

9-1-2008

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Patrick D. Austermuehle
IIT Chicago-Kent College of Law

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JUST A BUNCH OF FUSSPOTS AND NITPICKERS? THAT PRETTY MUCH *SUMS* IT UP

PATRICK D. AUSTERMUEHLE*

Cite as: Patrick D. Austermuehle, *Just a Bunch of Fusspots and Nitpickers? That Pretty Much Sums It Up*, 4 SEVENTH CIRCUIT REV. 34 (2008), at <http://www.kentlaw.edu/7cr/v4-1/austermuehle.pdf>.

INTRODUCTION

The Seventh Circuit has a reputation for being “harshly critical” of attorneys—both in oral arguments and in written opinions—who fail to comply with the Federal Rules of Appellate Procedure or the Court’s Local Circuit Rules.¹ Judge Richard Posner, in his opinion in *Smoot v. Mazda Motors of America*, asked the question: by sanctioning attorneys for relatively small rule violations, are the Seventh Circuit judges simply “being fusspots and nitpickers”?² Whether the reputation is deserved, the practicing attorney in the Seventh Circuit has an incentive to follow both the federal rules and the court’s local rules—if the rules are ignored, or purposefully contravened, the attorney can be sure of a public rebuke in writing or before the Court during oral argument.³

* J.D. candidate, May 2008, Chicago-Kent College of Law, Illinois Institute of Technology.

¹ See Howard Bashman, *Have 7th Circuit Judges Gone off the Deep End?*, LAW.COM, <http://www.law.com/jsp/article.jsp?id=1165582068191> (last visited Feb. 9, 2009). The inspiration for this note was derived, in part, from Mr. Bashman’s commentary.

² 469 F.3d 675, 678 (7th Cir. 2006).

³ See e.g. *Ambati v. Reno*, 2 F. App’x. 500, 501 (7th Cir. 2001); *In re Bagdade*, 334 F.3d 568, 570 (7th Cir. 2003).

Smoot provides an interesting ground for discussion: is the Seventh Circuit more likely to sanction or discipline an attorney practicing before it than the rest of the Circuit Courts? Is this practice commonplace, or are the Seventh Circuit judges merely “nitpicking”?

In *Smoot*, both Plaintiffs’ and Defendants’ attorneys were reprimanded for failing to follow Federal Rule of Civil Procedure 28(a)(1), which requires all parties to submit a diversity statement when the case is before the Court on diversity grounds.⁴ After each party submitted appellate briefs which included deficient jurisdictional statements, the Court ordered the attorneys to submit supplemental jurisdictional statements which properly laid out the grounds for diversity jurisdiction.⁵ Unfortunately, neither party properly alleged sufficient grounds for diversity jurisdiction in their supplemental jurisdictional statements.⁶

The attorneys’ failure to file adequate jurisdictional statements was addressed in the opinion.⁷ As for the court’s rationale, it explained:

We have been plagued by the carelessness of a number of the lawyers practicing before the courts of this circuit with regard to the required contents of jurisdictional statements in diversity cases. It is time ... that this malpractice stopped. We direct the parties to show cause within 10 days why counsel should not be sanctioned for violating Rule 28(a)(1) and mistaking the requirements of diversity jurisdiction. We ask them to consider specifically the appropriateness, as a sanction, of their being

⁴ *Smoot*, 469 F.3d at 676; FED. R. APP. P. 28(a)(1).

⁵ See *Smoot v. Mazda Motors of America*, No. 01-3006 (7th Cir. Dec. 12, 2005) (Docket Entry of Nov. 29, 2006).

⁶ *Smoot*, 469 F.3d at 676. Plaintiff’s jurisdictional statement claimed that the amount in controversy was *equal to* rather than *in excess of* the statutory requirement for diversity jurisdiction. *Id.* Both parties’ jurisdictional statements failed to adequately explain the diversity of citizenship requirement for diversity jurisdiction. *Id.*

⁷ *Id.* at 676-77.

compelled to attend a continuing legal education class in federal jurisdiction.⁸

After a relatively lengthy discussion before reaching the merits, the Court decided that whether the elements of diversity were met was of no matter: the attorneys did not comply with the diversity statement rule and were therefore ordered to show cause why they should not be sanctioned and required to enroll in a continuing education class on federal jurisdiction.⁹

Judge Terrance Evans concurred in the Court's opinion on the merits, but dissented on the issue of attorney sanctions:

I decline to join the court's stinging criticism of the attorneys regarding their less-than-perfect jurisdictional statements. Sure, the plaintiffs should have said the amount in controversy exceeds \$75,000, not that it is \$75,000. And sure, both sides stumbled on their declarations regarding the dual citizenship of the corporate defendants. But, at best, these are low misdemeanors; yet the court treats them like felonies. . . I would not issue an order to show cause, and I certainly would not suggest that an appropriate sanction might be to compel the lawyers' attendance at "a continuing legal education class on federal jurisdiction."¹⁰

Are the justices of the Seventh Circuit simply being "fusspots and nitpickers"? Or do Federal Appellate Courts on the whole treat rule-breaking attorneys in a similar manner? Simply examining a small sample of Seventh Circuit cases and analyzing the Court's rationale for sanctioning attorneys would not effectively answer Judge Posner's question, as too many variables exist from case to case. Instead, the court's tendency to issue sanctions is more appropriately

⁸ *Id.* at 677-78

⁹ *Id.*

¹⁰ *Id.* at 682.

analyzed and discussed by empirically comparing it to the rest of the Federal Courts of Appeal.

