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THE MULTI-JUDGE DECISIONAL PROCESS

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This brief article recapitulates what are believed to be sound practices on the part of judges of appellate courts engaged in the decision of appealed cases. Review of lower court adjudications is of course an appellate court's principal task, its reason for existence. Practices followed in the course of the decisional process vary considerably from court to court. This recapitulation, however, is in the nature of a consensus, or at least a restatement, of the views of a majority of approximately one thousand appellate judges who have over the last twenty-eight years participated in seminars discussing the subject. These were the Appellate Judges Seminars conducted since 1956 by the Institute of Judicial Administration at the New York University School of Law. This subject has been discussed, under the topic headings Administration in Appellate Courts and Preparation of Judicial Opinions, in every seminar since the first one in 1956. The consensus, if it is that, did not develop immediately, but rather grew over the years.²

A proper preliminary inquiry is why appeals regularly go to multijudge courts. The answer, almost taken for granted, derives from the idea that two or more heads are better than one. Appeals present ultimate issues, including lawmaking possibilities, and so deserve superior handling. An odd number of judges—three or five or seven; nine may be too many—avoids even divisions defeating decision. All relevant considerations are more surely recognized and taken into account when more than one person is charged with identifying and bringing them forward. The decisional process is less hurried. The sum total of group

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^{1.} Two of these seminars, lasting two weeks each, are held each summer. The Senior seminar is primarily for judges of state supreme courts and of the United States Courts of Appeals, the other is for judges of state intermediate appellate courts. Some twenty to twenty-five judges plus five or more faculty members, mostly appellate judges themselves, make up the membership of each seminar.

^{2.} The writer accordingly does not present these views as his own, though he agrees with nearly all of them and has stated most of them in recent seminars and judicial conferences.

thought, activated by collective responsibility, is apt to be more reliable than the thinking of single individuals in most instances.

The appellate process demands not only sound decisions but public confidence in their soundness. Public confidence in judicial integrity is part of the demand. Knowledge that multiple judges check each other helps to sustain confidence and to protect individual judges from public criticism. The solemn dignity of learned judges listening and conferring together engenders public confidence.

Reasonable assurance of sound decision and public confidence in that soundness support the multi-judge system, and by the same token, give rise to a proper insistence that it is the duty of all the judges on a multi-judge court to participate actively in the joint judicial enterprise which justifies their jobs. Although the writing of a court's opinion is customarily and almost necessarily assigned to a single judge, it is expected that all the judges on the panel that hears a case, or on the court, if the whole bench sits on the case, take an active part both in reaching the conclusion that decides the case and in agreeing, or disagreeing, with the opinion that sets out the facts and reasoning which, by serving the court's (not just the individual judge's) common-law-making function, constitute a guide to future decisions in comparable cases. If decisions and opinions do not truly represent this aggregate of the judges' views, the basic justifications for the multi-judge appellate system are disregarded. A three-judge or seven-judge court could dispose of more cases if single judges took complete responsibility for cases assigned to them, but quick disposal of appeals, though having a certain value, is far from the principal value served by the appellate process. One-judge opinions, or opinions constituting the considered views of fewer than the majority who purport to decide the case, violate the very reason for the court's existence in its standard multi-judge appellate form. Sound internal operating procedures for any appellate court must be so planned and administered as to assure maximum compliance with these basic purposes for which appellate courts are established.

The judges of an appellate court normally enter upon the decisional process with reference to any appealed case when the briefs are distributed to them. It should be assumed that all the judges who are to participate in a decision have read the briefs before the case is orally argued or submitted without argument for conference discussion. This has not always been a common practice. Even a quarter-century ago there were American courts in which judges were not required to read briefs in advance, and in which some judges for one reason or another regularly did not. Today practically all courts in this country expect their judges to read the briefs in advance of submission, and nearly all

judges consistently do so. Few appellate judges will admit that they do not, even occasionally. Thus there is reasonable opportunity for intelligent participation by every judge in the hearing and discussion of each case.

Many judges, when they read the briefs in an up-coming case, then prepare pre-argument memoranda, primarily for their own use when the case comes up in oral argument and later conferences. It has been suggested that copies of these memoranda be given to the other judges as well, in advance of case submission. If the judge who wrote the memorandum wants to pass it around, he is presumably free to do so, but each of the other sitting judges should undertake his own study and research, without undue reliance on other judges' memoranda. If case memoranda are prepared by the court's central staff, however, they are for the use of the whole court, and all the judges are entitled to see them before the case is taken up. If a staff memorandum has little value it can be disregarded, but whatever value it has belongs to all the judges, to the court as an entity.

