Ct. App. 2004). The court disagreed, stating:

[N]either the Louisiana Code of Civil Procedure nor the jurisprudence has ever recognized the answer to an appeal established by Article 2133 as the exclusive procedural device for an appellee to seek modification, revision or reversal of a final judgment. While an appellee may seek appellate review by answering another party's previously filed appeal within the delays established by Article 2133, that appellee may also seek that same review by filing a separate cross-appeal under Article 2121 of the Louisiana Code of Civil Procedure, within the delays allowed by Article 2123 for a suspensive appeal or Article 2087 for a devolutive appeal.

Id.

96. *See, e.g.,* *Ansley v. Stuart*, 52 So. 545, 545 (La. 1910) (on rehearing); *Verges v. Noel*, 17 La. Ann. 67, 67 (1865).

97. *See, e.g.,* *Guerrero v. Guerrero*, 110 So. 3d 723, 728 (La. Ct. App. 2013) (answer "incorporated" in brief and not filed as a separate pleading was both untimely and procedurally deficient); *Roberts v. Robicheaux*, 896 So. 2d 1232, 1235 (La. Ct. App. 2005) ("Appellee's 'Answer Brief' . . . [was] neither an answer nor an appeal" and did not satisfy the requirements of article 2133); *Bolzoni v. Theriot*, 670 So. 2d 783, 785 (La. Ct. App. 1996) (request only in brief did not satisfy requirements of article 2133); *Benoit v. Fleet Fin., Inc.*, 602 So. 2d 182, 186 (La. Ct. App. 1992) (court cannot consider a request made only

for sanctions as an answer to appeal, Louisiana courts have never regarded filing a brief as a satisfactory substitute. In 1865, the Louisiana Supreme Court denied a request for frivolous-appeal sanctions that were requested only by brief, stating: “Counsel’s brief is not considered an answer.”⁹⁸ Similarly, in 1931, the court refused to award damages for an appeal that was “plainly frivolous” when the damages were requested only in oral argument and brief.⁹⁹

Thus, the rule that damages for frivolous appeal must be requested in an answer to appeal or cross-appeal has been established through 150 years of jurisprudence. In cases of extremely bad behavior, however, some courts have either ignored the rule, created an exception, expansively interpreted the Code of Civil Procedure, or turned to their own inherent power to protect the judicial process.

1. Ignoring the Rule

In one case, the court ignored the answer-or-cross-appeal requirement. In *Haley v. Leary*, a pro se plaintiff sued all of the judges and justices who denied the relief he sought in a child-custody case and appealed when his case was dismissed on the basis of judicial immunity.¹⁰⁰ Although the appellees did not ask for sanctions, the appellate court, sua sponte, cited the standard for sanctioning frivolous appeals and remanded the case to the district court to determine whether the plaintiff’s conduct was contemptuous.¹⁰¹

Cases where judges ignore the rules of civil procedure regarding frivolous appeals are rare, however. Even when a court considers an appeal “utterly worthless,” the court usually will not grant sanctions on its own.¹⁰² Perhaps the strongest example of a court feeling bound to follow the rules of civil procedure in a frivolous-appeal context is *Johnson v. Nguyen*.¹⁰³ In that case, the

in brief); *Succession of Vallette*, 538 So. 2d 707, 709 (La. Ct. App. 1989) (issue of frivolous-appeal damages not properly raised by brief).

98. *Verges*, 17 La. Ann. at 67.

99. *Gaughan v. J.J. Lips, Inc.*, 137 So. 363, 363 (La. Ct. App. 1931).

100. *Haley v. Leary*, 69 So. 3d 430, 432 (La. Ct. App. 2010).

101. *Id.* at 433–34.

102. *See, e.g.*, *Washington v. State*, No. 14–154, 2014 WL 2558205, at *1 (La. Ct. App. June 4, 2014) (“Had [appellee] sought sanctions for frivolous appeal, they would have been gladly and freely granted.”); *Ketteringham Bldrs., LLC v. Speni*, No. CA 11–107, 2011 WL 2437907, at *1 (La. Ct. App. June 15, 2011) (appellant’s “lone assignment of error is so utterly devoid of merit that, had counsel for [appellee] sought damages for frivolous appeal, they would have been seriously considered.”).

103. 793 So. 2d 370 (La. Ct. App. 2001).

Louisiana Fourth Circuit Court of Appeal affirmed a judgment imposing contempt-of-court sanctions on a doctor whose behavior it termed “egregious” in evading the discovery process.¹⁰⁴ The court described the doctor’s numerous appeals as “at best, frivolous, and at worst, a carefully orchestrated manipulation of the legal process.”¹⁰⁵ It then stated that sanctions should be imposed because to “allow this type of action would be equivalent to a total disregard for this Court’s own precedent, and for the integrity of the legal system as a whole, it cannot be tolerated.”¹⁰⁶ The court’s decree, however, simply affirmed the trial court’s sanctions without imposing frivolous-appeal sanctions.¹⁰⁷ The reason was explained in Judge Patricia Murray’s concurrence: “As the appellees did not answer this appeal nor file an appeal, the issue of their entitlement to additional sanctions and/or sanctions for frivolous appeal cannot be considered by this court.”¹⁰⁸

2. *Creating an Exception*

Instead of ignoring the lack of an answer to appeal, the Louisiana Supreme Court overcame the problem by creating an exception to the rule in *Bouzon v. Bouzon*.¹⁰⁹ In that case, the appellee filed a motion to dismiss an appeal as frivolous within the 15-day period to answer the appeal and requested sanctions in the motion.¹¹⁰ The Louisiana Fifth Circuit Court of Appeal found that damages and attorney fees were warranted because the wife’s “sole purpose” in appealing was continuing alimony during the pendency of the litigation.¹¹¹ It declined to sanction the appellant, however,

104. *Id.* at 375.

105. *Id.* at 374.

106. *Id.* at 375.

107. *Id.*

108. *Id.* at 376 (Murray, J., concurring). Five years earlier, Judge Murray concurred in another frivolous-appeal case, *Hester v. Hester (Hester I)*, 680 So. 2d 1232 (La. Ct. App. 1996). In that case Judge Murray stated that the court *should* be allowed to award sanctions, even though the appellant had not answered the appeal, as follows:

I write because I do not agree that this court is without the authority to impose sanctions for a frivolous appeal unless the appellee has requested that sanctions be imposed in either an appeal or an answer to the appeal. I believe that art. 2164 of the Code of Civil Procedure would allow the appellate court to impose sanctions on its own motion if it determines that same are just, legal and proper based on the record on appeal.

Id. at 1237 (Murray, J., concurring).

109. 532 So. 2d 1386 (La. 1988).

110. *Id.* at 1387.

111. *Bouzon v. Bouzon*, 527 So. 2d 357, 359 (La. Ct. App. 1988).

because the appellee failed to appeal or answer the appeal.¹¹² The Louisiana Supreme Court granted the appellee's application for a writ of certiorari and summarily remanded the case to the court of appeal "to award damages and attorney fees for a frivolous appeal."¹¹³ Two justices dissented. Justice Lemmon concurred, explaining: "The motion, filed within the delay for answering the appeal, should be treated as an answer."¹¹⁴

On remand, the Fifth Circuit noted that the Louisiana Supreme Court's memorandum opinion did not explain "what constitutes an answer."¹¹⁵ Instead, the Supreme Court cryptically cited *Arnoult v. Arnoult*,¹¹⁶ another memorandum opinion in which the court reversed an award of damages for frivolous appeal.¹¹⁷ In *Arnoult*, the court stated: "Plaintiff respondent did not answer appeal or otherwise pray for such damages."¹¹⁸

Without citing the *Bouzon* exception or discussing the date of filing, the Third Circuit treated a motion to dismiss as "tantamount to filing an answer to appeal."¹¹⁹ Similarly, the Fourth Circuit noted that an appellee had not filed an answer to appeal or cross-appeal but characterized the request in the brief for frivolous-appeal damages as a "motion for damages for frivolous appeal" and fully addressed the issue.¹²⁰ In one case, a court stated that the motion to dismiss an appeal as frivolous was "in the nature of an answer to the appeal" but denied the request because the motion was filed more than 15 days after lodging.¹²¹ In several other cases where the appellee moved to dismiss and asked for sanctions, however, courts have not mentioned the *Bouzon* exception or the date that the motion was filed but have simply used the failure to file an appeal or answer to appeal as a reason for denial.¹²²

112. *Id.*

113. *Bouzon*, 532 So. 2d at 1387.

114. *Id.* (Lemmon, J., concurring).

115. *Bouzon v. Bouzon*, 537 So. 2d 822, 823 (La. Ct. App. 1989).

116. 498 So. 2d 749 (La. 1986).

117. *Bouzon*, 537 So. 2d at 823.

118. *Arnoult*, 498 So. 2d at 749 (emphasis added).

119. *Varney v. Varney*, No. 12-640, 2012 WL 6028889, at *9 (La. Ct. App. Dec. 5, 2012).

120. *Levy v. Levy*, 829 So. 2d 640, 644, 650 (La. Ct. App. 2002). *See also* *Succession of Granger v. Worthington*, 829 So. 2d 1108, 1110 (La. Ct. App. 2002). Appellee filed a cross-appeal on a procedural ground but also filed a separate "Motion for Costs and Attorney Fees," which was referred to the merits and ruled on. *Granger*, 829 So. 2d at 1110.

121. *Nat'l Equity Life Ins. Co. v. Eicher*, 633 So. 2d 1351, 1356 (La. Ct. App. 1994). *See also* *Benedict v. Kearby*, 537 So. 2d 870, 871 (La. Ct. App. 1989).

