CHAPTER I

# PROBLEMS IN OPINION-WRITING: A PANEL DISCUSSION*

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CHAIRMAN GARRETT: I take it we are ready to start this prestigious event.

The most important person in this room this afternoon is the lady seated before me. I need not identify her to you, but in her customary tyrannical fashion, she has implied all sorts of dire consequences if I do not assure that each and every discussant this afternoon, with a question or comment from the floor, identifies himself for the record. I trust you will all keep that in mind, in case I forget it myself later.

I am not entirely sure just what the Program Committee wanted to accomplish in this session this afternoon, because, as I look out at this assembled audience, I recognize many people who could sit up here and tell me a few things about writing opinions. But I suppose you all know the insidious Mr. Gill from Philadel-

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phia, and I find myself entrapped by his blandishments. The same, I suppose, goes for my colleagues.

I guess all of us can profit occasionally by taking a somewhat detached view of the nature of our work, for at times we may overlook the larger significance of what we are doing.

I think I can illustrate this by recalling to you something that I saw on TV about fourteen months ago. This was a program on the evening of the day after Jack Ruby shot Lee Oswald, and one of the industrious TV reporters was on a main street in Dallas, button-holing people coming down the street. The reporter first accosted a rather husky looking fellow about middle age and said that they were taking a sampling of opinion on what had happened the day before. He wanted to know what this fellow thought about Ruby's shooting Oswald, and whether this was good for the reputation of Dallas. The big fellow replied, "Well, I think it was a good thing to get it all over with right away."

Then the reporter passed on to a second individual, a young man about 30, and asked the same question. This fellow replied, "Well, maybe it was a good thing and maybe it wasn't. Maybe God wanted it that way, and then again maybe He didn't. Anyhow, that is my opinion." (Laughter)

Enboldened by this success, the reporter accosted a third individual, a rather attractive lady in her early 30's. She came right out with a strong opinion. She said, "Well, it was a bad thing. He should have had a fair trial . . . so that he could suffer longer."

Now, these rather primitive attitudes, it seems to me, are much more widespread than perhaps we care to admit. And I suggest to you that we encounter some of these primitive attitudes in some of the witnesses and participants in some of our cases. It may be appropriate, indeed, for us to recognize that we have a kind of responsibility as "law-givers" to assure that reason and fair play are brought to bear in settling grievances, and that one of the most significant ways that we carry out this responsibility is in the opinions we write.

So it seems altogether fitting that we should put forth our best effort in writing opinions, and I guess that is what we are really here for today, to consider how we can best do that.

I have with me a talented collection of stars who need no introduction. I assume that you wouldn't be here if you didn't know these fellows. I might say, however, that we have achieved a kind of geographical balance in the selection of this panel. For example, over here we have a gentleman who has the distinction of living and functioning to the north and to the east of New York City — our New Englander, Tom Kennedy, who is on the faculty of the Harvard Graduate School of Business Administration. Gerry Barrett, from the southeast, is a Professor of Business Administration at the University of North Carolina.

On my immediate right is a representative of the far west, Ben Aaron. Then, on my far right we have a representative of that great cultural center in the Alleghenies known as Pittsburgh—Herbert Sherman. I think that Herb probably is on the panel because I am from Pittsburgh too, and the program chairman thought Pittsburgh needed an antidote for me.

Some of you may boggle at the fact that all of these gentlemen are professors, but let me say quickly that all of them at one time or another have been full-time arbitrators or have labored full time for the federal government.

I don't think there is any need to dilate further upon the quality of this Panel, except perhaps to suggest to you that something of its high calibre may be indicated by the fact that one of them, during the last war, was able to wangle a three-year assignment as Territorial Director of the OPA in Hawaii. Those of you who are familiar with the jockeying that takes place to get such a juicy assignment in the federal government can appreciate the fantastic finagling which Gerry Barrett must have indulged in.

GERALD A. BARRETT: When do I get the floor, Mr. Chairman?

CHAIRMAN GARRETT: I think perhaps, at the risk of being too precipitate, I would like to start throwing a few questions around.

First, I would like to toss a question to Tom Kennedy, with the right of the other gentlemen to comment to the extent they wish.

I think, Tom, it is often said there are too many arbitrators'

opinions today which are too long, too rambling, too unimaginative and too dreary in their style. Do you think there is any substance to this criticism?

THOMAS KENNEDY: I don't know exactly why I should have to answer this question, or, really, why I am on this panel, except that you are as good at getting people to do these things as Lew Gill is, and that is why we find ourselves here.

I feel a little like the fellow who was back at school for the fiftieth reunion of his class. He was talking with another one of his friends, also there for the fiftieth reunion. One said to the other, "Elmer, do you remember when we were here how we used to chase the girls?" The other one said, "Yes, I have been trying to remember why we did that."

My answer, in general, is that this is not a valid criticism. We can all point to some opinions which are unimaginative, rambling, dreary, where too much is said about too little. But, on the whole, I think these are the exceptions rather than the rule.

My own experience in reading other arbitrators' opinions is that we can be quite proud of the opinions the arbitrators write. On the whole I find them well written, especially when we consider that usually arbitrators have no research assistants. I would like to hear some of the other panel members comment upon this point.

CHAIRMAN GARRETT: Unless some of the other members of the Panel would like to do so, I will go to the next question.