A short pre-argument conference on cases about to be orally argued, held perhaps a half-hour before oral argument begins, is standard procedure in a number of courts. It can give each judge a better feel for the cases to be heard, can enable the court to plan each judge's part in the hearings, and can produce a more efficient and helpful oral argument. At the beginning of argument on each case, the Chief Justice can tell counsel what issues bother the court and can hold counsel throughout the argument to those central issues. This practice can facilitate court control over the argument, often necessary if the argument is to be as useful as it should be. Allocation of issues for questioning of counsel by different members of the court can be planned. A single judge should not ask all or most of the questions directed to counsel in any particular case. Such concentrated questioning creates the impression that the case already has been assigned, formally or informally, to that one judge and that the other judges are deliberately taking less interest in it. The appearance of joint judicial concern with every case is almost as important as the actuality of group participation and responsibility. By pre-argument agreement upon areas of questioning to be handled by different judges, the danger of a misleading appearance of one-judge responsibility can be avoided.

Today less weight is attached to oral argument than in the past. Some judges assert that oral presentation seldom adds to the content of the briefs, and that when briefs are poor, the oral argument presented by the lawyer who wrote the poor brief will be equally poor. Yet some judges comprehend better through listening than through reading.

Doubts that persist after briefs are read can be resolved, or with better assurance left unresolved, after questioning at oral argument. Oral argument constitutes one of the few opportunities for public visibility in the appellate decisional process. Public confidence in the integrity of the process, indispensable in our tri-partite political system, is promoted by this element of visibility. And sometimes there are good oral arguments that truly further judicial understanding.

It is now generally agreed that time limits on the length of oral argument are necessary, and that in some cases oral argument is valueless. The length of argument may vary from case to case, though one fairly short maximum length is appropriate for the great majority of cases. Advance allocations of time are needed. For this purpose, some kind of screening is required. Screening normally will be administered by the court's staff, seldom by the judges themselves, and will involve consultation with counsel, although counsel must not be allowed to control the allocations. Standards for guidance of the staff in allocating time lengths will be set by the court, usually on the basis of case complexity, although the crowded state of the court's docket may have to be the underlying consideration. Oral arguments are not as central to the appellate decisional process as they once were, but they are still important and likely to remain important. Courts should not disparage them but should conduct them in such fashion as to yield a maximum of benefit and a minimum of wasted time and effort.

A tentative decision conference usually is held as soon as possible after the conclusion of oral arguments. If a morning is devoted to oral arguments, that afternoon is the ideal time for the conference. The judges have read the briefs and have heard the arguments. The issues and contentions are fresh and clear in the minds of the whole group. If there is a whole day or more of oral arguments, the earliest free time that can be set apart is the best time for the conference. Too many cases heard prior to a conference is almost as bad as a long delay; issues and cases blur and run together in either event. When that happens, conscientious judges must study the briefs and memoranda again in order to be well-prepared for the decision conference. If a court hears arguments for several days continuously, conferences ought not to be delayed until all arguments are heard. The conferences will serve judicial purposes best if periods are set aside for them at intervals during the long hearing period. Time is saved and judgment is better when consideration is prompt.

If there is a prompt decision conference after the case is submitted, and there has been no pre-assignment of cases, all the judges presumably will have equal interest in each case. No judge knows that any one

case will or will not be his case to write. Certainly, conferences should be so conducted that every judge sitting on a case has a fair opportunity to influence the decision.

The order in which judges state their views on cases during a conference has bearing on a judge's opportunity to influence the decision. The order might be controlled by seniority, with the Chief Justice, then the senior judge, leading off in every case, and the junior judge speaking last. That could leave junior judges only a minor role in determining results. A few courts that proceed by inverse seniority, requiring junior judges always to lead off, apparently assume that those who speak last are able to exert the greater influence. It would be better, more productive of full group effectiveness in decisionmaking, if leadoffs were rotated among all sitting judges, preferably from case to case and at least from day to day. Whatever the order, it ought to be varied. For similar reasons, the vote on how the case is to be decided should not come as the judges state their views on the case. A statement of views and reasons may of course indicate how the judge expects to vote, but no judge should commit a final vote before hearing the reasoned analyses of every one of the sitting judges. Those first to speak should leave themselves free to change their minds. It should be possible for all views to have effect upon each judge's vote.