122. *See, e.g., Humphrey v. Humphrey*, 614 So. 2d 837, 848 (La. Ct. App. 1993) (stating in response to a motion to dismiss appeal and request for damages

3. *Expansively Interpreting the Code*

In two recent cases, *Davisson v. O'Brien*¹²³ and *Nesbitt v. Nesbitt*,¹²⁴ the Second Circuit awarded attorney fees for frivolous appeal in the absence of an answer or cross-appeal by interpreting article 2164 as providing it with discretion to do so. Both involved bad behavior in domestic cases.¹²⁵

Davisson simply quoted *Nesbitt* and the cases it cited. In *Nesbitt*, the appellee asked for sanctions for frivolous appeal, including attorney fees, only in her brief.¹²⁶ The court stated that article 2164 “grants the appellate court the authority to address the issue of frivolous appeal from the proceedings conducted before it” and that “the issue of frivolous appeal first arises at the appellate court level and therefore may be adjudicated and remedied by this court.”¹²⁷ The court relied on two cases involving statutorily sanctioned attorney fees,¹²⁸ *Gandy v. United Services Automobile Ass’n*¹²⁹ and *Smith v. Pilgrim’s Pride Corp.*,¹³⁰ as authority for the proposition that “when an issue of attorney’s fees is present in the case, it is within the appellate court’s discretion to award or increase

that, “[n]either of these actions is sufficient to warrant consideration of her claim for damages”); *Succession of Bleuler*, 600 So. 2d 791, 792 (La. Ct. App. 1992) (noting that motion to dismiss appeal was not “procedurally sufficient”); *In re Liquidation of Hornsby & Landry v. Hornsby*, 559 So. 2d 861, 862 (La. Ct. App. 1990) (stating “damages for frivolous appeal cannot be claimed on a motion to dismiss”); *Napoli v. Napoli*, 536 So. 2d 839, 840 (La. Ct. App. 1988) (stating “damages cannot be claimed in a motion to dismiss an appeal”).

123. 104 So. 3d 467 (La. Ct. App. 2012).

124. 79 So. 3d 347 (La. Ct. App. 2011).

125. *Davisson* sued the social worker who testified in a custody case that he abused his child. *Davisson*, 104 So. 3d at 468–69. He appealed when the suit was dismissed on the basis of statutory immunity. *Id.* at 472. The court referred to the handling of the suit as “unprofessional and unduly confrontational,” the litigation as “painful and venomous,” and the attorney’s conduct and tactics as “reprehensible.” *Id.* at 476. *Nesbitt*, an attorney, filed repetitive pleadings stating no cause of action in a community-property squabble, including seeking a declaration that a property settlement judgment could “be paid in wine.” *Nesbitt*, 79 So. 3d at 350, 351, 353.

126. *Nesbitt*, 79 So. 3d at 352.

127. *Id.* at 353.

128. Attorney fees are awarded under Louisiana law only when “authorized by statute or provided for by contract.” *Sharbono v. Steve Lang & Son Loggers*, 696 So. 2d 1382, 1386 (La. 1997).

129. 721 So. 2d 34 (La. Ct. App. 1998) (discussing the arbitrary and capricious behavior by an insurer in refusing to pay a claim).

130. 4 So. 3d 983 (La. Ct. App. 2009) (discussing the unreasonable refusal to authorize surgery in a workers’ compensation claim).

attorney's fees for the expense of the appeal regardless of whether the appellee answered the appeal."¹³¹

In *Gandy*, the court held that it could not increase the attorney fees for the work done in the trial court without an answer to appeal.¹³² Without citing any authority, however, it held that it could award additional attorney fees for work done at the appellate level because those fees were "not an issue in the trial court."¹³³ *Smith* cited *Gandy* as authority in awarding attorney fees without an answer to appeal.¹³⁴

The best explanation of an appellate court's authority to award attorney fees on appeal when no answer to appeal has been filed is found in Judge Billie Woodard's dissent in *Perot v. Link Staffing Services*.¹³⁵ Judge Woodard authored the majority opinion that denied a workers' compensation claimant additional attorney fees for work done at the appellate level because "[o]n the basis of La. Code Civ. P. art. 2133, the jurisprudence of this circuit mandates that we do not consider such a demand if not made pursuant to an appeal or an answer to an appeal."¹³⁶ However, she dissented in part from her own opinion to express dissatisfaction with her circuit's interpretation of articles 2133 and 2164.

In her dissent, Judge Woodard described this "body of well settled jurisprudence" as "illegitimate" and "an improper application of the law."¹³⁷ Article 2133 requires an answer to appeal or cross-appeal when a party seeks to modify, revise, or partially reverse the trial court's judgment or seeks damages against the appellant.¹³⁸ She stated that the Louisiana Legislature did not intend that attorney fees be considered damages in that context, citing a case denying pre-judgment interest on an attorney fee award.¹³⁹ Further, she opined that it is a "logical and legal impossibility" to say that the appellate court is amending the trial court's judgment when it awards additional attorney fees for appellate work, as the trial court never had authority to award attorney fees for work performed in the appellate court.¹⁴⁰ Instead, "[t]he appellate court is rendering its own

131. *Nesbitt*, 79 So. 3d at 353.

132. *Gandy*, 721 So. 2d at 38.

133. *Id.*

134. *Smith*, 4 So. 3d at 991.

135. 744 So. 2d 80 (La. Ct. App. 1999).

136. *Id.* at 87.

137. *Id.* (Woodward, J., dissenting).

138. LA. CODE CIV. PROC. art. 2133 (2015).

139. *See Sharbono v. Steve Lang & Son Loggers*, 696 So. 2d 1382 (La. 1997). The court interpreted the word "compensation" in Louisiana Revised Statutes section 23:1203.1 to exclude penalties and attorney fees. *Id.* at 1386.

140. *Perot*, 744 So. 2d at 88 (Woodward, J., dissenting).

distinct judgment for attorney fees earned for work done on the appeal, which only it has the power to do and which is before it, only.”¹⁴¹

Judge Woodard recognized that article 2133 does not provide a procedure for requesting attorney fees on appeal. She asserted, however, that the language in article 2164 giving the appellate courts authority to “render any judgment which is just, legal, and proper” provides the appellate court

with the authority and mechanism for rendering such a judgment (especially when a request is made in a brief) without necessitating that the Appellee file either an appeal or an answer, because implicit within the mandate of 2164 is the authority for appellate courts to act on their own motion when they deem it appropriate.¹⁴²

She concluded by describing the rule that requires an answer to appeal to award attorney fees as “an old, lame ‘duck’” that should be “retire[d] . . . to gumbo.”¹⁴³

4. Asserting Inherent Authority

Federal courts have long recognized that courts have the inherent authority to “protect themselves from any attempts to interfere with the proper functioning of the courts and the judicial process.”¹⁴⁴ The United States Supreme Court established in 1812 that a court has “an implied power to preserve its own existence and promote the end and object of its creation.”¹⁴⁵ This power includes the right to fine for contempt, imprison for contumacy, and enforce the observance of order in the courts.¹⁴⁶ In 1980, the Supreme Court in *Roadway Express, Inc. v. Piper* recognized that federal appellate courts have inherent authority to impose sanctions for frivolous appeal,¹⁴⁷ and many state courts have used this power

141. *Id.*

142. *Id.*

143. *Id.* at 89. Gumbo is a “hearty, soupy stew” usually served over rice. Marie Louise Comeaux Manuel, *Acadian (Cajun) Cuisine*, in *CAJUN CUISINE* 9–10 (W. Thomas Angers ed., 1985). Fowl such as duck is a common ingredient. *See id.*; *RIVER ROAD RECIPES* 13 (1991).

144. Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 *DUKE L.J.* 845, 879 (1984).

145. *United States v. Hudson*, 11 U.S. 32, 33 (1812).

146. *Id.* at 34.

147. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

to sanction frivolous litigation, frivolous appeals, and other forms of bad behavior by litigants and their counsel.¹⁴⁸

The inherent-powers doctrine is applicable even in a civil-law jurisdiction where the only sources of law are legislation and custom.¹⁴⁹ The Supreme Court has stated that this power “is by no means peculiar to the common law” but “belongs to a system of universal law.”¹⁵⁰ Furthermore, Louisiana judges who have advocated for the court’s assertion of inherent authority rely on the Legislature’s grant of authority in article 2164, particularly the language that it can “render any judgment which is just, legal, and proper upon the record on appeal” and tax costs “as in its judgment may be considered equitable.”¹⁵¹

Although no Louisiana court has imposed sanctions for frivolous appeal by asserting its inherent authority to do so, Judge Woodard asserted the court’s inherent powers under article 2164 to sanction an attorney for “nefarious conduct in the trial court.”¹⁵² The court cited Justice Ortique’s dissent in *Hampton*, where the majority reversed an award of frivolous-appeal sanctions.¹⁵³ In *Hampton*,

148. See, e.g., *Dana Commercial Credit Corp. v. Ferns & Ferns*, 108 Cal. Rptr. 2d 278 (2001) (imposing sanctions for filing a frivolous motion on appeal); *Allied Prop. & Cas. Ins. Co. v. Good*, 919 N.E.2d 144, 152–56 (Ind. Ct. App. 2009) (imposing \$26,000 in sanctions by trial court for violating motions in limine and causing mistrial); *Persichini v. William Beaumont Hosp.*, 607 N.W.2d 100, 108–09 (Mich. Ct. App. 1999) (referencing the inherent power to impose sanction of attorney fees when “egregious misconduct of a party or an attorney causes a mistrial”); *Hartsoe v. Tucker*, 309 P.3d 39, 42 (Mont. 2013) (ordering a litigant who had filed 24 suits in three counties against government officials, including nine suits against judges, to obtain prior approval before suing any current or former judicial official as sanction for frivolous litigation); *State ex rel. N.M. State Highway & Transp. Dep’t v. Baca*, 896 P.2d 1148, 1155 (N.M. 1995) (stating that “a court’s inherent authority extends to all conduct before that court and encompasses orders intended and reasonably designed to regulate the court’s docket, promote judicial efficiency, and deter frivolous filings”); *Van Eps v. Johnston*, 553 A.2d 1089, 1091 (Vt. 1988) (“[C]ourts have the inherent power to assess expenses against an attorney in the form of consequential damages suffered by the opposing side, such as attorney’s fees and witness’s expenses, incurred due to the attorney’s abuse of the judicial process.”); *In re Attorney Fees in Yu v. Zhang*, 637 N.W.2d 754, 762 (Wis. Ct. App. 2001) (discussing the inherent authority to manage family-law cases and award sanctions for “overtrial”—excessive litigation and appealing multiple issues without merit).