By undertaking an empirical survey of Seventh Circuit's dockets and decisions which impose sanctions on attorneys for failure to comply with the Federal Rules of Appellate Procedure or the Seventh Circuit's local rules and comparing the results to similar surveys of the federal courts of appeal as a whole, this note will provide an empirical answer to Judge Posner's question. Part I describes the power of the federal courts to issue sanctions and discipline attorneys for failure to follow local and federal rules. Part II lays out the parameters of the empirical research, including both the rationale for the data collection and the methodology. Part III presents the results by comparing the types and frequency of sanctions issued by the Seventh Circuit and the U.S. courts of appeals collectively. Part IV will further discuss the data on attorney sanctions and discipline through a comparison of a specific appellate court's composition by political party of appointing President.

I. THE DISCIPLINARY POWER OF FEDERAL APPELLATE COURTS

Federal appellate courts have extensive power to sanction or discipline attorneys for misbehavior before the court. This power has been manifested in various statutory rules, most importantly Federal Rule of Appellate Procedure 46. Rule 46 provides:

(b) Suspension or Disbarment.

(1) *Standard.* A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) *Procedure.* The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) *Order*. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) **Discipline**. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.¹¹

Thus, Rule 46 allows a court of appeal to discipline attorneys who practice before it for “conduct unbecoming a member of the bar” or for failure to comply with any court rule or order.¹² Because the “conduct unbecoming a member of the bar” standard in Rule 46 is so broad, courts have pointed out several factors that will be considered in determining whether disciplining an attorney is appropriate:

[A] Court of Appeals carefully examines the circumstances of the particular situation, keeping in mind that the purpose of imposing sanctions is to protect litigants and possible future clients from further misfeasance, and deter other members of the bar from doing the same, and also considers the effect of the sanction on the individual attorneys involved.”¹³

Because this rule provides appellate court judges very broad sanctioning power, the decision to utilize the power is subjective; in any given scenario where an attorney fails to comply with a procedural

¹¹ FED. R. APP. P. 46(b), (c). On its face, the rule allows an Appellate Court to sanction only a member of that specific court’s bar association. However, “the disciplinary power is not limited to attorneys admitted to practice in Court.” *Ambati v. Reno*, 2 F. App’x 500, 501 (7th Cir. 2001).

¹² FED. R. APP. P. 46(c)

¹³ *Ambati*, 2 F. App’x at 501.

rule or a court order, the court *may* sanction or discipline the attorney.¹⁴ However, in many instances—especially with respect to trivial rule violations—judges refrain from issuing a sanction or an order to show cause.¹⁵

Generally, the quality of filings and attorney professionalism before any of the federal appellate courts is equivalent. It seems safe to assume that the First Circuit’s bar does is not comprised of a significant amount of “rule-breakers,” or that the Eleventh Circuit’s bar is not comprised of infallible attorneys. Although this is merely an assumption, for the purposes of this research it should be taken at face value. By assuming that the quality of any federal bar’s attorneys is equal, examining the types and number of disciplinary actions taken by any court will reveal the “disciplinary demeanor” of any given circuit court of appeals and may conclude that Judge Posner and his colleagues actually are just a bunch of “fusspots and nitpickers”.

II. THE SURVEY

A. Methodology

In conducting this empirical research many variables must be accounted for. Most important is determining what types of sanctions will be included in the empirical data. Attorneys can be sanctioned through various means. For example, in *Smoot*, the attorney was admonished in the Court’s opinion on the merits for allegedly improper attorney conduct.¹⁶ These “written sanctions” will be among the data collected included in the survey.¹⁷ Further, an appellate court

¹⁴ *Id.*

¹⁵ For a real-life illustration of this concept, see *Bashman*, *supra* n. 1.

¹⁶ *Smoot*, 469 F.3d at 677.

¹⁷ However, every opinion issued by the 7th Circuit during the relevant time period which discussed sanctioning an attorney had a corresponding docket entry which sanctioned or threatened to sanction an attorney. Compare *Smoot*, 469 F.3d at 677 with *Smoot v. Mazda Motors of America*, No. 01-3006 (7th Cir. Dec. 12, 2005) (Docket Entry of Nov. 29, 2006). Instead of collecting data by searching for

will frequently reprimand or threaten to impose a disciplinary action on an attorney by issuing an order that explains the allegedly improper conduct, and requires the attorney to provide an explanation to the court.¹⁸ These types of sanctions will be included in the result.

The methodology of this empirical study will be described in 4 relevant sections: period and scope, breadth of inquiry, data collection methodology, and baseline statistics.

i. Period and Scope

First, the data collection period is a critical step in setting up the survey.¹⁹ The period of data collection is September 30, 1997 to September 29, 2007. There are several reasons for choosing this ten-year period. First, the Director of the U.S. Courts publishes a Judicial Business Report and a Federal Court Management Statistics Report on a yearly basis, with data collection ending for each year on September 30.²⁰ By using these dates, an official report of federal appellate court statistics can be relied upon for all baseline appellate filing numbers. Further, a 10-year period is sufficiently lengthy to ensure enough relevant data but not so lengthy as to represent a sample size which reflects a drastically different court composition.