The vote taken at this conference may not be the final one. Because the judge to whom the case will be assigned for preparation of the court's opinion has not yet done the research upon which the opinion must be based, the vote must be tentative. Almost always, the tentative vote will stand, but the exceptional case will still turn up.

The system employed for assigning cases is of first importance. Several different methods of assignment are currently used. Assignment by some kind of rotation prior to argument and submission is still the practice in some courts, but it is increasingly believed that this is undesirable. Pre-assigned judges, knowing which cases will be theirs for writing opinions, almost certainly will spend more time on their own cases, from the beginning, than on the others. They will be better prepared than the other judges to ask questions of counsel during oral argument, thus enabling counsel to guess which judge has the case. The pre-assigned judge, by leading off in conference discussion of his case, can exert major influence in deciding it, since the other judges, each concentrating on his own cases, will be less prepared on all cases. The pre-assignment system does not lead inevitably to one-judge decisions, but it leans in that direction.

A check-judge device, used in some courts that pre-assign cases, minimizes the system's faults at least slightly. A second judge is pre-

assigned to each case, not with responsibility for the ultimate opinion but rather to check on the first judge's understanding of the facts and analysis of the law. In a sense this tends toward two-judge decisions.

In most courts cases are not assigned to individual judges until after the tentative decision is made in conference. All judges thus presumably remain equally involved with all the cases because they do not know which ones will later be assigned to them. And the subsequently assigned judge knows the views of all his colleagues before he settles down for his final research and preparation of the court's opinion.

Subsequent assignment by the Chief Justice or by the senior judge in the majority has been the most common method of post-conference assignment. This can produce a fair distribution of the work and can take account of the special interests, including the possible expertise, of particular judges. Some courts, however, prefer a more impersonal system.

Assignment of cases by lot after tentative decisions are reached is a possibility. A few courts do this, in one way or another. One way, not much favored, is to let the judges themselves, in an order determined by lot, select their cases. The judge who draws first might take what appears to be the easiest case, or the one that he finds most interesting, and so on down to the judge who drew the last choice. He takes what is left, which might be the most difficult case. On the next drawing, after the next decision conference, he might do better.

A more acceptable method of post-conference assignment by lot is now employed in a number of states. Under it the cases are given their numbers in advance, and the judges draw for the same numbers. By this method the assignment is altogether by chance and completely impartial, so that there is no opportunity for exercise of individual preferences on any basis, and the potentiality for one-judge opinions attributable to a judge's special expertise or special interest is reduced to a minimum. This may well be the fairest of all the appellate case assignment procedures in current use.

The writing of opinions is probably not an appellate judge's most important work, but it is the work which, more often than not, has most to do with his public reputation. He has to take it seriously, and usually he does.

The court's tentative decision has been made before he starts to write. He is aware of the views expressed in conference by his fellow judges. He knows that his assignment is to write an opinion for the whole court, or its majority, and not just for himself, though he does not want to be put in the position of dissenting from his own opinion. He is entitled to employ his own writing style and his own jurispruden-

tial concepts, but he needs to refer to divergent concurring reasons expressed by other judges so that they will not find it necessary to write separate opinions.

He knows that if his case is a difficult one his colleagues are relying on him to do the further research and analysis that may raise doubts about the tentative decision in which he concurred. If this happens, he may conclude that the case should be discussed again in conference before he writes, or he may decide to write it tentatively and let his writing introduce the new research for discussion at the subsequent conference.

There is no good reason why the writing judge should not be free to talk with his colleagues about his opinion as he writes it. Often he will not, because writing is a one-person job. The writing should be done as soon as possible after the conference, while the writer can still remember what the other judges' views were. He may choose to check with other judges as he writes to make sure that he understands their views, perhaps to the extent of showing them drafts of relevant paragraphs and asking, "Does this adequately take account of your views on that point?" A draft can be revised before it is seen by all the judges. The multi-judge character of the decisional process does not end with the conference vote to affirm, reverse, or whatever, but extends to and includes the language of the opinion. That too may have precedential effect. Even dictum sometimes influences future decisions. The fact that the writing judge puts his name on the opinion does not relieve the court as an entity of its responsbility, nor does that relieve the writing judge of his duty to make the opinion the court's collective statement.