149. LA. CIV. CODE art. 1 (2015).

150. *Hudson*, 11 U.S. at 34.

151. LA. CODE CIV. PROC. art. 2164 (2015).

152. *Brown v. Am. Honda Motor Co.*, 704 So. 2d 1234, 1237 (La. Ct. App. 1997). The court affirmed the trial court’s award of over \$25,000 in costs to the plaintiffs. *Id.* at 1238.

153. *Hampton v. Greenfield*, 618 So. 2d 859, 865 (La. 1993).

Justice Ortique characterized the appellant's behavior as a "flagrant abuse of the judicial process"¹⁵⁴ and opined that the court could use its inherent powers to impose sanctions, stating:

Under [Louisiana Code of Civil Procedure article] 2164, the courts of appeal have the inherent power to fashion and impose sanctions. This power is incident to the court's duty to protect the judicial process. This authority is specifically conferred by article 2164 If the appellate court determines that the appeal is frivolous, it has the authority and responsibility within its supervisory jurisdiction to initiate and to decide the question of sanctions.¹⁵⁵

Texas courts have also recognized their inherent authority to sanction litigants who abuse the judicial process, but they have not used the power to sanction frivolous appeals.¹⁵⁶ One commentator suggested the reason is because it is simply easier for the courts to cite a statute or rule than to rely on inherent authority.¹⁵⁷

B. Failure to Timely File Answer to Appeal

Even if Louisiana courts treated all briefs and motions for sanctions as answers to appeal under *Arnoult*, those attempts would likely fail due to timeliness issues. The appellant's brief is due 25 calendar days after the record is lodged with the court of appeal; the appellee has 45 days after lodging to file a brief.¹⁵⁸ If both parties appeal, the appellant who files last is treated as the appellee for the purpose of briefing deadlines.¹⁵⁹ Thus, a request for frivolous-appeal sanctions in a brief will usually be filed more than 15 days after lodging, making it untimely even if the court were inclined to treat the brief as an answer to appeal.¹⁶⁰ Even appellees

154. *Id.* at 866.

155. *Id.* at 865.

156. See David Lopez, *Why Texas Courts Are Defenseless Against Frivolous Appeals: A Historical Analysis with Proposals for Reform*, 48 BAYLOR L. REV. 51, 54 n.5 (1996) (citing *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398–99 (Tex. 1979)).

157. *Id.* Another commentator suggested that federal courts rarely rely on inherent authority to impose sanctions for this reason. See Martineau, *supra* note 144, at 862.

158. LA. CT. APP. R. 2-12.7.

159. *Id.*

160. See, e.g., *Guerrero v. Guerrero*, 110 So. 3d 723, 728 (La. Ct. App. 2013); *Walker v. Creech*, 509 So. 2d 168, 172 (La. Ct. App. 1987).

who request frivolous-appeal sanctions in an answer to appeal rather than a brief often miss the relatively short 15-day deadline.¹⁶¹

One difficulty with the short deadline to answer the appeal is that the appellee has no way of knowing what the appellant will assign as error, as the answer must be filed 10 days before the appellant's brief is due. If an appellee files an answer seeking frivolous-appeal damages, he must assume that the appellant will raise no novel issues.¹⁶² He must also hope that the appellant will not state in his brief that the appeal was taken sincerely and not simply for delay.¹⁶³ An appellant who has been forewarned by the filing of the answer to appeal may defeat the frivolous-appeal-damages request by simply proclaiming his sincerity in the brief, thereby satisfying the test of *Hampton* and *Parker*.¹⁶⁴ When that happens, many appellees simply abandon their claims for article 2164 sanctions by not briefing the issue.¹⁶⁵

V. OTHER PROCEDURAL ISSUES

Even when an attorney follows the correct procedure to request frivolous-appeal sanctions, he or she faces other procedural issues. Foremost is whether to ask for other relief at the same time he or

161. See, e.g., *Sprowl v. Taylor*, No. CA 07-857, 2008 WL 241574, at *3 (La. Ct. App. Jan. 30, 2008); *Foreman v. Babin*, 887 So. 2d 143, 153 (La. Ct. App. 2004); *McCoy v. Calalmia*, 653 So. 2d 763, 773 (La. Ct. App. 1995); *Galle v. Orleans Parish Sch. Bd.*, 623 So. 2d 692, 695 (La. Ct. App. 1993).

162. In *Matherne v. Purdy*, 576 So. 2d 621 (La. Ct. App. 1991), the court found that an appeal was not frivolous despite a “glaring lack of . . . basis for appeal” because the appellant asserted the issue was “novel.” *Id.* at 624. Similarly, in *Hall v. Brookshire Bros.*, 831 So. 2d 1010 (La. Ct. App. 2002), the court found the issues for review “substantively tenuous” but denied damages because of “novel legal questions.” *Id.* at 1030–31.

163. See *Roy v. Alexandria Civil Serv. Comm’n*, 980 So. 2d 225, 229–30 (La. Ct. App. 2008) (denying damages because “counsel insist[ed] that th[e] appeal was not taken for the purpose of delay and that he has been serious”).

164. “[W]hen counsel proclaims his sincerity, a court finds itself without just cause to disbelieve unless, and only unless, the proposition advocated is so ridiculous or so opposed to rational thinking that it is evident beyond any doubt that it is being deliberately professed for ulterior purposes.” *Hampton v. Greenfield*, 618 So. 2d 859, 863 (La. 1993) (quoting *Parker v. Interstate Life & Acc. Ins. Co.*, 179 So. 2d 634, 637 (La. 1965)).

165. See, e.g., *Watts v. Watts*, 10 So. 3d 855, 861 (La. Ct. App. 2009); *Levert v. Martinez*, 939 So. 2d 615, 619 n.1 (La. Ct. App. 2006); *Skelton v. Hunt Forest Prods.*, 787 So. 2d 1216, 1226 (La. Ct. App. 2001); *Wilson v. Inessa Stewart’s Antiques, Inc.*, 708 So. 2d 1132, 1135 (La. Ct. App. 1998); *Divincenti v. Redondo*, 486 So. 2d 959, 960 (La. Ct. App. 1986). Rule 2-12.4(B)(4) of the Louisiana Uniform Rules, Courts of Appeal, provides: “The court may consider as abandoned any assignment of error or issue for review which has not been briefed.” LA. CT. APP. R. 2-12.4(B)(4).

she requests sanctions. Then, if the appellant fails to file an appellate brief, the appellee must decide whether to ask that the appeal be dismissed as abandoned. Finally, once the request for sanctions is properly before the court, the appellee must prove that he or she is entitled to damages. Unfortunately, the courts are unclear as to how that is to be accomplished or even who should award the sanctions.

A. Appellee's Request for Other Modifications of Judgment

A long line of cases holds that frivolous-appeal damages will not be awarded if the appellee asks for other relief in his cross-appeal or answer to appeal.¹⁶⁶ The fountainhead for this rule is the 1824 case *Desblieux v. Darbonneaux*, which held that where the appellee answered the appeal and received an amendment to the judgment, he could not claim he was injured by the appeal and thus was not entitled to damages.¹⁶⁷ In 1853, the court cited *Desblieux* in dicta for the proposition that frivolous-appeal sanctions could not be awarded if the appellee received an amendment of the judgment.¹⁶⁸ By 1874, however, the rule had morphed from no sanctions if the appellee *successfully* asked for amendment to “no damages can be allowed where the appellee *joins in the appeal*, however frivolous it may be.”¹⁶⁹ This rule has simply been repeated over and over with no analysis, except for this statement in 2005: “To the extent that the [appellee] has answered the appeal and requested modification of the judgment, the [appellee] admits that the judgment is at least partially in error.”¹⁷⁰

If the appellee planned to appeal an error in the judgment before learning of his opponent's appeal, he will incur no additional delay when his opponent appeals first. Consequently, the opponent's appeal cannot be considered frivolous as “solely for delay.” But an appellant can certainly file an appeal raising meritless issues in an attempt to harass his opponent, and if that occurs, the appellee is damaged because he has to expend time and money dealing with

166. *Abushanab v. St. Charles Gaming Co.*, 103 So. 3d 1197, 1207 (La. Ct. App. 2012); *ANR Pipeline Co. v. La. Tax Comm'n*, 923 So. 2d 81, 100 (La. Ct. App. 2005); *Parker, Seale & Kelton v. Messina*, 36 So. 2d 724, 728 (La. 1948); *Dennis v. Huber*, 92 So. 126, 127 (La. 1922); *Mahan v. Michel*, 27 La. Ann. 97, 97 (1875); *Whetstone v. Rawlins*, 26 La. Ann. 474, 476 (1874) (on application for rehearing).

167. *Desblieux v. Darbonneaux*, 2 Mart. (n.s.) 215, 217 (La. 1824).

168. *Hood v. Knox*, 8 La. Ann. 73, 73 (1853).

169. *Whetstone*, 26 La. Ann. at 476 (emphasis added). The Louisiana Supreme Court stated this was based on “settled jurisprudence” but cited no cases. *Id.*

170. *ANR Pipeline*, 923 So. 2d at 100.

those issues. If the appellee is unsuccessful in his attempt to have the judgment amended, he should be able to receive reimbursement to the extent he was damaged by the frivolous appeal.

