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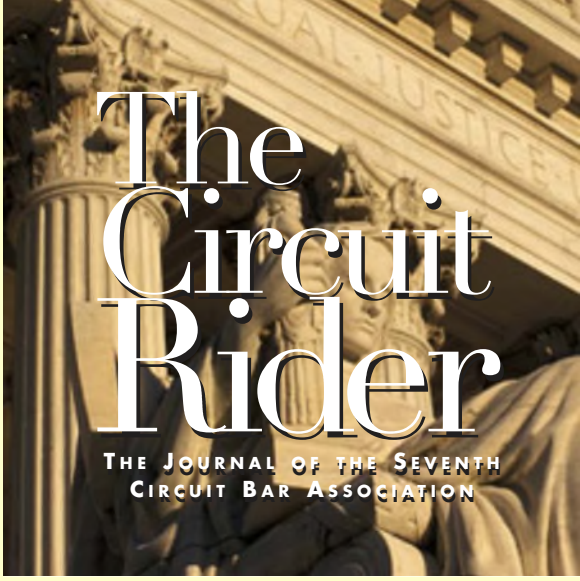

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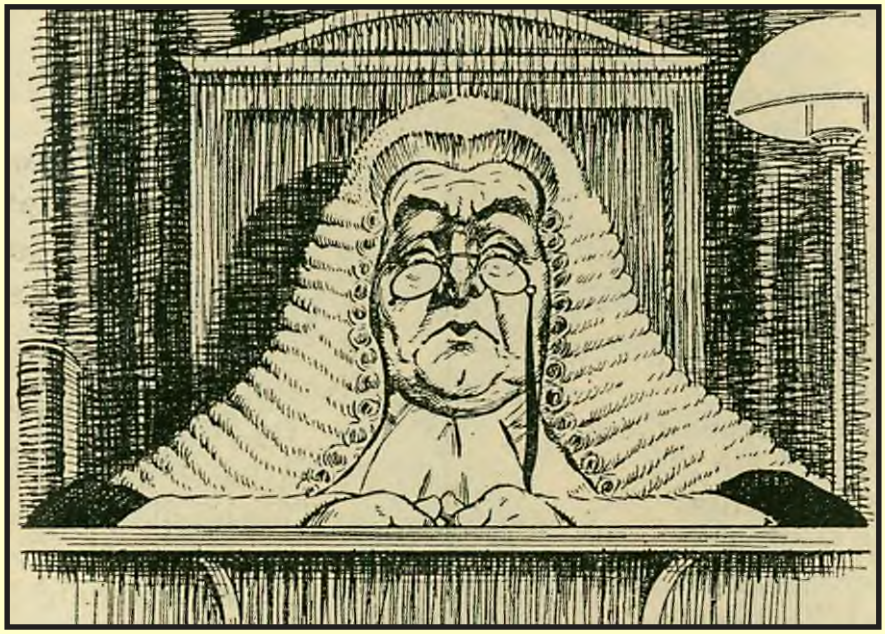

The Circuit Rider

In This Issue

The Seventh Circuit's Uncodified Operating Procedures for *Assigning* Interlocutory Appeals

*By Alexandra L. Newman**

Litigants and commentators have recently questioned the Seventh Circuit's practice — uncodified in the court's internal Operating Procedures — of allowing motions panels asked to permit interlocutory appeals under 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 23(f) to also decide the merits of those appeals, often without merits briefing or oral argument. Critics maintain that this practice is problematic because, among other reasons, it is contrary to the court's own Operating Procedures; it impermissibly allows judges to pick their own cases; it improperly affects the outcome of cases on the merits by allowing particular judicial ideologies to dominate in certain areas of the law; it interferes with the court's presumptive procedure of assigning judges randomly to panels; it lacks transparency; and it obscures the public perception of judicial impartiality.

This article summarizes a recent challenge to that practice and explores the Seventh Circuit's history of adopting panel assignment procedures primarily intended to promote judicial efficiency.