No piece of writing can become a court's opinion until it has been formally approved by the members of the court as a group, or by the required majority. Normally this approval will come at an opinion conference held shortly before opinions are due to be released. Opinion conferences could be a dull and time-consuming chore, but need not be. Drafts of opinions should be circulated to all the judges before the conference so that every judge has a fair opportunity to call the writer's attention, either orally or in writing (which may be more helpful), to mistakes and to changes that might improve the opinion. If these turn out to be substantial and the author accepts them, the opinion would be recopied and recirculated in corrected form before it is formally submitted at conference. If opinions have been circulated in essentially final form at least a day before the conference, so that all the judges are currently acquainted with them, there will be no need to read or discuss them except in reference to disagreements and minor

changes. Most opinions can be approved summarily or, if not approved, can be held over for revision and resubmission. Announcement of intent to write concurrences or dissents would be made at that time.

It is possible that the equivalent of an opinion conference can be conducted by correspondence or by telephone, perhaps by conference call. This may be necessary in courts whose judges do not all have offices together. Spontaneous exchange of views and mutual understandings may ensue more easily from personal conversations and from serious but friendly discussion around a table. The important thing is that no opinion ever be issued save after group consideration of it and agreement to its issuance. Some kind of an opinion conference, culminating in whatever agreement can be arrived at, is essential to the exercise of the collective responsibility that is required by the very nature of multi-judge appellate courts.

Special problems inevitably arise if the court is one that sits in separate panels, usually with three judges per panel. The whole court may consist of fifteen or even thirty or more judges. When a case is decided and an opinion issued by a three-judge panel, or by a two-to-one majority of the panel, it constitutes something more than the judgment of the panel; it is in some way a judgment of the whole court of which the panel is only a fractional part. Another panel might have reached a different result. Should another panel faced with a similar case a month or a year later be free to reach a different result? Should there be some procedure for committing, or at least alerting, the whole court to a panel's decision and opinion, before it becomes final?

One possibility of course is that the losing party may ask for an en banc review of the case. If the total membership of the court is no more than nine, or even eleven, an en banc hearing can be held, and many smaller multi-panel courts do hold them. If there is more than that number of judges on the whole court, however, en banc hearings will seldom if ever be held, nor can they be. A large court might establish a review system under which seven or nine judges specially selected from its total membership could rehear such cases, but few multi-panel courts do this. Probably they should. Precedents from that body could then be binding on the whole court.

Alternative devices, though helpful, seem less satisfactory. The principal one is to treat the decision first announced as a binding precedent for the whole court regardless of possible later disagreement with it by other panels. Several intermediate courts do that. Dangers inherent in this approach can be minimized by requiring that, before any panel opinion is released, it be circulated to all the judges on the entire

court under an arrangement by which other judges may within a specified short time report their objections to it with requests that the original panel reconsider its position. The panel would not be bound to do so, but could. This arrangement at least would give all the judges some opportunity for input into the original panel's ultimately authoritative precedential decision.

A companion technique employed in many multi-panel courts calls for rotation of membership on panels, so that every judge within each fixed time period — six months or a year — will sit on a panel with every other judge on the court. That prevents persistently unique legal attitudes that might develop in permanently separate panels. The combination of rotation in panel memberships with advance circulation of all opinions to other-panel judges can reasonably justify the practice of treating the first announced panel decision as precedent for the whole court. Thus guarded, the practice is preferable to the other alternative, of later panels being free to disregard the first decision as though it came from a different court.

Motions for rehearing, apart from motions for en banc hearings, in most courts are freely allowed, seldom granted, and ordinarily looked upon with a kind of judicial disdain. A reason for this situation is that attorneys most often do not file them with any real expectation of reversing a court's already considered judgment, but rather to gain delay in the judgment's finality and to give clients a little more time to accept the fact that their case has been lost. Court rules could well be more hardboiled in not allowing such motions to be filed unless real grounds for reconsideration are asserted in good faith. Some courts follow a practice of leaving it to the judge who wrote the attacked opinion to recommend to the court what action it should take on the motion. That seems wrong. A different judge or judges should make the recommendation, presumably after consulting with the writing judge. This would not be an undue burden if the mass of baseless motions were eliminated. One of the real advantages of motions for rehearing, however, is to focus the court's attention on erroneous or careless statements in an opinion while there is still time to correct the language before it becomes final. Judges should have an opportunity to correct their errors before they become the law.

Finally, every court would be helped in conducting its decisional processes if all the details of those processes were fixed and publicly known. In several courts these procedures, having first been definitely agreed upon, are published in pamphlets available to the bar and the general public. This enables the judges themselves, especially new judges, and the bar and interested citizens, including litigants, to know

what the procedures are. This can add to any court's effectiveness by assuring added public confidence in the court's collegial responsibility and integrity. The public can know through the published procedures that the court does operate as a court and not as a collection of one-judge decisionmakers.