B. Maintenance of Answer to Appeal When Appeal Is Dismissed

When an appeal is dismissed as abandoned after an answer to appeal is filed, the circuits conflict as to whether damages may be awarded for frivolous appeal. In *Weathers v. Herald Life Insurance Co.*, the Louisiana Third Circuit Court of Appeal held that when the original appeal is dismissed, the answer, “being unsupported and without foundation, falls also,” and that article 2133 “does not allow the maintenance of an answer independently of the appeal from which it arose.”¹⁷¹ The court opined that the appellee should have sought relief through a separate appeal instead of an answer.¹⁷² *Weathers* was followed by two other Third Circuit cases¹⁷³ and one from the Fifth Circuit.¹⁷⁴

The Second Circuit, in a well-reasoned opinion in *State ex rel. Muse v. Ross*, expressly declined to follow *Weathers* and its progeny.¹⁷⁵ The court noted the language in article 2133 that the answer to appeal “shall be equivalent” to a separate appeal¹⁷⁶ and stated it “would not truly be equivalent” if the appellant could cause the answer to fall simply by dismissing his appeal.¹⁷⁷ The court also cited the official Revision Comments to article 2133, which state that filing an answer to appeal is the proper method to request damages for frivolous appeal.¹⁷⁸ The court thus found that the answer to appeal survived dismissal of the original appeal.¹⁷⁹

The court further noted in *Muse* that the First Circuit had awarded damages in two cases where the original appeal was dismissed as abandoned and the appellee requested article 2164

171. *Weathers v. Herald Life Ins. Co.*, 284 So. 2d 624, 625 (La. Ct. App. 1973).

172. *Id.*

173. *Crochet v. Pritchard*, 509 So. 2d 501 (La. Ct. App. 1987); *Moity v. Guilliot*, 466 So. 2d 511 (La. Ct. App. 1985).

174. *Edwards v. Lousteau Auto Sales*, 424 So. 2d 460 (La. Ct. App. 1982).

175. *State ex rel. Muse v. Ross*, 651 So. 2d 364, 365–66 (La. Ct. App. 1995).

176. Article 2133 provides in pertinent part, “The answer filed by the appellee shall be equivalent to an appeal on his part from any portion of the judgment rendered against him in favor of the appellant and of which he complains in his answer.” LA. CODE CIV. PROC. art. 2133 (2015).

177. *Muse*, 651 So. 2d at 365 (internal quotation marks omitted).

178. *Id.* at 365.

179. *Id.* at 366.

sanctions through an answer to appeal.¹⁸⁰ In those cases, the court found there was no need for a trial on the merits because it was apparent that the appellant did not sincerely believe his appeal had merit if he filed no brief and specified no error.¹⁸¹

This issue has arisen only once since *Muse*, in a Second Circuit case that followed *Muse*,¹⁸² and the Louisiana Supreme Court has never ruled on the issue. This author agrees with the court in *Muse* that to allow an appellant to avoid sanctions for frivolous appeal by simply dismissing his appeal “hamper[s] the deterrent effect provided by the potential for assessment of frivolous appeal damages.”¹⁸³

C. Proof of Frivolous-Appeal Damages

The party seeking damages normally has the burden of proof. Louisiana courts have never explicitly discussed burden of proof with regard to frivolous-appeal sanctions. However, several cases imply that the appellee is required to prove through evidence in the record that the appellant is insincere or that the appeal was taken merely for delay. For example, in *Hampton v. Greenfield*, the Louisiana Supreme Court stated that “nothing in the record suggests that the appeal was filed solely for delay.”¹⁸⁴ In *Neff v. City Planning Commission*,¹⁸⁵ the court denied frivolous-appeal sanctions, stating: “Although Mr. Neff contends that this appeal was intended merely to delay his return to his position, he offers no evidence of this.”¹⁸⁶ Similarly, in *Lucy v. State Farm Insurance Co.*,¹⁸⁷ the court stated: “There is no evidence in the record that this appeal was taken merely for delay purposes.”¹⁸⁸ In *Ritter v. Genovese*, the appellee tried to prove frivolity through the lack of specificity in the brief, but the court

180. See *Capital-Union Sav., F.A. v. Williams*, 528 So. 2d 187, 188 (La. Ct. App. 1988); *Ecopur, Inc. v. McCloud*, 432 So. 2d 380, 381 (La. Ct. App. 1983).

181. *Capital-Union*, 528 So. 2d at 188; *Ecopur*, 432 So. 2d at 381.

182. *Succession of Chapman*, 699 So. 2d 916 (La. Ct. App. 1997).

183. *Muse*, 651 So. 2d at 366.

184. *Hampton v. Greenfield*, 618 So. 2d 859, 862 (La. 1993) (emphasis added).

185. 681 So. 2d 6 (La. Ct. App. 1996).

186. *Id.* at 9.

187. 475 So. 2d 88 (La. Ct. App. 1985).

188. *Id.* at 90 (emphasis added). See also *Gagnard v. Zurich Am. Ins. Co.*, 819 So. 2d 489, 496 (La. Ct. App. 2002) (“Plaintiff’s counsel simply urges his blanket belief that this appeal lacks legitimate bases, without offering any evidence whatsoever that it was taken for delay or that counsel was insincere.”).

denied sanctions because it had “no *record proof* of defendant's alleged dilatory and deficient actions.”¹⁸⁹

The difficulty here is that Louisiana appellate courts are courts of record; they may not review evidence that is not in the record, nor may they receive evidence.¹⁹⁰ As the Louisiana Third Circuit explained: “The record on appeal includes the pleadings, court minutes, transcript, jury instructions, judgments, and other rulings unless otherwise designated. . . . [F]acts referred to solely in the arguments of counsel, in brief or otherwise, are not considered record evidence.”¹⁹¹ Requiring an appellee to point to evidence in the trial court record proving that an appeal was taken solely for delay is an almost impossible burden.

Furthermore, the courts have held that they should look to the nature of the appeal to determine whether an appeal is frivolous, rather than to the actions of the appellant that gave rise to the lawsuit or the behavior during trial.¹⁹² The trial court record contains evidence of the actions giving rise to the suit and the behavior during trial but tells the appellate court nothing about the nature of the appeal.

Despite the language in the jurisprudence, courts often cite assertions of sincerity in an appellant's brief or at appellate oral argument to deny sanctions,¹⁹³ and cite actions in the appellate court such as failing to appear for oral argument or filing briefs that cite no legal authority as evidence of insincerity.¹⁹⁴ Some courts also admit to considering both the record and the briefs, denying sanctions because neither contain evidence of lack of sincerity or dilatory tactics.¹⁹⁵

189. *Ritter v. Genovese*, 740 So. 2d 807, 810 (La. Ct. App. 1999) (emphasis added).

190. LA. CODE CIV. PROC. art. 2164 (2015) (“The appellate court shall render any judgment which is just, legal, and proper *upon the record on appeal*.” (emphasis added)); *Cao v. Liberty Mut. Ins. Co.*, 119 So. 3d 725, 729 (La. Ct. App. 2013).

191. *Abushanab v. St. Charles Gaming Co.*, 103 So. 3d 1197, 1201 (La. Ct. App. 2012) (quoting *Thomas v. Connolly*, 726 So. 2d 1052, 1054 (La. Ct. App. 1999)).

192. *Jordan v. City of Baton Rouge*, 652 So. 2d 701, 705–06 (La. Ct. App. 1995); *Fudge v. Levine*, 647 So. 2d 405, 409 (La. Ct. App. 1994).

193. *See, e.g., Haney v. Davis*, 925 So. 2d 591, 599 (La. Ct. App. 2006); *Fisk v. Mathews*, 525 So. 2d 223, 227 (La. Ct. App. 1988).

194. *See, e.g., Bankston v. Alexandria Neurosurgical Clinic*, 583 So. 2d 1148, 1155 (La. Ct. App. 1991); *Allen v. IMTC, Inc.*, 567 So. 2d 1155, 1159 (La. Ct. App. 1990).

195. *See, e.g., Tee It Up Golf, Inc. v. Bayou State Constr., L.L.C.*, 30 So. 3d 1159, 1162 (La. Ct. App. 2010); *Petrocana, Inc. v. William H. Kenny Consultants, Ltd.*, 595 So. 2d 384, 386 (La. Ct. App. 1992).

D. Determining Which Court Assesses Damages

Appellate courts can determine the amount of attorney fees to award on appeal based on the skill of the attorney and the effort required on appeal,¹⁹⁶ which the judges witness firsthand from the appellate briefs and oral arguments. Thus, when the sanction imposed is attorney fees, the appellate courts usually set the amount of the sanctions themselves.¹⁹⁷ However, some courts have remanded cases to the trial court to take evidence and determine the amount of attorney fees,¹⁹⁸ as an appellate court cannot receive evidence. In one puzzling case, the court set an amount for “sanctions” for a frivolous writ application but also remanded “for a hearing to determine the appropriate amount of sanctions, representing respondent’s legal fees and costs incurred in defending this matter in the trial court.”¹⁹⁹

When damages in addition to attorney fees are awarded, appellate courts are more likely to remand to the trial court to take evidence of the damages. In one case, the appellate court remanded to take evidence of the “extent, if any, the appellant has been unjustly enriched and the appellee unjustly damaged by the appellant’s continual receipt of alimony *pendente lite* during the course of the appeal.”²⁰⁰ And in an eviction suit, the court remanded to the trial court for it to take evidence on the amount of rent the appellee lost during the appeal.²⁰¹

196. *Nesbitt v. Nesbitt*, 79 So. 3d 347, 353 (La. Ct. App. 2011).