1. The Seventh Circuit's Presumptive Procedure Of Random Panel Assignments

The federal statute governing the assignment of judges to three-judge panels in the federal appellate courts does not require that judges be assigned at random to serve on panels. Instead, the statute provides that "[c]ircuit judges shall sit on the court and its panels in such order and at such times as the court directs."[1] Accordingly, each court determines for itself how it will create its own panels.

Continued on page 41

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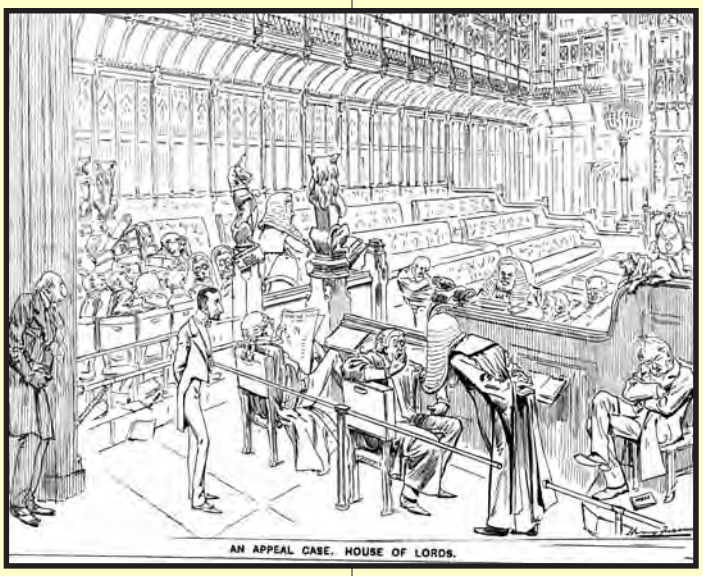
Assigning Interlocutory Appeals

Continued from page 40

Like all of the other federal courts of appeals,[2] the Seventh Circuit's stated presumptive procedure is that panel members for three-judge panels shall be chosen randomly from the judges of the court:

> Assignments of judges to panels are made about a month before the oral argument on a random basis. In death penalty appeals, panels are randomly assigned when the appeal is docketed. . . . Each judge is assigned to sit approximately the same number of times per term with each of his or her colleagues.
>
> The calendar of cases to be orally argued in a given week is prepared and circulated to the judges, and the judges advise the chief judge of any disqualifications . . . . The judges are then randomly assigned by computer to sit in various panels. This separation of the processes of randomly assigning panels and scheduling cases avoids even the remote possibility of the deliberate assignment of an appeal to a particular panel.[3]



In addition, when appeals are decided without oral argument, three judges are randomly assigned and meet as a panel to decide these appeals.[4]

2. Operating Procedure 6 Concerning Panel Assignments In Certain Cases

The Seventh Circuit's internal Operating Procedure 6 codifies four exceptions to the court's presumptive practice of randomly assigning judges to panels.[5] First, a case remanded by the Supreme Court to the Seventh Circuit for further proceedings will "ordinarily be reassigned to the same panel that heard the case previously."[6]

Second, briefs in a successive appeal in a case in which the court has heard an earlier appeal will be sent to the panel that heard the prior appeal.[7] This panel will "decide the successive appeal on the merits unless there is no overlap in the issues presented. When the subsequent appeal presents different issues but involves the same essential facts as the earlier appeal, the panel will decide the subsequent appeal unless it concludes that considerations of judicial economy do not support retaining the case. If the panel elects not to decide the new appeal, it will return the case for reassignment at random."[8] If a case has been heard by the court en banc, then successive appeals will be randomly assigned unless the en banc court directs otherwise.

Third, with regard to successive collateral attacks on a conviction, an application for leave to file a second or successive petition under 28 U.S.C. §2254 or §2255 will be assigned to the panel that heard the prior appeal on the merits. If there was no appeal in the prior case, the application will be assigned to the current motions panel.[9]

Finally, when a motions panel decides that a motion should be set for oral argument or that the appeal should be expedited, it may recommend to the chief judge that the matter be assigned for argument and decision to the same panel. In the absence of such a recommendation, however, "the matter will ordinarily be assigned in the same manner as other appeals" (*i.e.,* randomly assigned to a merits panel).[10]

These four stated exceptions to the presumption of random panel assignments do not identify any established practice under which motions panels may retain interlocutory appeals to decide them on the merits with or without merits briefing or oral argument. Yet this has been the Seventh Circuit's practice for many years.

