

The Art of Judging Within a Judges' Panel

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- **The preliminary consultation**

Judges usually meet to discuss a case before it is heard by court, and to consult with each other about the case. This preliminary consultation between the members of the panel has a major influence on the cooperation and coordination in the following stages of the trial. An effective preliminary consultation can assist in several ways:

- Focusing on the problematic aspects of the case and the questions that will be posed to the parties.
- Finding out whether there is an agreement between the members of the panel, or otherwise some difference of opinions.
- Preparing a proposal to compromise.
- Deciding on which member of the panel will "lead" the oral deliberation and will write the judgment afterwards.

- **Hearing the case**

Several models can be suggested concerning the collaboration between the members of the panel during the oral deliberations:

- *The Chairman Exclusivity Model*: Only the Chairman interacts with the parties: asks questions, offers ways to compromise and writes prompt decisions. The other judges in the panel generally don't address the parties but can silently speak with the Chairman.

- *The Chairman Dominance Model*: The Chairman leads the oral deliberations but the other members of the panel can ask important questions and also write prompt decisions if the Chairman asks them to do so.
- *The Equal Influence Model*: While the Chairman may have some formal duties in the management of the oral deliberations (such as opening the discussion), the distribution of the tasks between the members of the panel is essentially equal.

Each of these prototype models has advantages and disadvantages. Generally speaking, the dominance of the Chairman can contribute to the efficient administration of the deliberations, and can prevent unnecessary lack of organization and harmonization. Furthermore, often the Chairman is the most experienced judge so he can effectively navigate the deliberations and accurately articulate the questions and views of the whole panel. However, too much dominance can prevent the other members of the panel from clarifying issues that are important to them, and may even lead to resentment.

I believe that a flexible implementation of the *The Chairman Dominance Model* is advisable. Good preparation, including appropriate preliminary consultation, is essential for this model to achieve the best results. Sometimes, transferring the dominance to another judge in the panel can be useful, especially if this judge is very familiar with the topic and will probably write the first opinion afterward.

The Chairman Dominance Model may introduce a challenge when another member of the panel has a different opinion about the case. If the disagreement arose during the preliminary consultation, it is important that the chairman will take it into consideration during the oral deliberations, and of course the other judge may also actively participate in a cooperative manner.

- **Writing the judgment**

When the time comes to write the final judgment, typically one member of the panel will take it upon himself to draft the first opinion. It can be argued that it would be better if every judge wrote his opinion without knowing his colleagues opinions, so that he could make up his mind objectively. But this is not the common practice. The prevailing practice has several justifications. *First*, it demonstrates the importance of a dialogue between the members of the panel. While every judge must decide according to his own understanding of the law and his conscience, it is not only allowed but often desirable that judges in the same panel speak with one another and explain their reasons to one another. *Second*, it is based on the assumption that professional judges are able to review the case openly and neutrally after the first opinion is distributed. *Third*, the case load usually requires that the work will be divided between the judges and that opinions will not be written if not necessary. *Forth*, if every judge wrote his own separate opinion, it would become very difficult to figure out the ratio and the precedent from the judgment. Indeed, the development of the law through the decisions of the court would be hampered in a system where judges in a panel act like atoms.

However it is still important to stress the potential problems and biases in the majority-minority system. First we can present the following example: in a criminal case 3 judges are presiding. Their conclusions are:

Judge #1: The accused had a sexual relationship with a woman that was under his authority.

Judge #2: The accused had a sexual relationship with the woman but she was *not* under his authority.

Judge #3: The accused had *no* sexual relationship with the woman; the woman *was* under his authority.

In this case the accused will be acquitted, since 2 judges (#2 + #3) will come to this conclusion. However a close look will reveal that for every element of the offence, 2 judges find for its fulfillment.

Furthermore, according to research in the field of Psychology, there are unique effects of making decisions by a group, rather than by an individual. These effects may be of relevance when judicial decisions are made by a panel of judges. It is important to note that a panel of judges does not have all of the regular attributes of a decision-making group. For example, judges are normally familiar with the case discussed by the panel before the discussion begins. Also, judicial decisions are usually not made by the panel "on the spot", and so judges have the time to read material and think about cases individually, even after the panel has discussed them. There are, however, several group-like attributes to a panel which may make Psychological insights relevant to the analysis of judicial decisions. Judges meet to discuss a

case before it is heard by court and to consult with each other about the case. They may also continue to consult with each other after a case is heard. Finally, judges read the opinions written by the other judges on the panel – sometimes prior to writing an opinion. They may also revise their opinion after having read opinions written by others. These attributes make the examination of group decision effects worthwhile to the study of judicial decisions.