197. *See, e.g.*, *Succession of Horn*, 827 So. 2d 1241, 1248 (La. Ct. App. 2002) (remanding the case to trial court “for a hearing to determine the amount of attorney’s fees [appellee] has incurred in defending against [appellant’s] last amending petition” but setting the sanction of attorney fees on appeal at \$1,000).

198. *See, e.g.*, *Stumpf v. Richardson*, 748 So. 2d 1225, 1228 (La. Ct. App. 1999); *Blake v. Mosquito Control Bd.*, 470 So. 2d 193, 202 (La. Ct. App. 1985) (remanding for a hearing to determine attorney fees “[b]ecause there [was] no evidence contained in the record dealing with the attorney’s fees incurred by” appellant).

199. *Hester v. Hester (Hester II)*, 699 So. 2d 1099, 1102 (La. Ct. App. 1997). It is unclear from the opinion whether the court was assessing \$2,000 as a penalty in addition to legal fees and costs or whether the court meant that attorney fees were \$2,000 and the trial court was to determine the total figure by adding costs. *Id.*

200. *Lupberger v. Lupberger*, 805 So. 2d 264, 275 (La. Ct. App. 2001) (quoting *Lupberger v. Lupberger*, 739 So. 2d 1026 (La. Ct. App. 1999)). The trial court failed to do so, and the appellate court eventually made the assessment on its own, awarding legal interest on the alimony payments. *Id.*

201. *Arnona v. Arnona*, 497 So. 2d 9, 10 (La. Ct. App. 1986) (ordering the trial court to calculate the amount of attorney fees).

VI. TYPES OF SANCTIONS AWARDED AND AGAINST WHOM

Nationwide, sanctions for frivolous appeal include a percentage of the judgment;²⁰² a cash penalty, payable to the appellee, against the appellant, his attorney, or both;²⁰³ a cash penalty or fine payable to the court;²⁰⁴ attorney fees;²⁰⁵ a contempt finding;²⁰⁶ single or double damages;²⁰⁷ single, double, or treble costs;²⁰⁸ interest;²⁰⁹ dismissal of the appeal;²¹⁰ or a combination of these penalties. Louisiana courts may award costs and damages, including attorney fees or a percentage of the judgment. They may not, however, dismiss an appeal for frivolity or award a penalty or fine payable to the court, and no Louisiana appellant has ever been held in contempt for filing a frivolous appeal.

A. Attorney Fees and Other Monetary Awards

The predecessor statute to article 2164, Louisiana Code of Practice article 907,²¹¹ limited awards to 10% of the amount in dispute and were allowed only on a suspensive appeal from a money judgment.²¹² This left courts without a way to penalize either unsuccessful plaintiffs who appealed frivolously²¹³ or frivolous appellants in suits that did not involve money judgments, such as in custody cases.

202. See, e.g., GA. CODE ANN. § 5-6-6 (2013) (“When in the opinion of the court the case was taken up for delay only, 10 percent damages may be awarded by the appellate court upon any judgment for a sum certain which has been affirmed.”).

203. See, e.g., GA. CT. APP. R. 15 (requiring the penalty not to exceed \$2,500).

204. See, e.g., ARK. R. APP. PROC. CIV. 11.

205. See, e.g., ALASKA R. APP. PROC. 508(e)(2); HAW. R. APP. PROC. 38.

206. See, e.g., ARIZ. R. CIV. APP. PROC. 25.

207. See, e.g., FED. R. APP. PROC. 38 (“just damages”); ARIZ. REV. STAT. ANN. § 12-349(A) (2003) (double, but not to exceed \$5,000). “Damages” specifically includes attorney fees in many states, including Louisiana. See LA. CODE CIV. PROC. art. 2164 (2015).

208. See, e.g., FED. R. APP. PROC. 38 (single or double); ME. REV. STAT. tit. 14, § 1802 (2013) (treble); N.C. R. APP. PROC. 34 (single or double); N.D. R. APP. PROC. 38 (single or double); UTAH R. APP. PROC. 33 (single or double).

209. See, e.g., N.H. REV. STAT. ANN. § 490:14-a (2009) (stating the “interest at the rate of 12 percent per annum on any amount which has been previously found due or for which a verdict has been recovered or which the moving party has been ordered to pay,” in addition to double costs).

210. See, e.g., N.C. R. APP. PROC. 34; OKLA. STAT. tit. 12, § 995 (2000).

211. LA. CODE PRAC. art. 907 (Dart 1942).

212. Stephenson, *supra* note 13, at 138.

213. As one commentator noted: “[T]he use of an appeal to harry a defendant into compromise is quite as lamentable as its employment by defendants to

Article 2164 gives the courts much more discretion. It does not specify the types of damages that may be awarded for frivolous appeal or even against whom the damages can be assessed. The 2010 amendment added the phrase “including attorney fees,” which simply codified what Louisiana courts had been doing for at least 40 years under the theory that the appellee’s principal damages are what he “must pay his attorney to answer the appeal in order to establish that the appeal *is* frivolous.”²¹⁴ That amendment quelled any qualms judges might have had over awarding attorney fees in light of the long-established rule in Louisiana that attorney fees could not be awarded except where authorized by contract or statute.²¹⁵

The first cases awarding frivolous-appeal damages after article 2164’s enactment in 1961 simply awarded a percentage of the judgment.²¹⁶ More recent cases tend to award a sum of money characterized alternatively as “legal fees,”²¹⁷ “penalties,”²¹⁸ “damages,”²¹⁹ or, most commonly, “attorney’s fees.”²²⁰ Occasionally, a court awards both damages and attorney fees.²²¹

delay satisfaction of a judgment.” Note, *Penalties for Frivolous Appeals*, 43 HARV. L. REV. 113, 117 (1929).

214. *Samford v. Samford*, 297 So. 2d 465, 468 (La. Ct. App. 1974).

215. *See* *Sher v. Lafayette Ins. Co.*, 988 So. 2d 186, 201 (La. 2008). Before the 2010 amendment, the courts explained that the rule prohibiting attorney fees except when authorized by contract or statute did not apply because the appellee’s liability for attorney fees for defending a groundless appeal “does not occur until *after* rendition of the judgment by the lower court and the perfecting of the appeal [and] cannot be claimed in the original suit. As a consequence, the usual rule of denying recovery for attorney’s fees unless provided by contract or statute has no application.” *Boulet v. Foti*, 539 So. 2d 843, 845 (La. Ct. App. 1989) (quoting *Samford*, 297 So. 2d at 468).

216. *See, e.g., Bader Fin. Co. v. Asset*, 169 So. 2d 220, 221 (La. Ct. App. 1964) (5% of the principal amount of the judgment); *Hous. Oil Field Material Co. v. Creole Explorations, Inc.*, 150 So. 2d 48, 50 (La. Ct. App. 1963) (5% of the principal and accrued interest).

217. *See, e.g., Lindsey v. Caddo Parish Sch. Bd.*, 954 So. 2d 272, 275 (La. Ct. App. 2007).

218. *See, e.g., Hughes v. Fabio*, 983 So. 2d 946, 954 (La. Ct. App. 2008).

219. *See, e.g., Johnson v. Johnson*, 986 So. 2d 797, 802 (La. Ct. App. 2008); *Lafayette City Parish Consol. Gov’t v. Dien’s Auto Salvage, Inc.*, 916 So. 2d 384, 395 (La. Ct. App. 2005).

220. *See, e.g., Davisson v. O’Brien*, 104 So. 3d 467, 476 (La. Ct. App. 2012); *Nesbitt v. Nesbitt*, 79 So. 3d 347, 353 (La. Ct. App. 2011).

221. *See, e.g., Voiron v. Voiron*, 897 So. 2d 697, 699 (La. Ct. App. 2004) (imposing \$500 in damages and \$1,000 in attorney fees; noting in a footnote that article 2164 allows the award of damages); *Hester v. Hester (Hester IV)*, 752 So. 2d 269, 273 (La. Ct. App. 2000) (awarding \$3,000 in attorney fees and “sanctioned and fined” the appellant \$5,000, payable to the appellee).

The two most common types of damages awarded in addition to attorney fees are lost rent in cases where frivolous appeals postponed evictions²²² and the return of alimony pendente lite paid where frivolous appeals postponed termination of the marriage.²²³ Alimony pendente lite was Louisiana's version of interim spousal support, which terminated when a judgment of divorce became final. In 1997, the Louisiana Legislature amended the law regarding spousal support and separated the awarding of support from the rendition of a support judgment.²²⁴ The amendments eliminated the incentive to appeal divorce judgments; the last two reported cases seeking damages for frivolous appeal in alimony cases involved suits for divorce that were filed in 1997.²²⁵

B. Amount of Monetary Sanctions

Louisiana courts have accurately described the monetary sanctions awarded in Louisiana frivolous-appeal cases as “modest.”²²⁶ Over the past 30 years, awards have ranged from a low of \$250²²⁷ to a high of \$20,000,²²⁸ with the most recent award being \$1,000.²²⁹ Although the amount of the awards seems to be increasing slightly, three cases in the last decade awarded less than \$1,000 in sanctions.²³⁰

222. *See, e.g.*, *Wilson v. Fuqua*, 553 So. 2d 926, 928 (La. Ct. App. 1989); *Arnona v. Arnona*, 497 So. 2d 9, 10 (La. Ct. App. 1986).

223. *Roland v. Roland*, 519 So. 2d 1177, 1179–80 (La. Ct. App. 1987) (awarding attorney fees, return of alimony paid while the suit was pending, and return of one-half of the mortgage payments that appellee made on the family home while not allowed to live there); *Schnatz v. Schnatz*, 501 So. 2d 318, 320 (La. Ct. App. 1987) (awarding attorney fees plus \$750 in damages, stating that “the sole purpose of the appeal was delay in order for her eligibility for alimony pendente lite payments to continue”).