3. Recent Challenges To Non-Random Panel Assignments In *Motorola Mobility LLC v. AU Optronics Corp.*

The Seventh Circuit's uncodified practice of allowing motions panels to decide interlocutory appeals on the merits, often without merits briefing or oral argument, has recently received widespread attention in *Motorola Mobility LLC v. AU Optronics Corp.*[11] In that case, Motorola had requested interlocutory review under

Continued on page 42

Assigning Interlocutory Appeals

Continued from page 41

28 U.S.C. § 1292(b) of the district court's dismissal of certain claims. The district court certified its ruling for immediate appeal. Motorola filed a petition for permission to appeal, to which the respondents agreed. A Seventh Circuit motions panel granted the petition for interlocutory review and then, without asking for further briefing or oral argument, issued an opinion affirming the district court's judgment on the merits.[12] After Motorola petitioned for en banc review, the motions panel vacated its opinion, granted the request for interlocutory appeal, imposed a merits briefing schedule, and assigned itself to decide the appeal.[13] After briefing and oral argument, the motions panel issued a new opinion affirming the district court's decision.[14]

After the Seventh Circuit issued its new opinion, legal scholars and media commentators raised concerns about the Seventh Circuit's apparent practice of permitting a motions panel to assign itself to decide the merits and rule without allowing merits briefing or oral argument.[15] This practice, critics asserted, allows motions panels to pick which cases they want to decide on the merits and thereby allows particular judicial ideologies to dominate in certain areas of the law, among other problems. One journalist, Ed Whelan, posed four questions about the practice on a blog post about Seventh Circuit motions panels, and he received responses directly from Chief Judge Wood and (former chief) Judge Easterbrook (neither of whom served on the panel in *Motorola Mobility LLC*). These judges acknowledged certain uncodified operating procedures with regard to panel assignments:

> **1. Question 1:** How are Seventh Circuit motions panels composed? . . . .
>
> **Chief Judge Wood:** Motions panels are set for each six-month period. A motions judge is set for each week, and Judge 2 and Judge 3 for the panel are also specified. The motions judge rules on all one-judge motions, and the panel handles three-judge motions. For the next week, Judge 2 moves up to the Motions judge slot, Judge 3 is in the next position, and a new Judge 4 fills out the panel. If one judge is disqualified, then the motions staff contacts the next judge in the rotation.
>
> **Judge Easterbrook:** The Seventh Circuit rotates motions duty on a schedule fixed every six months. The Senior Staff Attorney asks judges when they are available and uses that information to compose panels that last one week. For each week there is an assigned motions judge (who handles all one-judge motions that arrive during the week and makes recommendations to the panel about three-judge motions) and two other members. . . . Judges usually serve on the motions panel for three consecutive weeks, though only one week as motions judge; each week, one new judge joins the panel and one drops off.
>
> All active judges serve an equal number of weeks on the panel (and as motions judge) during the course of a year. Senior judges participate, or not, at their option. . . .
>
> Motions filed during a panel's week stay with that panel, even if a request for a response means that the case is not ready for submission until the panel has changed. This ensures that neither counsel nor any judge can manipulate the assignment system. Effectively locking a case to a panel by the date the motion is filed means that the process produces a random distribution of assignments over the year. (Counsel don't know who is on that week's panel or who will be on the next week's, so they can't time their motions to produce assignment to a particular panel.)
>
> **2. Question 2:** Under Seventh Circuit policy or practice, who on a motions panel decides whether to recommend that a particular matter be assigned to the motions panel for a decision on the merits? . . . .
>
> **Chief Judge Wood:** The panel decides as a whole whether to keep the case.
>
> **Judge Easterbrook:** When a motion requires the panel to consider the merits to some degree — for example, when the movant requests permission to take an interlocutory review of a class-certification order, or permission to appeal under 28 U.S.C. §1292(b) — the motions panel decides whether it wants to keep the case for decision on the merits too. The principal consideration is whether the panel has gotten deeply enough into the merits that it would be sensible to continue, rather than require three other judges to learn the case from scratch. This isn't written in any rule or operating procedure, but it has been the court's practice since I was appointed in 1985.
>
> Normally the motions judge (who will be the most senior judge on the panel only about a third of the time) makes a recommendation about this to the whole panel, but any member of the panel is free to make a recommendation independently (or to disagree with the motions judge). The panel then decides by consensus. Some judges are more apt than others to prefer keeping a case, but the process is the same for all judges—and all have an equal chance to keep cases for decision on the merits.