Additionally, the data collected on attorney sanctions from the Seventh Circuit would not be informative on its own. This note will compare the results collected from the Seventh Circuit to both the US courts of appeal as a whole, as well as to each circuit individually.

sanctions being discussed in opinions, this study collected data solely from the courts' dockets.

¹⁸ See e.g. *Fairley v. Andrews*, No. 07-3343(7th Cir. Sep. 27, 2007) (Docket Entry of Nov. 13, 2007); *Gabriel v. Bumann*, No. 01-3006 (7th Cir. Aug. 1, 2001) (Docket Entry of Aug. 16, 2001).

¹⁹ Choosing an overly expansive period of time may nullify the results, as the composition of the court has significantly changed over the past quarter century. Too short of a period will not provide enough data to be relevant. Therefore, choosing a middle ground that provides enough data, and is focused on the basic makeup of the court as it sits today, is critical.

²⁰ See DIRECTOR OF U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS, 1997-2007, <http://www.uscourts.gov/fcmstat/index.html> (last visited Feb. 9, 2009)..

ii. Breadth of Inquiry

The parameters that establish relevant data collection are the most important aspect of the study. By failing to include relevant potential data points in the survey, too little data may be collected. Over expansion of the search or careless search criteria will provide irrelevant data. Therefore, determining (a) the types of sanctions that will be searched for, and (b) the manner of sanctioning, are the most important choices in this study.

Generally, appellate attorneys can be sanctioned in two forms. First, while the case is pending before the court, an attorney can be threatened with sanction or discipline. This type of sanction will appear in the case docket.²¹ Second, an attorney can be sanctioned, disciplined, or admonished within the court's written opinion. However, only sanctions which appear in the docket will be collected in this study.²²

a. Sanctions within the Docket

Because many of the issues that the court has with attorneys are resolved before the opinion on the merits is published, the majority of a court's disciplinary or sanctioning function is carried out in pre-opinion orders and rulings. The empirical data will be collected from the courts' dockets during the relevant time period.

A large portion of the disciplinary orders issued by the court in the docket are based on an attorney's failure to comply with a Federal Rule of Appellate Procedure or for failing to comply with a previous order issued by the court in that case. Such an order typically appears within a docket as follows:

²¹ See e.g. Hicks v. Midwest Transit, No. 06-2186 (7th Cir. April 27, 2006) (Docket Entry of Nov. 5, 2007).

²² See *supra* note 17.

11/28/04 ORDER: BEVERLY M. RUSSELL FOR APPELLEE RUSSELL RAU, APPELLEE E. A. STEPP, APPELLEE G. L. HERSHBERGER, APPELLEE KATHLEEN H. SAWYER, APPELLEE JOHN D. ASHCROFT IS DIRECTED, AS COUNSEL, TO SHOWCAUSE AS TO WHY DISCIPLINARY ACTION SHOULD NOT BE TAKEN PURSUANT TO FED. R. APP. P. 46(C), FOR FAILING TO RESPOND TO THE COURT'S ORDER OF NOVEMBER 1, 2004.²³

A court will ask why disciplinary action should not be taken for a multitude of reasons. Some examples include: “[F]or failing to prosecute the appeal”²⁴; “for failing to respond to the court’s order [requiring the filing of a supplemental statement of jurisdiction]”²⁵; or for failing “to respond to the court’s order [requiring the filing of a status report regarding the completion of the transcripts referred to in Plaintiffs-Appellant’s Motion.]”²⁶

The court can issue such an order based on any attorney infraction, be it a violation of a Federal Rule of Appellate Procedure, a Circuit Rule, or a previous court order.²⁷ This type of on-the-docket disciplinary order will be referred to as a Potential Disciplinary Order.

Similarly, the court can order an attorney to explain why he or she should not be sanctioned based on a wide variety of violations. Such an order typically appears within a docket as follows:

08/08/2000 ORDER: COUNSEL FOR THE PETITIONERS ARE DIRECTED TO SHOW CAUSE

²³ Allen v. Ashcroft, No. 04-2390 (7th Cir. June 1, 2004) (Docket Entry of Nov. 18, 2004).

²⁴ Essex v. Bd. of Educ., No. 01-3581 (7th Cir. Oct. 1, 2001) (Docket Entry of Feb. 28, 2002).

²⁵ Hicks v. Midwest Transit, No. 06-2186 (7th Cir. April 27, 2006) (Docket Entry of Nov. 5, 2007).

²⁶ Fairley v. Andrews, No. 07-3343(7th Cir. Sep. 28, 2007) (order to show cause) (Docket Entry of Nov. 13, 2007).

²⁷ FED R. APP. P. 46(c).

WHY THEY SHOULD NOT BE SANCTIONED FOR
PLACING THEMSELVES IN A POSITION WHERE
THEY WERE UNABLE TO ARGUE ORALLY ON
BEHALF OF THEIR CLIENTS. [1314774-1] AJM [99-
3211] RESPONSE TO SHOWCAUSE DUE 8/22/00 FOR
JOHN W. KEARNS. (SQUID)²⁸

Orders requiring an attorney to explain why he or she should not be sanctioned²⁹ are based on an even wider variety of issues than a Potential Disciplinary Order. Some examples include: “For making a frivolous argument in light of Fed. R. App. P. 39(A)(4) and the discretion it accords to this court in assessing costs”³⁰; “for [the attorney’s] failure to inform us that the board of immigration appeals had granted a motion to reopen in this case eight months before we issued our opinion”³¹; for “[filing a] contumacious motion”³²; or “for filing a frivolous appeal and impugning the integrity of the bankruptcy judge in [the] reply brief.”³³

This type of on-the-docket order will be referred to as a Potential Sanctioning Order. The court can order an attorney to defend him or herself against potential sanctions for any reason that it sees fit.³⁴

²⁸ *Ambati v. INS*, No. 99-3211 (7th Cir. Aug. 30, 1999) (Docket Entry of Dec. 6, 2000).

