

*Session 7.1*

*Teaching the Art of Listening, Reading and Judging within a Judges Panel  
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- 1 Justice Dr Levin has spoken inter alia about the way a judge has to learn how to read, the art of reading. Professor Carmi will tell us about the art of listening. What about speaking? I think that one of the most important skills of a judge in a panel is how to avoid speaking, the art of not speaking. It is not easy, as you will realise in a moment. When we are speaking of the art of sitting in a panel, in fact we are speaking of teamwork, teamwork in a very special environment. The procedure of sitting in a panel can be divided into three stages. The first of them is the preliminary discussion, or preliminary consultation. The second stage is hearing the case in the courtroom. The third one is deciding the case, usually writing a judgment. Speaking of the preliminary consultation, when judges meet to discuss a case before the hearing, before they turn and enter their courtroom they consult with each other over the case. The preliminary consultation between the members of the panel has a major influence upon the cooperation and coordination in the ensuing stages of the trial, or hearing, and can be decisive in the conclusion of the case.
- 2 Effective preliminary consultation can assist in several ways: first, in focusing on the problematic aspects of the case and the questions that should be posed to the parties; secondly, in finding out whether there is an agreement between the members of the panel or otherwise some difference of opinion; and third, preparing a proposal for settlement of the case, in appropriate cases a settlement by way of compromise, deciding, quite often, on which member of the panel will lead the whole deliberation and will eventually write the judgment.
- 3 The second stage of the panel work is the hearing, in the courtroom. Several models can be suggested with regard to the collaboration between the members of the panel during the oral deliberation. The first model is the 'chairman exclusivity' model. According to this model, only the Chairperson interacts with the parties. He or she asks the questions, offers way to settle the case, and writes forming a decision on the spot. The other judges in the panel generally are not supposed to address the parties, at least not directly, but can silently speak with the chairperson and suggest some questions to be asked or proposal to be put.
- 4 The second model is the 'chairperson dominance' model. According to this model, the chairperson leads the whole deliberation but the other members of the panel can ask questions and also might write a prompt decision if the chairperson asks them to do so.
- 5 The third model is the 'equal participation' model according to which while the chairperson may have some formal duties in the management of the whole deliberation, such as opening the discussion, the distribution of the tasks between the members of the panel, he or she is essentially equal.
- 6 Each of these prototype models has advantages and disadvantages. Generally speaking, the chairperson dominance model can contribute to the efficient

administration of the deliberation and the hearing, and can prevent unnecessary lack of organisation and harmony. Furthermore, quite often the chairperson is the most experienced judge so he can effectively navigate the deliberation accurately, articulating the questions and views of the whole panel. Yet 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.

- 7 It seems that a flexible implementation of the second model, the chairperson dominance model, is advisable. Good preparation, including the appropriate preliminary consultations, is essential for this model to achieve the best results. The chairperson dominance model may introduce a challenge when another member of the panel has a different opinion about the case. A chairperson should spot, as much as possible, such differences in opinion during the preliminary consultation. It is very important to do so. If such disagreement arises during the preliminary consultation it is important that the chairperson take it into consideration during the oral deliberation, and of course the other judge may also actively participate in a cooperative manner during the deliberations. Yet differences of opinion should be solved outside the courtroom. For God's sake, do not argue between yourselves inside the courtroom. Try to clarify differences of opinion before or after the discussion, after the whole hearing and not during your stay in the courtroom.
- 8 Of course, a chairperson cannot decide by himself how to take steps, procedural steps and other steps, throughout the whole hearing. He should not ignore the other judges and should consult them when he needs to make a decision on the spot. On the other hand a member, or other members, of the panel should not take control of the hearing without the consent of the chairperson. If they decide to express a differing opinion, which is not the opinion of the whole panel or not even of the majority of the panel, it should be made clear that this opinion is not necessarily the opinion of the panel, that is, that it is the opinion of one of the members of the panel. I remember an instance in which one member of the panel said, 'well, it is very clear that the punishment is too severe' and the other member said, 'oh, it's very clear that it was not severe enough'. That could not be a way of behaviour inside the courtroom. It should be clarified that such an opinion is the opinion of the member and only his own opinion. It will not necessarily be the outcome of the case.
- 9 When we come to the outcome of the case, the third stage, decision-making, typically one member of the panel is assigned by the chairperson to draft the first opinion. It can be argued that when doing so every judge should be on his own and should write his opinion without knowing his colleagues' opinion, so he can make up his own mind independently, but of course that should not be the common practice. It is not very desirable.
- 10 The prevailing practice, according to which one judge is assigned to write the first opinion and then the other judges react upon this opinion, and decide whether to write a separate or dissenting opinion, a concurring opinion, or just to express their consent with the opinion, has several justifications. First of all, it demonstrates the importance of dialogue between the members of the panel. While every judge must and should decide according to his own understanding of the law and according to his conscience, it is very desirable that judges in the same panel speak with each other and explain the reasoning to one another. Secondly, such practice 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 caseload usually requires that the work be divided between the judges and that additional opinions will not be written if not necessary. Fourth, 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 decision of the court would be hampered in a system where judges in a panel act like separate atoms.

- 11 The last point requires some elaboration. Is it really desirable that there be a dialogue between the judges and that the members of the panel shall try to overcome some unimportant differences? Are there, at all, unimportant differences? One of my colleagues once said, and I shall try to translate it into English, 'every judge should remember that the court is a house of law and not a house of lords'. In other words, do not act as if you are on your own, as if you are the only judge in the court. You have always to remember that you are part of a court of law and that the court must speak in a very clear voice. While judges must always be independent and free to decide according to their understanding of the facts and the law it is important for judges in a panel to be open to cooperation with their colleagues. The scale of cooperation includes consulting with one another, convincing one another and sometimes also compromising with one another.
- 12 Should panel members compromise their opinion? Well, it is not a simple question, and nor is the answer simple. When we speak of a 'little' question there is often room for compromise. For example, in the wording of the reasons of the court, the compromise may lead to a unified voice, the clear voice of the court. In a factual question compromise is less attainable but there is still much value in the consultation between the judges of the panel.
- 13 Such consultation might avoid the need to refer to a technical rule of determination, for instance where there are differences of opinion and one has to decide between the different opinions and you do not have a clear majority or a rational majority for one opinion. Let us take an example from the criminal field. Assume, for instance, that you sitting in a panel of three judges, and assume that it is a crime in your country to have sex with a woman under your authority. The judges in the panel decide as follows: the first judge decides that the accused had a sexual relationship with a woman who was under his authority, and therefore is guilty. The second judge decides that the accused had a sexual relationship with the woman, but she was not under his authority, and therefore is not guilty. The third judge decides that the accused had no sexual relationship with the woman, and that the woman was under his authority, and therefore is not guilty. In this case, the accused will be acquitted since two judges will come to this final conclusion. However, a close look will reveal that for every element of the alleged offence, two judges, the majority decided for the prosecution. Nevertheless, the final outcome will be an acquittal and I am not sure that it is the real opinion of the three members of the panel, so a dialogue in such a case might avoid the need to resort to a technical rule of determination. There might be other technical rules of determination. It depends on the system. For instance, there are systems in which when you cannot decide a majority or when the members of the panel present three totally different opinions the only opinion that counts is that of the chairperson. This is another quite common technical rule of determination which also because of its flaws should be avoided. Maybe a real dialogue, where no one gives up his real opinion or his real insight into the case, might avoid such an

undesired outcome. As you may see, the work in a panel is an art in itself. It can be developed by an appropriate legal education and it is of course a combination of experience and education.