Continued on page 43

Assigning Interlocutory Appeals

Continued from page 42

> **3. Question 3:** Under Seventh Circuit policy or practice, does the chief judge ever disapprove a motions panel's recommendation that a matter be assigned to that panel for a decision on the merits?
>
> **Chief Judge Wood:** No, as far as I can recall.
>
> **Judge Easterbrook:** Although the operating procedures say that the panel will refer the matter to the Chief Judge for assignment, this rarely happens—and no one wants it to be done routinely. As a practical matter, the issue is referred to the Chief Judge only when the panel is internally divided about whether to retain the case for decision on the merits. During my seven years as Chief Judge, that happened only once. . . .
>
> **4. Question 4:** Are there any recognized standards under Seventh Circuit policy or practice that govern a motions panel's decision whether to recommend that a matter be assigned to that panel for a decision on the merits?
>
> **Chief Judge Wood:** The judges will consider such factors as the amount of time the panel members have already invested in the matter, the similarity of the issues involved in the motion with the issue involved in the merits decision, and the need to schedule a prompt hearing.
>
> **Judge Easterbrook:** [See response to Question 2.][16]

Invoking these statements concerning the Seventh Circuit's uncodified practice of permitting a motions panel to assign itself to decide the merits, Motorola has asked the Supreme Court to grant certiorari, in part so that the Court can "exercise its supervisory power" to "put an end to the Seventh Circuit's anomalous practice of permitting motions panels to pick through their docket and assign themselves to decide the merits of cases they find of particular interest."[17] "Absent unusual circumstances," Motorola contends, "no other circuit allows that practice, which casts public doubt on the impartiality of the assignment process and the resulting decisions of the court. Appellate judges should not be able to pick their own cases."[18] The petition argues that the Seventh Circuit's practice of allowing motions panels hearing applications for interlocutory review to assign to themselves the merits cases that they find "particularly significant or interesting, rather than leaving the case to the ordinary random assignment process," is "not permitted by the circuit's own [Operating Procedure 6]."[19]

In its certiorari petition, Motorola notes a tendency of certain Seventh Circuit judges, when sitting on a motions panel presented with an application for an interlocutory appeal under 28 U.S.C. § 1292(b) in antitrust cases, to decide such cases on the merits without allowing merits briefing or oral argument.[20] Motorola also raises similar concerns about Seventh Circuit judges' rulings — issued in response to motions under Federal Rule of Civil Procedure 23(f) for permission to appeal class certification orders — that contain significant interpretations of Rule 23 concerning class actions. In many cases, Motorola argues, these judges elect to "decide the merits of the case without any further briefing or oral argument" instead of simply deciding whether to permit the appeal.[21] Indeed, Motorola cites a law review article reporting that two Seventh Circuit judges wrote every Rule 23(f) opinion — 17 in total — that the court issued during the rule's first nine years on the books, and that this was possible because 11 of the 17 cases stemmed from motions panels on which either of the two judges sat that granted permission to appeal and then retained the appeal for decision.[22]