²⁹ Occasionally, instead of asking why an attorney should not be sanctioned, the court will ask why he or she should not be penalized. *See e.g. Aziz v. Tri-State University*, No. 99-2866 (7th Cir. Sep. 23, 1999) (Docket Entry of Feb. 2, 2002).

³⁰ *Bean v. WI Bell Inc.*, No. 03-1983 (7th Cir. April 14, 2003) (Docket Entry of May 27, 2004).

³¹ *Boctor v. Gonzales*, No. 05-2530 (7th Cir. May 26, 2005) (Docket Entry of Feb 16, 2007).

³² *Google, Inc. v. Cent. Mfg., Inc.*, No. 07-1569 (7th Cir. Mar 15, 2007) (Docket Entry of July 25, 2007).

³³ *Lester v. Vance*, No. 00-3027 (7th Cir. Aug. 10, 2007) (Docket Entry of Mar. 3, 2001).

³⁴ FED. R. APP. P. 46(c).

A court may also issue an order to show cause to an attorney for a potential rule or order violation. Such an order typically appears on the docket as follows:

08/24/2006 ORDER: PETITIONERS ARE ORDERED TO SHOW CAUSE FOR THEIR FAILURE TO RESPOND TO THE MOTION TO DISMISS, AS ORDERED BY THIS COURT ON AUGUST 1, 2006. THE RESPONSE TO THIS ORDER IS DUE BY AUGUST 31, 2006. [1864839-1] JD [04-3341, 05-2529] (MANK) [04-3341 05-2529]³⁵

An attorney can be ordered to show cause, for example, for “why [he] failed to file a timely response”³⁶ or “why he should not be fined \$1,000 for his violation of Circuit Rule 30.”³⁷ This type of on-the-docket disciplinary order will be referred to as an Order to Show Cause.

Although every Order to Show Cause indicates a willingness on the part of a given court to exercise its disciplinary function, Orders to Show Cause which themselves do not refer to sanctioning or disciplining an attorney can be much less serious:

“07/12/1999 SHOW CAUSE ORDER: APLNT HAS FAILED TO PAY TO THE CLERK OF THIS COURT THE REQUISITE DOCKETING FEE. PETITIONER IS DIRECTED TO SHOW CAUSE WITHIN 15 DAYS, WHY THIS APPEAL SHOULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE [99-2697]”³⁸

³⁶ Berinde v. Gonzales, No. 06-1109 (7th Cir. Jan. 11, 2006) (Docket Entry of Apr. 18, 2006).

³⁷ Normand v. Orkin Exterminating, No. 98-4111 (7th Cir. Dec. 7, 1998) (Docket Entry of Oct. 12, 1999).

³⁸ Argueta-Martinez v. INS, No. 99-2697 (8th Cir. June 18, 1999) (Docket Entry of July 12, 2004).

In many instances, these types of procedural Orders to Show Cause seem to be automatically exercised. If an appellant fails to pay the court's fees, the case can be dismissed on procedural grounds, and an Order to Show Cause is the court's preferred method of doing so.³⁹

Therefore, for purposes of studying the results of the survey, data can be sorted based on whether the court is threatening a sanction or discipline and when the court is issuing an order to show cause for a litigant's procedural default or other rule violation. Both types of data will be collected, but focusing specifically on the serious instances of sanctions and disciplinary threats may provide an alternate picture of how willing a specific court is to voluntarily exercise its disciplinary authority.

It would be nearly impossible to search the courts' dockets based on *particular* Federal Appellate Rules or Circuit Rules and retrieve relevant data, as each appellate court has different Circuit rules and applications of those rules. Additionally, potential sanctions or disciplinary actions based on an attorney's failure to comply with an order issued by the court earlier in the case would be impossible to find. By focusing the search on the court's *language* and *method* in issuing sanctions or potential sanctions (i.e. requesting an attorney to prepare a statement as to why he or she should not be sanctioned), as opposed to searching the dockets for the underlying rule upon which the sanction is based, relevant data can be collected across every circuit.

The relevant data to be collected from the appellate courts' dockets is therefore comprised of Potential Disciplinary Orders, Potential Sanctioning Orders, and Orders to Show Cause.

iii. Data Collection Methodology

With the desired criteria selected, the next step is performing a search which will effectively yield the data. The overall search is comprised of various individual searches, and all results are cross-

³⁹ *See Id.*

referenced to eliminate double-counting. Because Westlaw provides access to every federal court's dockets (and, unlike PACER, is free of charge for a law student), all searches were conducted through Westlaw.

A. Potential Disciplinary Orders

1. Search 1: ["DISCIPLIN! ACTION SHOULD NOT BE TAKEN" or "DISCIPLIN! ACTION WILL BE TAKEN"]

a. Rationale: The most frequently used language in issuing this type of order is "Attorney for litigant X must submit Y arguing 'WHY DISCIPLINARY ACTION SHOULD NOT BE TAKEN'". Occasionally, the court will phrase the order "Attorney for litigant X must submit Y or 'DISCIPLINARY ACTION WILL BE TAKEN'". The search query accounts for both variants. Additionally, the root expander (!) accounts for any variation on the word disciplinary, i.e. disciplining.