For example, Group polarization is an effect by which decisions made after a group discussion, by the group, tend to be more extreme than the average of the individual decisions made by members of the group.¹ In a typical setting, participants are individually presented with a dilemma, and are asked to mark their response on a scale (such as how good, or how bad, a faculty member is John, a fictional character). Then they are asked to discuss the dilemma as a group and arrive at a group rating. While the discussion does not change the initial direction of average individual responses, the group's collective decision is more extreme than the average of the individual responses. In other words, "good" becomes better and "bad" becomes worse. In one such experiment, the group polarization effect was found in a simulated jury setting.² Participants discussed traffic cases which elicited a dominant pre-disposition of either guilty or not guilty. After discussion, jurors were more definite in their judgments of guilt or innocence. The jurors recommended

¹ David G. Myers, *Polarizing Effects of Social Interaction*, in *GROUP DECISION MAKING* (H. Brandstatter, J. Davis, and G. Stocker-Kreichbauer eds., 1982).

² Myers, D.G. and Kaplan, M.F., *Group-induced Polarization in Simulated Juries*, 2 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 63 (1976).

punishment also polarized in the initial direction – punishments in the "high in guilt" cases were harsher after the discussion and more lenient in the "low in guilt" cases.

Could the phenomenon of group polarization effect the decisions made by a panel of judges? Group discussion was found to polarize decisions even when individuals had made an independent decision before the discussion. Therefore, it seems that group polarization can be a real concern for a judicial panel, as panels hold a consultation on a regular basis before hearing a case. However, the hearing of the case may serve so as to moderate the polarization. A new "group" may be formed during the hearing phase, in which the parties to case have a significant role. Polarization is usually found in groups whose members have a common initial tendency towards a certain direction. The adversary quality of the hearing of the case may counteract the effects of the more homogenous discussion prior to the hearing.

One more example of a potential cognitive effect is the "extremeness aversion" (or the compromise effect). The classic normative analysis of choice commonly assumes that given a set of options, the decision maker will choose the one with the highest value. Following this assumption, the relative ranking of any two options should not vary with the addition or deletion of other options. "A person who prefers chicken over pasta should not change this preference on learning that fish is also available".³ However, there is

³ Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, BEHAVIORAL LAW & ECONOMICS 61 (2000).

evidence that decision makers often do not follow this pattern. The "Extremeness Aversion" (or "Compromise Effect") suggests that the same option is evaluated more favorably when it is seen as intermediate in the set of options under consideration than when it is seen as an extreme option. The advantages and disadvantages are defined relative to the other options in the "choice set".⁴ This implies that the relative ranking of two options depends on the presence or absence of other options.

Salespeople occasionally exploit this tendency by presenting the customers with modest and fancy products in order to persuade them to buy an intermediate product. [This effect has been demonstrated in several experiments. In one experiment, subjects first reviewed several available cameras in a catalog. One group chose between a midlevel camera and low-end camera. 50 percent chose each camera. Another group could also choose a third, high-end camera. 72 percent chose the mid-level camera.] Similarly, the "contrast effect" (or polarization) suggests that the same option is evaluated more favorably in the presence of inferior options than in the absence of such options. The same circle appears larger when surrounded by small circles than when surrounded by large ones.

In light of this phenomenon, it is interesting to look at the judging panel. Consider for example the assembly of three judges following a particular court hearing, during which the judges discuss their views of the case. Assume now

⁴ Alexander Chernev, *Extremeness Aversion and Attribute-Balance Effects in Choice*, JOURNAL OF CONSUMER RESEARCH, VOL. 31, NO. 2, 249, 249 (2004), available at SSRN:

that two judges have made up their minds and expressed contradicting opinions on the subject at hand. According to the compromise effect, the third judge – now faced with two opposing opinions - may tend to choose an opinion which represents the middle between the two extremes. This third opinion does not necessarily represent a third outcome, but rather some sort of an intermediate way to reach one of the outcomes offered by the other judges. Similarly, judges could be presented with choices between two opposing opinions before the court hearing when reviewing the case at hand, during the court session and while writing their opinions afterwards.

One could argue that this might lead to inconsistent and perhaps undesired results, since the final decision depends on the options presented in the first place and their relative ranking. However, we must keep in mind that the effect of the extremeness aversion is probably lessened considering that the judges in a panel are usually well acquainted, well experienced, and independent. Furthermore, often favoring the more subtle, balanced intermediate option is perhaps a positive outcome.

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