224. Kenneth Rigby, *The 1997 Spousal Support Act*, 58 LA. L. REV. 887, 898–99 (1998).

225. *Lupberger v. Lupberger*, 805 So. 2d 264, 266 (La. Ct. App. 2001); *Lemoine v. Lemoine*, 715 So. 2d 1244, 1245 (La. Ct. App. 1998).

226. *In re Clement*, 46 So. 3d 804, 809 (La. Ct. App. 2010); *Yarnell Ice Cream Co. v. Allen*, 867 So. 2d 969, 973 (La. Ct. App. 2004).

227. *River Parish Fin. Serv., Inc. v. Stewart*, 474 So. 2d 1025, 1027 (La. Ct. App. 1985).

228. *Hester v. Hester (Hester V)*, 874 So. 2d 859, 862 (La. Ct. App. 2004).

229. *Cox v. O'Brien*, 147 So. 3d 809, 817 (La. Ct. App.), *writ denied*, No. 2014-C-1907, 2014 WL 6725688 (La. Nov. 21, 2014).

230. *Gray v. Gray*, No. 2011 CA 2360, 2012 WL 4501002, at *1 (La. Ct. App. Oct. 1, 2012) (awarding \$750); *Johnson v. Johnson*, 986 So. 2d 797, 802 (La. Ct. App. 2008) (awarding \$500); *Lindsey v. Caddo Parish Sch. Bd.*, 954 So. 2d 272, 275 (La. Ct. App. 2007) (awarding \$750).

C. Dismissal of Appeal as a "Sanction"

A sanction is a penalty or punishment.²³¹ Dismissal of an appeal is technically not a sanction because a frivolous appeal will ultimately be unsuccessful;²³² dismissal simply hastens the process. However, federal courts treat summary dismissal as a sanction, and many states' rules specifically list dismissal as a sanction.²³³ Although Federal Rule of Appellate Procedure 38 does not mention dismissal,²³⁴ federal courts have inherent power to dismiss an appeal taken in bad faith.²³⁵ Furthermore, many of the federal circuits have enacted local rules that explicitly provide that frivolous appeals may be dismissed,²³⁶ including the Fifth,²³⁷ Eighth,²³⁸ Tenth,²³⁹ Eleventh,²⁴⁰ and D.C. Circuits.²⁴¹

In Louisiana, however, a state court may not dismiss an appeal simply because it is frivolous.²⁴² The Louisiana Supreme Court explained in 1956 that "to determine whether an appeal is frivolous or is taken for purposes of delay and harassment necessarily requires an examination of, and a decision on, the merits of the appeal. It is only after the appeal has been heard on its merits" that the court can resolve the parties' contentions.²⁴³ For the same reasons, an appellee cannot agree to settle a case and yet retain the right to pursue sanctions for frivolous appeal.²⁴⁴

231. STEWART RAPALJE & ROBERT L. LAWRENCE, II *DICTIONARY OF AMERICAN AND ENGLISH LAW* 1147 (1997).

232. Martineau, *supra* note 144, at 864.

233. *See, e.g.*, ARK. R. APP. PROC. CIV. 11(c).

234. The rule 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." FED. R. APP. PROC. 38.

235. Martineau, *supra* note 144, at 862.

236. Federal Rule of Appellate Procedure 47(a)(1) authorizes each court of appeals to "make and amend rules governing its practice."

237. 5TH CIR. R. 42.2.

238. 8TH CIR. R. 47A.

239. 10TH CIR. R. 46.5(D).

240. 11TH CIR. R. 42-4.

241. D.C. CIR. R. 38.

242. *Francois v. Andry*, 930 So. 2d 995, 997 (La. Ct. App. 2006); *Jarman v. Jarman*, 532 So. 2d 484, 486 (La. Ct. App. 1988).

243. *Kendrick v. Garrene*, 91 So. 2d 603, 606 (1956).

244. *Barry W. Miller, A Prof'l Law Corp. v. Poirier*, 580 So. 2d 558, 560-61 (La. Ct. App. 1991).

D. Who Can Be Sanctioned

As noted above, article 2164 does not state against whom sanctions can be assessed. One commentator opined that the full burden of sanctions should be on the attorney²⁴⁵ unless the client is a “large, sophisticated institution.”²⁴⁶ The federal courts have assessed damages solely against the attorney in several cases where the appellant had no practical legal knowledge²⁴⁷ and where it was “unlikely that the appellant was responsible in any truly meaningful way for the meritlessness of the legal arguments presented.”²⁴⁸ Some courts have assessed sanctions against both client and counsel because “attorney and client are in the best position between them to determine who caused [the] appeal to be taken,”²⁴⁹ and when frivolous arguments are made, counsel “must be held responsible for [his] tactical decision.”²⁵⁰

Despite Louisiana courts’ broad authority, in the past 30 years, Louisiana courts have sanctioned only counsel for a frivolous appeal just once²⁵¹ and have sanctioned both client and counsel in only three of the 75 cases in which represented parties were sanctioned—all cases where attorneys behaved very badly.²⁵² In one case, the court noted counsel’s “unprofessional and unduly confrontational

245. Scott A. Martin, Note, *Keeping Courts Afloat in a Rising Sea of Litigation: An Objective Approach to Imposing Rule 38 Sanctions for Frivolous Appeal*, 100 MICH. L. REV. 1156, 1175 (2002) (noting that “when an appeal is objectively frivolous, the attorney should naturally be the one to bear the burden of the monetary sanction”).

246. *Id.* at 1178.

247. See, e.g., *Coghlan v. Starkey*, 852 F.2d 806, 816–17 (5th Cir. 1988) (stating that “blame for this appeal rests upon her attorney, and usually so should the burden of any sanctions”); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1200, 1202 (7th Cir. 1987).

248. Martin, *supra* note 245, at 1174–75.

249. Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 PACE L. REV. 323, 341 (1999) (quoting *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 382 (2d Cir. 1982)). See also *Hagerty v. Succession of Clement*, 749 So. 2d 217, 222–23 (5th Cir. 1984); S. Jay Plager et al., *The Federal Circuit and Frivolous Appeals*, 12 FED. CIR. B.J. 373, 387 (2002–2003).

250. *Dungaree Realty, Inc. v. United States*, 30 F.3d 122, 125 (Fed. Cir. 1994).

251. *In re Succession of Horn*, 827 So. 2d 1241, 1247–48 (La. Ct. App. 2002) (awarding frivolous-appeal sanctions against attorney who appealed from trial court but failed to address the issue in brief; the trial-court proceedings were “duplicative, reiterating the same claims and repeating the same arguments regardless of their having been found without merit by two courts”).

252. *Davisson v. O’Brien*, 104 So. 3d 467 (La. Ct. App. 2012); *Mitchell v. Brown Builders*, 902 So. 2d 1288 (La. Ct. App. 2005); *Olympia Roofing Co. v. Henican*, 534 So. 2d 16 (La. Ct. App. 1988).

manner” and “reprehensible tactics and conduct.”²⁵³ In the second, there was “no basis whatsoever in the record” to support the appellant’s claim, and appellant’s counsel failed to offer “a single case or statute that support[ed] his argument.”²⁵⁴ In the third, the court complained of “rambling briefs” containing “primarily superfluous and purely vindictive statements” and “paragraph after paragraph of meaningless and irrelevant allegations.”²⁵⁵

VII. TREATMENT OF PRO SE PARTIES

A. *Pro Se Appellants*

When the appellant and his badly behaving counsel are one and the same, i.e., an attorney appearing pro se, the courts are likely to impose sanctions. In cases where the pro se appellant is not legally trained, however, courts are extremely reluctant to impose sanctions under article 2164,²⁵⁶ “even though a small number of such litigants expend a disproportionate amount of the court’s time and resources.”²⁵⁷ In the federal system, “[m]any courts have historically chosen not to impose sanctions on pro se appellants, even after a finding of frivolity.”²⁵⁸ Louisiana courts are also reluctant to sanction pro se appellants.²⁵⁹ Although pro se litigants are given more latitude than represented appellants in Louisiana,²⁶⁰ courts will award sanctions in cases of flagrant abuse of the judicial system.

253. *Davisson*, 104 So. 3d at 476.

254. *Mitchell*, 902 So. 2d at 1292.

255. *Olympia Roofing*, 534 So. 2d at 17, 19.

256. *Duke v. Sherwood Acres Apartments*, 898 So. 2d 416, 418 (La. Ct. App. 2004) (“[C]ourts of appeal generally refrain from awarding damages for frivolous appeals against pro se litigants.”).

257. *Bankston v. Alexandria Neurosurgical Clinic*, 659 So. 2d 507, 511 (La. Ct. App. 1995).

258. Meehan Rasch, *Not Taking Frivolity Lightly: Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38*, 62 ARK. L. REV. 249, 273 (2009). See, e.g., *Lonsdale v. Comm’r*, 661 F.2d 71, 72 (5th Cir. 1981) (stating that “[a]ppellants’ contentions are stale ones, long settled against them. As such they are frivolous. Bending over backwards, in indulgence of appellants’ pro se status, we today forbear the sanctions of Rule 38 . . .”).

259. See, e.g., *Bernard v. Lafayette City-Parish Consol. Gov’t*, No. 12-1341, 2013 WL 1437891, at *3 (La. Ct. App. Apr. 10, 2013) (declining to award penalties against pro se appellants because “as lay people, they did not comprehend the consequences of their actions”); *Zeno v. Foret*, No. 10-330, 2010 WL 3903782, at *1 (La. Ct. App. Oct. 6, 2010) (“Inasmuch as the appellant is appearing pro se, we deny any damages for frivolous appeal.”)

260. *Dowl v. Redi Care Home Health Ass’n*, 31 So. 3d 596, 608 (La. Ct. App. 2010).