2. Search 2: ["SHOULD NOT BE DISCIPLIN!"]

a. Rationale: Often (but not as frequently as in Search 1), the docket entry will read "Attorney for litigant X must do Y explaining 'WHY THEY SHOULD NOT BE DISCIPLINED FOR Z.'"

B. Potential Sanctioning Orders

1. Search 1: ["SHOULD NOT BE SANCT!" or "SHOULD NOT SANCT!"]

a. Rationale: The most frequently used language in issuing this type of order is "Attorney for litigant X must submit Y arguing why he/she 'SHOULD NOT BE SANCTIONED for Z'". Occasionally, the court will phrase the order "Attorney for litigant X must submit Y arguing why the Court 'SHOULD NOT SANCTION him/her for Z'". The search query accounts for both variants. Additionally, the root expander (!) accounts for any variation on the word sanction.

2. Search 2: [“46(c)”]

a. Rationale: Often, a court’s docket will mention the specific Rule under which the Court has the authority to sanction an attorney. Although many of the results contained in this search are captured in Search 1, there is a significant number which are not, and the search is therefore necessary.

3. Search 3: [“SANCT! RESPONSE” or “SANCT! STATEMENT”]

a. Rationale: In some instances, the Court will issue a directive to an attorney warning of potential sanctions without using the phrases contained in Search 1, or mentioning the law (contained in Search 2). However, in these instances the court will direct the attorney to provide the court with a sanction response or a sanction statement. This search captures both variations.

4. Search 4: [“SHOULD NOT BE PENAL!” or “SHOULD NOT PENAL!”]

a. Rationale: Occasionally the court will substitute penalized for sanctioned. This search captures the few instances in which courts use these alternate phrasings.

C. Orders to Show Cause

1. Search 1: [“ORDERED TO SHOW CAUSE”]

a. Rationale: The most frequently used language in issuing this type of order is “Attorney for litigant X is ‘ORDERED TO SHOW CAUSE’ why he/she did Z”.

2. Search 2: [“DIRECTED TO SHOW CAUSE” or “DIRECT! /4 SHOW CAUSE”]

a. Rationale: Sometimes the court will substitute the word directed for ordered. This also allows the court to phrase the order “the court DIRECTS attorney Y to SHOW CAUSE for Z”. Using the /4 requires the word directed (or directs, directing, etc.) to occur within 4 words of the phrase show cause. Because the order usually only reads

“directs NAME to show cause” or “directs ATTORNEY FOR NAME to show cause,” this search will catch all instances of this language.

iv. Baseline Statistics

In order to determine the relative frequency of attorney sanctions in the Seventh Circuit, the results must be compared with the results of the federal appellate courts as a whole, as well as with the circuits individually. The baseline data to which the collected data is compared is provided in this chart⁴⁰:

**Table 1:
Appeals Filed by Circuit**

Circuit	Appeals Filed
1	18426
2	62288
3	42193
4	54081
5	93331
6	53583
7	37956
8	35667
9	128423
10	29332
11	77253
DC Cir	15110

⁴⁰ See DIRECTOR OF U.S. COURTS, *supra* note 20.

PART II: RESULTS⁴¹A. *Finding 1: The Seventh Circuit exercises its disciplinary function at the fourth-highest rate of any Federal Appellate Court.*