As a policy matter, Motorola argues that the Seventh Circuit's practice of permitting motions panels to decide interlocutory appeals on the merits is alarming because it permits a "handful of judges" to "decide particular kinds of cases" such that "judges with particular jurisprudential interest or agendas [have] an opportunity to thumb through the docket and assign themselves cases in which to advance those interests."[23] This practice, according to Motorola, interferes with the "public perception and reality of judicial impartiality" that is at stake when judges are randomly assigned to cases.[24] Finally, Motorola urges, the Supreme Court should exercise its supervisory powers to forbid the Seventh Circuit's uncodified procedure because the practice "contradicts its own rules and stands alone among all the courts of appeals."[25]

4. The History And Policy Of Random Panel Assignments In The Seventh Circuit

An exploration of the Seventh Circuit's history of random panel assignments reveals that the circuit first instated the practice of randomly assigning judges to panels in order to distribute the court's workload efficiently and equitably among the judges.

Continued on page 44

Assigning Interlocutory Appeals

Continued from page 43

Court historian and long-standing Circuit Executive for the Seventh Circuit, Collins T. Fitzpatrick, has reported that for more than forty years, the Seventh Circuit has followed a general practice of randomly assigning judges to serve on the merits panels of cases on appeal.[26] The late Chief Judge Swygert first adopted this practice in the early 1970s. Before then, the chief judge chose which judges would sit each day after the cases were scheduled. The first randomly drawn panel involved the convictions and contempt citations of the "Chicago Seven" and the contempt citation of Bobby Seale, who had all been tried for the charge of conspiring to incite the riots that erupted during the 1968 Democratic National Convention in Chicago. Appellate review of the trial — which had received extensive national coverage — was expected to entail an onerous workload for the judges. Out of a concern to distribute the workload fairly, Judge Swygert selected the panel members by placing each judge's name on a slip of paper in a hat and drawing out the names at random. In devising this procedure, Judge Swygert also instituted informal rules such as if a judge's name was drawn to sit on two days of cases during a particular week, his name would not be put in the hat for drawing for the rest of the week. A "bedrock principle," explains Mr. Fitzpatrick, was that each active judge would sit as much as the other judges over the course of the term, thereby distributing the workload in an equitable manner among the judges.[27]

The court's history, as reported by Mr. Fitzpatrick, also illustrates that exceptions set forth in the court's Operating Procedure 6 developed primarily out of a concern for judicial efficiency. According to Mr. Fitzpatrick, the predecessor of Operating Procedure 6(b) "grew out of the multiple appeals in the Indianapolis School desegregation case. After four appeals, all with different panels, the court agreed to have the fifth and sixth appeal go to the panel that heard the fourth appeal. The appeal involved a large record and it saved judge time by not having three new judges educate themselves as to the facts and the law when there were subsequent appeals."[28] Eventually this practice evolved into current Operating Procedure 6(b), which provides that successive appeals are returned to the panel that heard the prior appeal.[29] Mr. Fitzpatrick reports that the practice of returning successive appeals to the same panel has "helped to make the judges more efficient and helped with stare decisis," among other benefits.[30] He further describes the policy objectives behind Operating Procedure 6(c) (concerning successive collateral attacks on a conviction) as an "offshoot" of the successive-appeals practice under Operating Procedure 6(b).[31] Thus, as suggested by the Seventh Circuit's history, both the presumptive practice of random panel assignments and the exceptions under Operating Procedure 6 were developed with the primary intended purpose of promoting judicial efficiency.

The preamble to the court's current Operating Procedures further suggests that the court adopted its internal practices with the primary intention to promote the efficiency of the court's own operations. Indeed, the preamble states that the court's Operating Procedures are "for the court's internal operations. The court may dispense with their use in particular cases. Litigants acquire no rights under these procedures."[32] As applicable to Operating Procedure 6, then, the court has essentially advised litigants that its procedures relating to panel assignments in certain cases are designed with the primary purpose of promoting efficient resolution of cases before the court. Words such as "ordinarily" and "may" appearing in Operating Procedure 6 indicate the court's view that these procedures are merely advisory, not mandatory.[33]