For example, in *Dowl v. Redi Care Home Health Ass'n*, the court imposed sanctions against a pro se litigant who appealed despite the trial judge thoroughly explaining to him that he had no case and would be penalized if he appealed.²⁶¹ In *Bankston v. Alexandria Neurosurgical Clinic*, the pro se litigant failed to appear at trial and then filed repeated appeals of the same issue.²⁶² The court awarded sanctions in all three appeals because of the “repeated abuse of the judicial system” through “voluminous, repetitive, and irrational filings.”²⁶³ And, in *Allen v. IMT, Inc.*, the court sanctioned the pro se litigant, finding that she was not serious when she filed a late brief that cited no legal authority and asserted specifications of error that “were totally without merit either factually or legally.”²⁶⁴

The rationale for giving more latitude to pro se appellants is their lack of legal training.²⁶⁵ That rationale disappears when the pro se appellant is a law student or attorney. The courts have sanctioned legally trained pro se appellants in at least three cases.²⁶⁶

B. Pro Se Appellees

In the one reported Louisiana case seeking article 2164 sanctions where the appellee appeared pro se, the court denied sanctions under article 2164, apparently under the mistaken belief that the only applicable damages were attorney fees. In *Miles v. Connick*,²⁶⁷ an inmate won affirmance of a public-records request suit. He asked for statutory attorney fees and frivolous-appeal damages. The court denied both requests because “he [was] not entitled to be reimbursed for fees that he was not required to pay.”²⁶⁸

261. *Id.* at 609.

262. *Bankston v. Alexandria Neurosurgical Clinic (Bankston III)*, 659 So. 2d 507, 511 (La. Ct. App. 1995); *Bankston v. Alexandria Neurosurgical Clinic*, 583 So. 2d 1156 (La. Ct. App. 1991); *Bankston v. Alexandria Neurosurgical Clinic*, 583 So. 2d 1148 (La. Ct. App. 1991).

263. *Bankston III*, 659 So. 2d at 511.

264. *Allen v. IMT, Inc.*, 567 So. 2d 1155, 1159 (La. Ct. App. 1990).

265. *Dowl*, 31 So. 3d at 608.

266. *Sisk v. Sisk*, 971 So. 2d 1215, 1218 (La. Ct. App. 2007) (sanctioning former attorney who cited no legal authority in brief, was warned by both the trial and appellate courts about accusations against the court, and still made “endless defamatory and unsupportable allegations”); *Hester v. Hester (Hester II)*, 699 So. 2d 1099, 1102 (La. Ct. App. 1997) (noting that attorney exhibited a “continued pattern of harassment and delay” against his ex-wife); *State Farm Mut. Auto. Ins. Co. v. Callahan*, 571 So. 2d 852, 855 (La. Ct. App. 1990) (explaining at length that claimed defense of law student/appellant was frivolous when at time of trial the appellant was “not wholly unfamiliar with the legal system” and was admitted to the bar by the time the appeal was decided).

267. 613 So. 2d 1169 (La. Ct. App. 1993).

268. *Id.* at 1172.

VIII. ETHICAL CONSIDERATIONS

Attorneys who represent appellants are held to a higher standard than non-attorney pro se appellants, of course, because attorneys are subject to rules of ethics and professionalism.

The first ethical issue an appellate attorney faces is whether to bring the appeal. The attorney “must assess whether a good-faith argument . . . exist[s] to support the client’s claim.”²⁶⁹ Louisiana Rule of Professional Conduct 3.1 prohibits asserting or defending a claim “unless there is a basis in law and fact for doing so that is not frivolous.”²⁷⁰ Thus, “[i]f the legal question is not genuinely arguable, the case should not be [appealed].”²⁷¹

In order to make that determination, the attorney must identify the client’s objective in taking the appeal. If that objective is to delay or harass, the appeal may violate Louisiana Rule of Professional Conduct 3.2, which provides: “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”²⁷²

The attorney has an obligation to inform his client if the appeal is frivolous, as he must advise his client when adverse consequences can result from a proposed course of action.²⁷³ If the client’s objective in appealing is improper, the attorney must withdraw.²⁷⁴

If an attorney decides to take an appeal, knowing he has at least one meritorious issue, he then faces the ethical dilemma of whether to also include other not-so-meritorious issues. After all, a Louisiana appellant, unlike a federal appellant,²⁷⁵ will not be sanctioned “when partially frivolous grounds are urged on appeal if the appellant is accorded at least part of the relief requested based on a meritorious

269. MELISSA H. WERESH, *LEGAL WRITING: ETHICAL AND PROFESSIONAL CONSIDERATIONS* 130 (2d ed. 2009). See also J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L.J. 677, 684 (1989).

270. LA. R. PROF. CONDUCT, in LA. REV. STAT. ANN. § 37, ch. 4 app., art. XVI, R. 3.1 (2013) [hereinafter LA. R. PROF. CONDUCT].

271. Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate’s Duty and Opportunity*, 16 GA. L. REV. 821, 829 (1982).

272. LA. R. PROF. CONDUCT 3.2. See also Medina, *supra* note 269, at 684.

273. See *Smith v. St. Paul Fire & Marine Ins. Co.*, 366 F. Supp. 1283, 1289–90 (E.D. La. 1973), *aff’d*, 500 F.2d 113 (5th Cir. 1974) (quoting *Ramp v. St. Paul Fire & Marine Ins. Co.*, 269 So. 2d 239 (La. 1972)).

274. Medina, *supra* note 269, at 680; Glenn K. Seidenfeld, *Professional Responsibility Before Reviewing Courts*, 25 DEPAUL L. REV. 264, 268 (1976). In discussing attorneys’ obligations in criminal appeals, the United States Supreme Court stated that an attorney is “under an ethical obligation to refuse to prosecute a frivolous appeal.” *McCoy v. Ct. App. Wis.*, 486 U.S. 429, 436 (1988).

275. See *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1203 (7th Cir. 1987); Lopez, *supra* note 156, at 148.

ground.”²⁷⁶ The attorney should keep in mind that although he might not be sanctioned under article 2164, he is acting irresponsibly by wasting time that the court could be spending on meritorious issues.²⁷⁷ Moreover, such conduct contravenes the Louisiana Code of Professionalism, which provides in pertinent part: “I will not . . . utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party.”²⁷⁸

When the attorney does not withdraw and proceeds with an appeal intended to delay or harass, he violates several Louisiana Rules of Professional Conduct and risks official disciplinary proceedings. Rule of Professional Conduct 4.4(a) states: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”²⁷⁹ Rules 8.4(a) and (d) more generally proscribe unprofessional conduct. Rule 8.4(a) provides: “It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct . . . ;”²⁸⁰ and Rule 8.4(d) prohibits engaging “in conduct that is prejudicial to the administration of justice.”²⁸¹

Attorneys file frivolous appeals for myriad reasons, which generally fall into four categories: greed, anxiety, ineptness, and excessive zeal. Greedy attorneys appeal to increase their fees,²⁸² to profit from favorable interest rates,²⁸³ or to “harry [the opponent] into compromise.”²⁸⁴ Anxious attorneys appeal to keep clients they

276. *Thibodeau v. Mayor of Morgan City*, 619 So. 2d 595, 608 (La. Ct. App.), *rev'd on other grounds*, 629 So. 2d 362 (La. 1993). *See also* *Starwood v. Taylor*, 434 So. 2d 1236, 1238 (La. Ct. App. 1983); *Galloway v. Minckler*, 63 So. 2d 891, 892 (La. Ct. App. 1953).

277. *See* *Miner*, *supra* note 249, at 325–26.

278. *Code of Professionalism*, 62 LA. B.J. 307 (2015).

279. LA. R. PROF. CONDUCT 4.4(a).

280. LA. R. PROF. CONDUCT 8.4(a).

281. LA. R. PROF. CONDUCT 8.4(d).

282. *See* *Miner*, *supra* note 249, at 326; *Lopez*, *supra* note 156, at 150 (“[S]ome frivolous appeals are brought merely ‘to line a lawyer’s pocket.’”).

283. *Miner*, *supra* note 249, at 326. In *Bankers Trust Co. v. Publicker Industries Inc.*, 641 F.2d 1361, 1367–68 (2d Cir. 1981), the court noted that a judicial interest rate lower than the market rate encouraged appeals solely for delay. The value of the delay to the appellate ultimately depends on the extent of the delay; the further behind an appellate court’s docket is, the more incentive an appellant has to appeal. *Oberman*, *supra* note 5, at 1062 n.50.

284. *Penalties for Frivolous Appeals*, *supra* note 213, at 117. “Frivolous appeals are easy to file but often difficult and expensive to defend.” Mark R. Kravitz, *Unpleasant Duties: Imposing Sanctions for Frivolous Appeals*, 4 J. APP. PRAC. & PROCESS 335, 342 (2002). While on the First Circuit, Justice Breyer described “undesirable types of behavior” by both plaintiffs and defendants who appeal meritless cases seeking compromises. *Natasha, Inc. v. Evita Marine*

fear will find another attorney to file the appeal or worry that they will be sued for malpractice if they do not appeal.²⁸⁵ Inept attorneys fail to properly research²⁸⁶ or “blindly follow[] their clients’ wishes.”²⁸⁷ Overzealous attorneys want to show their clients “they are willing to fight to the end”;²⁸⁸ some become obsessed and use appeals to carry on a vendetta against their opponents.²⁸⁹

Under Louisiana’s standards, anxious, inept, overzealous, and even greedy attorneys are rarely sanctioned for filing frivolous

Charters, Inc., 763 F.2d 468, 471 (1985). Some unscrupulous plaintiffs appeal “strike suits” that “have no legal merit but which a plaintiff hopes the defendant will settle by paying the plaintiff something less than it would cost to defend the suit,” while some defendants who owe money may not pay it or may offer to pay less in the belief that “the costs of litigation will make it uneconomic for the plaintiff to pursue collection of the full amount owed.” *Id.* at 471–72 (citing Note, *Extortionate Corporate Litigation: The Strike Suit*, 34 COLUM. L. REV. 1308 (1934); Arthur Allen Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 5 (1970)).