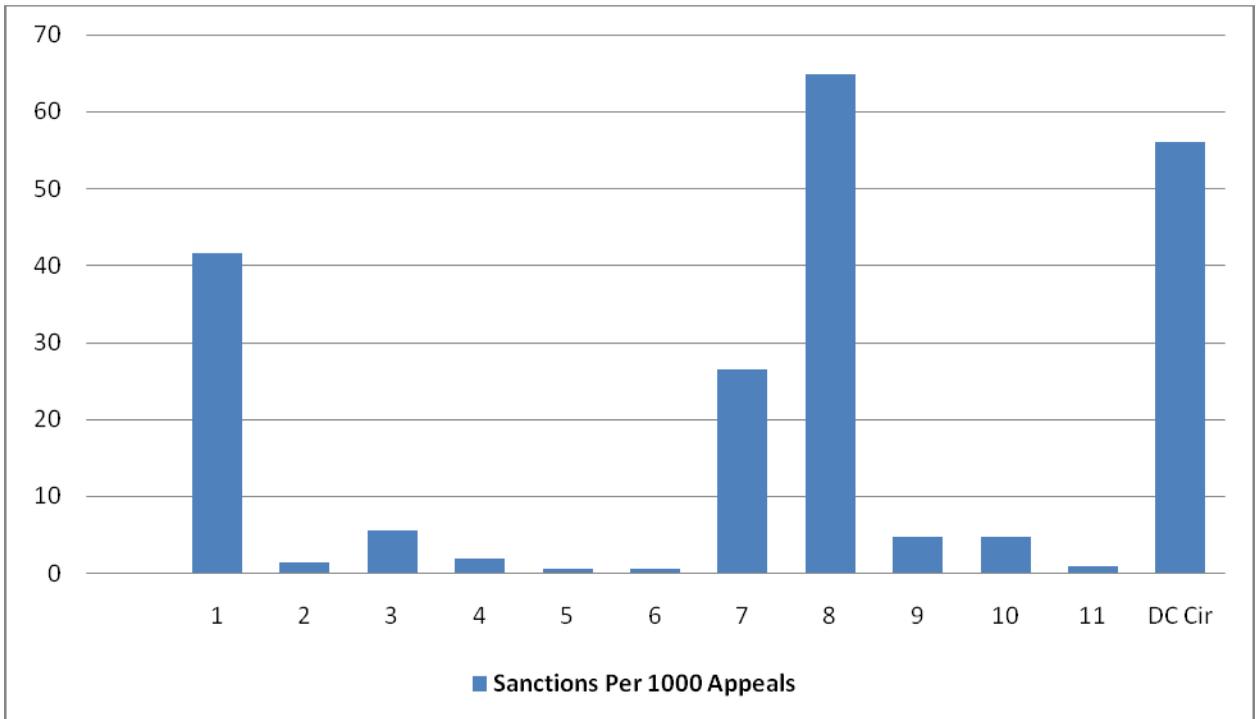
During the ten-year period between September 29, 1997 and September 30, 2007, the Seventh Circuit disciplined, sanctioned, or ordered an attorney to show cause for a rule violation in 1,007 cases, which equates to a ratio of 26.53 sanctions per 1,000 appeals filed. The court that exercised its disciplinary function the most frequently was the Eighth Circuit, which did so in 2,315 cases, and which equates to a ratio of 64.91 sanctions per 1,000 appeals filed. The Sixth Circuit was the least likely to exercise its disciplinary function – it did so only 36 times, which equates to .67 sanctions per 1,000 appeals filed. The following table provides the total number of sanctions issued by each Federal Circuit, as well as the ratio of sanctions per 1,000 appeals filed.

⁴¹ After collecting the data, there were many instances of cases that appeared in two or more searches. For example, this could occur when a docket entry such as “Petitioner is *ordered to show cause* why he *should not be disciplined* for . . .” This docket entry would have been retrieved under more than one search. Therefore, in order to prevent any case from being counted twice, I sorted through all cases collected in the survey and removed any instances a case being returned more than once.

Table 2:
Total Sanctions and Ratios by Circuit

Circuit	Number of Sanctions	Appeals Filed	Per 1000
1	766	18426	41.57169
2	92	62288	1.47701
3	239	42193	5.664447
4	106	54081	1.960023
5	61	93331	0.653588
6	36	53583	0.671855
7	1007	37956	26.53072
8	2315	35667	64.90594
9	624	128423	4.858943
10	141	29332	4.807037
11	75	77253	0.970836
DC Cir	846	15110	55.98941

**Graph 1:
Total Sanctions and Ratios by Circuit**



B. Finding 2: The Seventh Circuit issues “serious” sanctions or disciplinary orders at the highest rate of any Federal Appellate Court.

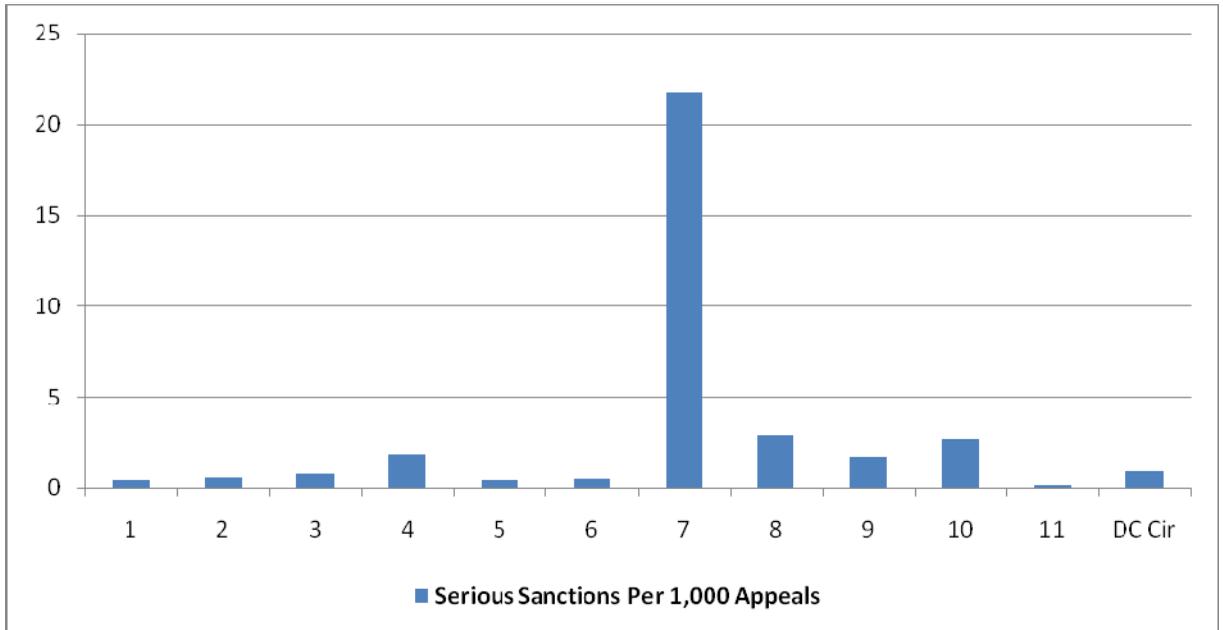
Based on the differing values equated to each type of docket entry described in Part II (B), the Seventh Circuit issued the most Potential Disciplinary Orders or Potential Sanctioning Orders.” Disregarding all instances of Orders to Show Cause, the Seventh Circuit exercised its sanctioning authority in 824 cases, which equates to a ratio of 21.71 sanctions per 1,000 appeals filed. The Eleventh Circuit was the least likely to issue serious sanctions, doing so in 10 cases, which equates to a ratio of .13 sanctions per 1,000 cases filed. The following table (Table 2) provides the total number of serious sanctions issued by each

Federal Circuit, as well as the ratio of sanctions per 1,000 appeals filed.