Continued on page 45

Assigning Interlocutory Appeals

Continued from page 44

The Seventh Circuit thus may view the Operating Procedures as opening the door to uncodified procedures intended to promote the efficiency of the court's internal operations. The Seventh Circuit has invoked judicial efficiency to justify other "uncodified operating procedures."[34] And the same rationale was at the heart of the explanation provided by Chief Judge Wood and Judge Easterbrook for the Seventh Circuit's practice of allowing motions panels to retain and decide interlocutory appeals.[35]

Of course, even if the Seventh Circuit's primary intention in adopting internal procedures may be to promote efficiency in its own operations, litigants assert that they are nonetheless aggrieved by the court's seemingly routine departure, in permissive interlocutory appeals, from the principle of random panel assignment espoused in the court's own Operating Procedures.[36] Such apparently systematic departure is one reason why litigants and others assert that the court's practice of allowing motions panels to also decide the merits of certain appeals is not merely an "uncodified operating procedure" but is also a violation of the codified Operating Procedures. And this practice, litigants and others maintain, impermissibly results in allowing judges to pick their own cases and thereby affect the development of substantive law and the outcome of cases on the merits, among other problems.

5. Conclusion

The Seventh Circuit's uncodified operating procedure permits motions panels to retain cases for later decision on the merits and rule on occasion without allowing further briefing or oral argument. A review of the court's history concerning random and non-random panel assignments suggests that the court's primary concern with such procedures may be judicial efficiency. Litigants and commentators now question whether this practice violates the court's own Operating Procedures and impacts parties' substantive rights by threatening the premise of judicial impartiality and allowing judges to implement their own ideological agendas by actively developing particular areas of law.

Notes:

[1] 28 U.S.C. § 46(a) (2012); *see also id.* § 46(b) ("In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court. . . . Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs.").

[2] Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis,* 3 J. Legal Analysis 101, 110 (2011) (noting that it is "the practice in all circuits" that panel members are chosen randomly).

[3] U.S. Court of Appeals for the Seventh Circuit, Practitioner's Handbook for Appeals 10 (2014), *available at* http://www.ca7.uscourts.gov/rules/handbook.pdf.

[4] *Id.* at 10–11.

[5] Seventh Circuit Operating Procedures ("OP") (Dec. 1, 2009), *available at* http://www.ca7.uscourts.gov/rules/rules.htm#opproc.

[6] *Id.* ¶ 6(a).

[7] *Id.* ¶ 6(b); Practitioner's Handbook, *supra* note 3, at 10.

[8] OP ¶ 6(b).

[9] *Id.* ¶ 6(c) (internal citations omitted).

[10] *Id.* ¶ 6(d).

[11] 775 F.3d 816 (7th Cir. Jan. 12, 2015), *petition for cert. filed,* U.S. Mar. 17, 2015 (No. 14-1122).

[12] Order, *Motorola Mobility LLC v. AU Optronics Corp.,* Dkt. No. 14-8003 (7th Cir. Mar. 27, 2014), ECF No. 14. This opinion is available at 746 F.3d 842 (7th Cir. Mar. 27, 2014), *reh'g granted and opinion vacated* (July 1, 2014).

[13] Order, *Motorola Mobility LLC v. AU Optronics Corp.,* Dkt. No. 14-8003 (7th Cir. July 15, 2014), ECF No. 74.

[14] Order, *Motorola Mobility LLC v. AU Optronics Corp.,* Dkt. No. 14-8003 (7th Cir. Nov. 26 2015), ECF No. 133. This opinion is available at 773 F.3d 826 (7th Cir. Nov. 26, 2014), *withdrawn from bound volume, order amended and superseded,* 775 F.3d 816 (7th Cir. Jan. 12, 2015).