285. Anastasia Parham Campbell, Student Commentary, *Frivolous Civil Appeals: How to Avoid Sanctions*, 25 J. LEGAL PROF. 135, 135 (2001); Miner, *supra* note 249, at 326.

286. See, e.g., *Natasha*, 763 F.2d at 472. Justice Breyer noted that while an “appeal’s frivolity may not be intuitively clear to one familiar with the field,” the appeal would be found frivolous when “a minimal amount of research, even a cursory reading of the relevant treatises and case law, should have revealed to the appellants” that a legal position was unsound. *Id.* As Professor Lopez noted, such a mistake may indicate ineptness, but “can reflect an empty head as easily as an impure heart.” Lopez, *supra* note 156, at 107. See also *Hilmon Co. (V.I.) Inc. v. Hyatt Int’l*, 899 F.2d 250, 254 (3d Cir. 1990) (holding that “attorneys have an affirmative obligation to research the law and to determine if a claim on appeal is utterly without merit and may be deemed frivolous”).

287. Campbell, *supra* note 285, at 135.

288. Miner, *supra* note 249, at 326. As the United States Court of Appeals for the Seventh Circuit noted, “the desire to keep business is an inevitable part of the practice of law. When lawyers yield to the temptation to file baseless pleadings to appease clients, however, they must understand that their adversary’s fees become a cost of *their* business.” *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985).

289. See, e.g., *Arthur A. Collins, Inc. v. Am. Tel. & Tel. Co.*, 103 F.3d 125 (5th Cir. 1996); *Platt v. Jack Cooper Transp., Co.*, 959 F.2d 91, 96 (8th Cir. 1992). One Louisiana judge, however, disagreed that overzealousness should be penalized. In *Gulf Coast Bank v. Robino*, 634 So. 2d 1190 (La. Ct. App. 1993), the trial court imposed sanctions on Robino for a frivolous pleading “filed for both harassment and dilatory purposes.” *Id.* at 1193. Robino appealed the sanctions and was assessed additional penalties on appeal. Judge John Saunders dissented from the imposition of sanctions, stating, “The true measure of any profession is the vigor and zeal given by its members to the interest of those they serve. An overzealous bar poses no threat to the ends of justice. One immobilized by timidity is, in my mind, a very real threat to those ends.” *Id.* at 1196 (Saunders, J., dissenting).

appeals, but in a recent case the Louisiana Supreme Court took disciplinary action against an attorney who “engaged in a pattern and practice of filing repetitive, harassing, burdensome, and frivolous lawsuits, appeals, and writs.”²⁹⁰ In that case, an attorney was publicly reprimanded for violating Rules 3.1, 4.4(a), 8.4(a), and 8.4(d).²⁹¹ The Rules of Professional Conduct were established to maintain the integrity of the legal profession and public confidence in the profession,²⁹² and it is appropriate that they be applied to attorneys who undermine that integrity and destroy public confidence in the profession.

IX. RECOMMENDATIONS AND CONCLUSION

Louisiana’s frivolous-appeal-sanction scheme is ineffective due to its highly subjective standards and the courts’ unwillingness to impose sanctions. Louisiana appellate judges complain about their crowded dockets, yet they do little to discourage time-consuming frivolous appeals. When, on average, fewer than three appeals are found frivolous each year, and those violators are punished with paltry monetary penalties, attorneys are not deterred from wasting the courts’ time with meritless claims. As Judge Morris Lottinger stated in *Rogers v. D’Aubin*: “The failure to award frivolous appeal damages sends forth a message to all appellees to not waste the time and effort seeking frivolous appeal damages, because they are not to be awarded.”²⁹³ Thus, one recommendation is that, when appropriate, Louisiana courts stop being so timid about imposing sanctions and punish appellants and their counsel for filing frivolous appeals.²⁹⁴

290. *In re Bandaries*, 156 So. 3d 1152, 1156–57 (La. 2014). In another case, the Louisiana Supreme Court referred attorney/appellant Hester to the Louisiana Office of Disciplinary Counsel “for investigation and appropriate action” after his ex-wife complained that in seven years he had filed 12 appeals before the intermediate appellate court and six writ applications to the Louisiana Supreme Court. *Hester v. Hester*, 756 So. 2d 314, 315 (La. 2000).

291. *Bandaries*, 156 So. 3d at 1160–61.

292. See Andrew D. Pugh, *The Antidiscrimination Amendment to Rule 8.4 of the Minnesota Rules of Professional Conduct*, 19 WM. MITCHELL L. REV. 211, 214–15 (1993).

293. 498 So. 2d 253, 257 (La. Ct. App. 1986) (Lottinger, J., dissenting). Judge Lottinger also authored the majority opinion but filed a separate opinion indicating his dissent at the majority’s refusal to award damages for frivolous appeal.

294. One appellate practitioner has suggested that appellate courts have become “the victims of their own timidity” when they refuse to impose sanctions or impose penalties that are so small they have no deterrent effect. Kravitz, *supra* note 284, at 348.

Another recommendation is that those penalties be more than a mere slap on the wrist. As the United States Court of Appeals for the Eleventh Circuit stated: "The best way to control unjustified tactics in litigation is to ensure that those who create costs also bear them."²⁹⁵ A typical "modest" award of \$1,000 is unlikely to fully compensate an appellee who must pay an attorney to file an answer to appeal, brief the case, and appear at oral argument. Imposing sanctions that fully cover the cost of the appellee's attorney fees would have much more of a deterrent effect.

The court refused to award sanctions in *Rogers* because it did not want to "penalize an appellant for his counsel's erroneous interpretation of the law."²⁹⁶ Penalizing the client is not much of a deterrent to an attorney and will not stop the attorney from continuing to file frivolous appeals in other cases.²⁹⁷ However, nothing in article 2164 prohibits the court from imposing sanctions directly against counsel, rather than the appellant. Thus, an additional recommendation is that Louisiana courts penalize the attorneys who are responsible for bringing the frivolous appeals, starting with cases involving briefs with no authority cited and counsel who fail to appear at oral argument. If the courts are reluctant to assess sanctions solely against the attorney, they may assess sanctions jointly against the attorney and the client as "attorney and client are in the best position between them to determine who caused [a frivolous] appeal to be taken."²⁹⁸

One reason intermediate appellate courts refuse to award sanctions is that they do not like to be reversed, and the Louisiana Supreme Court is not known for upholding sanctions. The highly subjective standard applied by the Louisiana Supreme Court gives unethical or inept attorneys a license to fritter away the courts' time, leaving less time for the issues that need deep analysis. As one commentator noted: "A high threshold sanctions scheme that requires proof of subjective bad faith as a prerequisite to sanctions is the least effective kind of sanctions scheme in deterring litigation abuse."²⁹⁹ A fourth suggestion is that when the Supreme Court addresses the issue again, it reject the *Parker* and *Hampton*

295. *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985).

296. *Rogers*, 498 So. 2d at 257.

297. See *Martin*, *supra* note 245, at 1181; *Coughlan v. Starkey*, 852 F.2d 806, 817 (5th Cir. 1988) (quoting *Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984)).

298. *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 382 (2d Cir. 1982).

299. Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Rule 11 and State Sanction Provisions*, 21 PEPP. L. REV. 1067, 1141 (1994).

test and instead adopt an objective test—at the time the appeal was taken, would a *reasonable attorney* have believed that the judgment should be reversed—rather than the current subjective test—whether the *appellant*, at the time he appealed, believe the judgment should be reversed.³⁰⁰ An objective test would discourage attorneys from filing appeals as “a knee-jerk-reaction to every unfavorable ruling”³⁰¹ and encourage more careful research and analysis.³⁰² An exception could be made for pro se appellants who lack legal training.³⁰³

A final recommendation is that the Louisiana Legislature ameliorate some of the procedural problems by amending the Code of Civil Procedure to allow frivolous-appeal sanctions to be requested by motion filed within a short period of time after the appellant’s brief is filed and to specifically allow frivolous-appeal sanctions when appeals are dismissed as abandoned. The current procedure, which requires the request to be made before the appellant’s brief is filed, leaves the appellee trying to guess the grounds for the appeal. It also gives the appellant a significant advantage under the current subjective standard, as it allows the appellant to defeat the request for sanctions by making a claim of sincerity in the brief.

The task of the appellate courts is to “ensure that justice is carried out.”³⁰⁴ Appellate courts should be willing “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 appellate court calendar for cases worthy of consideration.’”³⁰⁵ Sanctioning frivolous appeals will allow Louisiana appellate courts to ensure that justice is carried out by giving them more time to carefully consider meritorious appeals, reimbursing appellees for the time and money lost dealing with frivolous appeals, and punishing attorneys who flout ethical rules established to maintain the integrity of the profession.

300. See Lopez, *supra* note 156, at 74; Martineau, *supra* note 144, at 854–55; Rasch, *supra* note 258, at 275 (describing the reasonable-attorney standard as a “sensible benchmark”).

301. Simon & Flynn, Inc. v. Time, Inc., 513 F.2d 832, 833 (2d Cir. 1975).

302. See Martineau, *supra* note 144, at 855–56.

303. A federal court applied the standard that a pro se appeal was frivolous when a reasonable, non-legally trained person should have known “that his cause was indeed hopeless.” Bacon v. Am. Fed’n of State, Cnty., & Mun. Emps. Council, 795 F.2d 33, 35 (7th Cir. 1986).

304. LaDonte A. Murphy, Comment, *Access to Appellate Review: Writs, Appeals, and Interlocutory Judgments*, 34 S.U. L. REV. 27, 28 (2007).

305. Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993) (quoting Hilmon Co. (V.I.) Inc. v. Hyatt Int’l, 899 F.2d 250, 251 (3d Cir. 1990)).