**Table 3:
"Serious" Sanctions and Ratios by Circuit**

Circuit	"Potential Disciplinary Order"	"Potential Sanctioning Order"	Total	Appeals Filed	Per 1,000 Appeals
1	3	5	8	18426	0.434169
2	7	28	35	62288	0.561906
3	1	31	32	42193	0.75842
4	0	99	99	54081	1.830587
5	25	12	37	93331	0.396438
6	0	26	26	53583	0.485229
7	659	165	824	37956	21.70935
8	102	1	103	35667	2.887823
9	14	205	219	128423	1.705302
10	58	21	79	29332	2.693304
11	0	10	10	77253	0.129445
DC Cir	0	14	14	15110	0.926539

Graph 2:
“Serious” Sanctions and Ratios by Circuit



PART IV: POLITICAL CORRELATION

C. Finding 3: There is a statistically significant correlation between the composition of a given appellate court—based on the nominating President’s political party—and that court’s propensity to exercise its disciplinary function

After collecting the data and studying the results we investigated whether any correlations could be drawn from the quantitative data. It appears there is a statistically significant correlation between the political composition of a given appellate court and its propensity to sanction or discipline an attorney before it. Generally, the more Republican-appointed judges serve on an appellate court, the more likely that the court is to sanction attorneys.

In order to compare the data collected on sanctions and disciplinary actions to the political composition of an appellate court a numerical standard was developed to make the comparison. To do so, a graph of each judge who has sat on an appellate court during the relevant ten-year time frame was prepared and then a calculation of calculated the length of their tenure on the court was used to compute a political quotient of each appellate court based on the number of months each political party's candidates have served on the court.⁴²

The table below reflects the composition of each federal appellate court based on the nominating President's political party.

Table 4⁴³:
Judicial Composition of Circuit – Based on Political Party of Appointing President: September 30, 1997 through September 29, 2007

	Republican	Democrat
1	68.18%	31.82%
2	35.97%	64.03%
3	59.44%	40.56%
4	58.70%	41.30%
5	67.08%	32.92%
6	49.66%	50.34%
7	63.64%	36.36%
8	73.73%	26.27%
9	64.34%	35.66%
10	58.59%	41.41%
11	57.36%	42.64%
DC Cir	58.72%	41.28%

⁴² Frequently, seats on an appellate court are left vacant for extended periods of time. When computing the political quotient of a given court, vacancies were treated as if they did not exist during the time they were vacant.

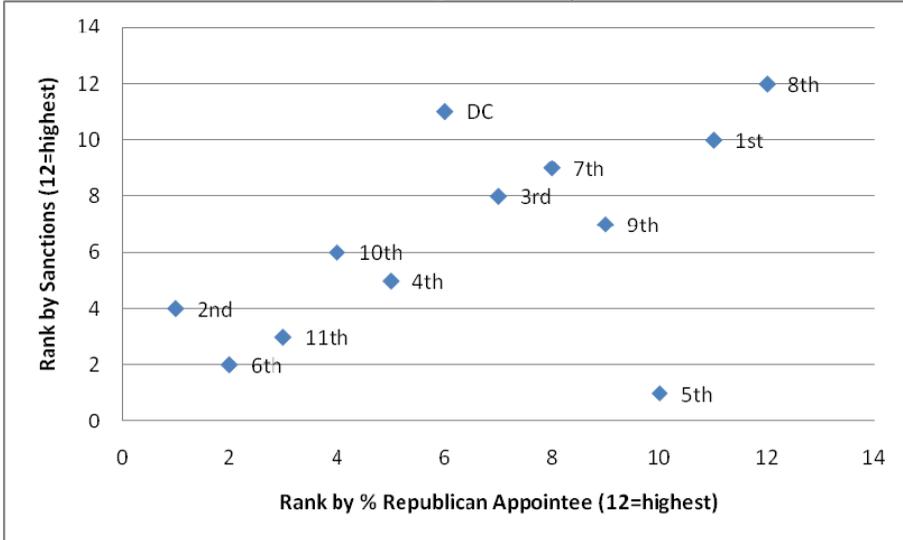
⁴³ FEDERAL JUDICIAL CENTER, THE U.S. COURTS OF APPEALS AND THE FEDERAL JUDICIARY, http://www.fjc.gov/history/home.nsf/ca_frm!OpenFrameSet (last visited Nov. 11, 2008).

The political quotient of each court, was compared to the results to the data collected on sanctions. A correlation definitely exists: between the greater Republican political quotient of a given court, the more likely that court is to exercise its disciplinary function. The most Republican influenced court—the Eighth Circuit, where Republican judges composed 73% of the court during the relevant 10 year time frame—was also the most likely to issue sanctions. The second-most Republican influenced court—the First Circuit, where Republican judges composed 68% of the court—was the third-most likely to issue sanctions. The chart below provides the compiled data and the graphs provide a visual representation of the correlation.