Continued on page 46

Assigning Interlocutory Appeals

Continued from page 45

[15] *See, e.g.,* Ed Whelan, *Bench Memos: Seventh Circuit Motions Panels Seizing Merits Cases?,* National Review Online (Dec. 1, 2014), http://www.nationalreview.com/bench-memos/393734/seventh-circuit-motions-panels-seizing-merits-cases-ed-whelan; Ed Whelan, *Bench Memos: Judge Easterbrook Responds,* National Review Online (Dec. 2, 2014), http://www.nationalreview.com/bench-memos/393796/judge-easterbrook-responds-ed-whelan; Ed Whelan, *Bench Memos: Chief Judge Wood Responds,* National Review Online (Dec. 2, 2014), http://www.nationalreview.com/bench-memos/393807/chief-judge-wood-responds-ed-whelan; Will Baude, *How Seventh Circuit motions panels work [updated],* Washington Post (Dec. 3, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/03/how-seventh-circuit-motions-panels-work/; Alison Frankel, *At 7th Circuit, unseen judicial mechanics drive decisions,* Reuters (Dec. 3, 2014), http://blogs.reuters.com/alison-frankel/2014/12/03/at-7th-circuit-unseen-judicial-mechanics-drive-decisions-new-paper/; Alison Frankel, *Those non-random appellate panels? Study finds they're (almost) everywhere,* Reuters (Dec. 4, 2014), http://blogs.reuters.com/alison-frankel/2014/12/04/those-non-random-appellate-panels-study-finds-theyre-almost-everywhere/.

[16] *See* Ed Whelan, *Bench Memos: Judge Easterbrook Responds, supra* note 15; Ed Whelan, *Bench Memos: Chief Judge Wood Responds, supra* note 15. These questions and responses have been slightly edited for the sake of brevity. Omissions are indicated with ellipses.

[17] Brief of Petitioner at i, 13, 33, *Motorola Mobility LLC v. AU Optronics Corp.,* No. 14-1122 (7th Cir. Jan. 12, 2015) (citations omitted). On the merits, Motorola asks the Supreme Court to review the Seventh Circuit's determination that the Foreign Trade Antitrust Improvements Act blocks the vast majority of its $3.5 billion price-fixing case against several liquid crystal display panel makers.

[18] *Id.* at 13.

[19] *Id.* at 33.

[20] *Id.* at 34 (collecting cases).

[21] Brief of Petitioner, *supra* note 17, at 35 (collecting cases).

[22] *Id.* at 36 (citing Margaret V. Sachs, *Superstar Judges As Entrepreneurs: The Untold Story of Fraud-on-the-Market,* 48 U.C. Davis L. Rev. at *27 (forthcoming), *available at* http://blogs.reuters.com/alison-frankel/files/2014/12/usdavislawreviewarticle.pdf).

[23] *Id.*

[24] *Id.* at 37.

[25] *Id.* at at 38–39.

[26] *See generally* Collins T. Fitzpatrick, *Changes to the United States Court of Appeals for the Seventh Circuit over a Third of a Century,* 32 S. ILL. U. L.J. 527, 536–37 (Spring 2008).

[27] *Id.*

[28] *Id.*

[29] OP ¶ 6(b) (expressly invoking "considerations of judicial economy").

[30] Fitzpatrick, *supra* note 26, at 536.

[31] *Id.,* at 537.

[32] OP, Preamble.

[33] *Id.* ¶ 6(a), (d).

[34] For example, the court coined the phrase "uncodified operating procedure" in *United States v. Adeniji,* 179 F.3d 1028 (7th Cir. 1999) (Posner, J.) (in chambers), in which the court provided an efficiency rationale for its uncodified practice relating to referral of motions to waive oral argument from the presiding judge to the other two panelists. *Id.* at 1029. In addition, Mr. Fitzpatrick has identified an uncodified practice in which appeals with similar issues that are fully briefed around the same time are argued before and decided by the same panel of judges. Fitzpatrick, *supra* note 26, at 537. The policy behind this practice, according to Mr. Fitzpatrick, is that it helps to "insure consistency of decisions" and allows judges "to spend more time on one area of the law." *Id.*

[35] *See supra* note 16.

[36] *See* OP ¶ 6(d) (stating that matters "will ordinarily be assigned in the same manner as other appeals" (*i.e.,* randomly assigned to a merits panel) unless the motions panel recommends to the chief judge that the matter should be assigned to the same panel for oral argument or expedited appeal).

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