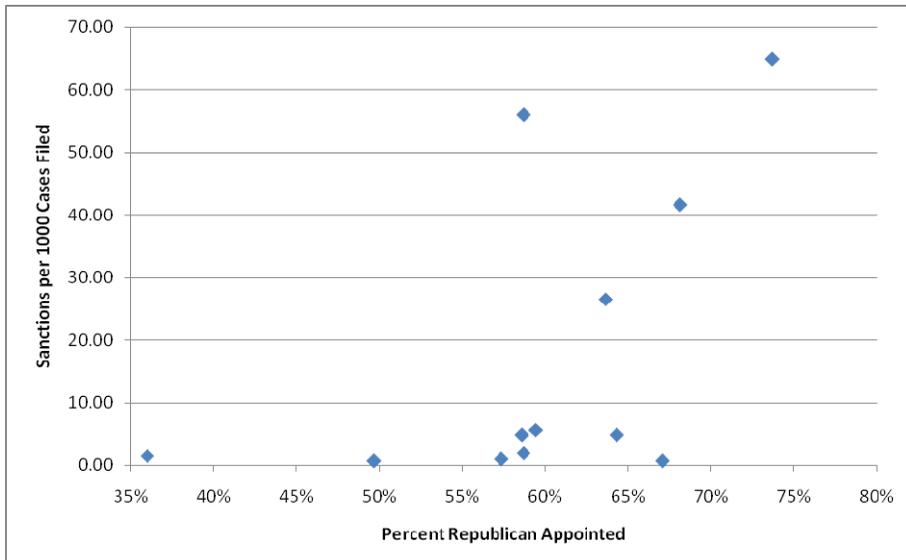
**Table 5:
Sanctions / Political Quotient by Circuit (Ranked)**

Circuit	Sanctions Per 1000 Appeals	Rank	% Republican Appointed	Rank
1	41.57	3	68.18%	2
2	1.48	9	35.97%	12
3	5.66	5	59.44%	6
4	1.96	8	58.70%	8
5	0.65	12	67.08%	3
6	0.67	11	49.66%	11
7	26.53	4	63.64%	5
8	64.91	1	73.73%	1
9	4.86	6	64.34%	4
10	4.81	7	58.59%	9
11	0.97	10	57.36%	10
DC Cir	55.99	2	58.72%	7

**Graph 3:
Sanctions / Political Quotient by Circuit (Ranked)**



**Graph 4:
Sanctions / Political Quotient by Circuit (Raw Data)**



Although there are a few circuits that do not conform to the general rule—most notably, the Fifth Circuit—there is a general, positive correlation between the amount of Republican President appointed judges that sit on a given appellate court and its propensity to use its disciplinary power.

Statisticians use a tool called the Pearson Product-Moment Correlation Coefficient (Pearson's Correlation) in order to assess the strength of a particular apparent correlation.⁴⁴ Pearson's Correlation is a way of summarizing the strength of a linear relationship between two variables with a single figure that ranges between -1 and +1. The stronger the relationship between the variables, the closer the correlation figure is to ± 1 .⁴⁵

The two variables in this case are sanctions per 1000 cases filed and percent Republican appointees. A high positive Pearson's Correlation in this case would indicate that as the percentage of Republican appointees increased on a given appellate court, the number of sanctions issued by that court would increase. A high negative Pearson's Correlation would indicate that as the percentage of Republican appointees increased, the number of sanctions would decrease. A low Pearson's Correlation would indicate that there is not a strong relationship between the two variables.

The Pearson's Correlation between sanctions per 1000 cases filed and percent Republican appointees is 0.515, which represents a statistically significant correlation at a 90% alpha level (or probability).⁴⁶

⁴⁴ JACOB COHEN ET AL., APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES, 27-28 (3d ed. 2003).

⁴⁵ In order to illustrate the meaning of the Pearson Product Moment Coefficient, an example is helpful: the Pearson's Correlation between "foot size" and "height" in a sample of human beings would be high, while the Pearson's Correlation between "foot size" and "individual net worth" would be low.

⁴⁶ MARK SIRKIN, STATISTICS FOR THE SOCIAL SCIENCES, 507 (3d ed. 2003). Alpha Level represents the statistician's "willingness to be wrong." *Id.* On the most basic level, a 90% alpha level signifies that the probability that the statistically significant correlation has occurred by chance is 10%. *Id.* In social science studies,

CONCLUSION

By examining the empirical data on each federal court of appeals, the Seventh Circuit's willingness to issue sanctions or exercise its disciplinary power can be seen. The Seventh Circuit issued the fourth-most sanctions overall and issued the most serious sanctions. In the end, the data suggests that the Seventh Circuit may be "nitpicking" to a certain degree, but that there are other circuits that are nearly as critical of attorneys.

Additionally, the data shows a correlation between the political composition of any given court—based on the appointing President's political party—and its propensity to exercise its disciplinary function. Although the data does not indicate any cause/effect relationship, it is interesting and may warrant additional research.

an alpha level of 90% is acceptable. In "hard science" studies, an alpha level of 95% is acceptable, but more commonly a 99% alpha level is used. *Id.*