BENJAMIN AARON: Before you do that, I would like to make just one comment about one aspect of this: the dreariness of style. It seems to me that the cards pretty generally are stacked against arbitrators. It is very difficult to deal with certain questions in a lively and brilliant style. In fact, I would go so far as to say there is nothing more detrimental to good literary style than the need to write nothing but arbitration awards and opinions.

Most of the gems of which we were so proud when we were younger fall pretty flat with an audience that is not interested in literary style. This gets into the question of who the audience is, but that is another matter which we will get into a little later.

I think, though, that the dreariness is to a certain extent unavoidable. One has to concentrate pretty much on simply a workman-like job of clarity and, hopefully, brevity.

CHAIRMAN GARRETT: I would like to pick you up on your hopeful note on brevity. Within the last few weeks I have been browsing amongst opinions, in part at the prodding of Lew Gill. I discovered a couple of 14-page decisions in BNA which run between 4,500 and 5,000 words, dealing in one instance with a discharge case and in another instance with distribution of overtime, neither of which seem to be particularly technical problems. There seemed to be a tendency in the opinion to detail the testimony of each witness, to copy large excerpts from the parties' briefs, and, generally, to drag the whole thing out at great length.

I am wondering if you can think of any factors that might lead an arbitrator to write such an opinion?

MR. AARON: Well, I can think of lots of factors. I will start out listing a few, so long as I don't have to justify them.

The obvious answer is that the arbitrator doesn't have time to write a shorter opinion. If he is hurried and has a large backlog, it is easier, I think, to write just the kind of opinion you described, throwing in everything, than it is to take the time to prune it, polish it, and hone it down to the essentials.

But there are other reasons as well. Particularly with new arbitrators, there is a tendency to be somewhat intimidated by the tactics of the parties. I think all of us have had the experience of having some burly fellow on one side or the other look at you sternly and say, "Did you get that down? That is a point I am particularly concerned about, Mr. Arbitrator, and I want to be sure you have it in your notes." And I think an arbitrator may very well feel that he wants to assure the parties that he has taken into account everything that is conceivably relevant in the case.

MR. BARRETT: Your remarks remind me of the famous comment Mr. Justice McReynolds once made, when, having decided the main issues urged by the parties, stated: "The remaining arguments are sterile and deserve no consideration."

MR. AARON: That is quite apropos, Gerry. As a matter of fact,

I have been taken to task for referring to an argument as being without merit. The parties had their feelings hurt. That doesn't mean that I have eschewed that tactic, but I think that some people are very sensitive. There are various ways of saying this. The best way is simply not to refer to it, but I think we would be quite wrong if we were to assume that every long opinion is a bad opinion.

There are a number of cases—I think particularly of incentive cases in the steel industry in which our worthy chairman, as well as Ralph Seward and others, have written some of the most notable opinions—that were of considerable length, and quite necessarily so, because they were dealing with a very complicated problem which required lengthy exposition and analysis.

The thing that I think is most indefensible is this kind of cut and paste job that Mr. Justice Cardozo referred to, if I am not mistaken, as the agglutinative process—just pasting and adding together, without analysis, then capping it all with a conclusion.

But I do think we have to be very careful about condemning an opinion for length only.

MR. BARRETT: Isn't the real question not the length of the opinion but what is responsible for its length? If the length of the opinion is due to a recital of detailed testimony and contentions of the parties almost *ad nauseam,* that kind of length may be subject to criticism. If the length is due to a necessary analysis by the arbitrator, then I doubt there is any basis for criticism.

HERBERT L. SHERMAN, JR.: I agree with you on that, Gerry. I think it is true that there are cases, as Ben Aaron has noted, where particularly lengthy opinions may be necessary.

It is my personal belief, however, that the majority of arbitrators' opinions could be written so that they would take up not more than four to eight typed pages. I realize there are some that could take up fewer pages, occasionally a case may require more, but it is my belief that too many arbitrators' opinions are unnecessarily long today.

MR. KENNEDY: I think this depends on what you want to accomplish with your arbitration opinion, but I would like to make

one suggestion—I used to have a format that I would follow, where I would put down the arguments of the company, the arguments of the union, and then the reasoning of the arbitrator. I just cut out the arguments of the company and the arguments of the union. I find this makes it a lot shorter.

CHAIRMAN GARRETT: I would like to hear from the panel as to whether they think there is any substance to the view that the parties expect and need to have evidence that you have fully absorbed their arguments, fully appreciated them, and have fully considered them. I think this may be what underlies the approach of those fellows who spell this kind of thing out at great length.

MR. KENNEDY: I think you can do that without having special sections for the arguments of the company and the arguments of the union. When I used to include such sections in my opinions, I often found that when I got to the section setting forth the reasoning of the arbitrator, I was repeating a great deal of what the parties had said.

MR. SHERMAN: I find by not listing the company's arguments separately from the union's arguments, but rather using a merged statement of the arguments the length of the opinion can be reduced. It is sometimes possible to set them up in juxtaposition, so that the argument of one party wipes out the argument of the other party.

Another thing an arbitrator may do is to exercise some judgment as to what are really the major arguments of the parties, and then deal with the major arguments. As to other arguments, if you feel it is necessary, a simple sentence could be put in the opinion that the argument one party or the other made is not persuasive.

CHAIRMAN GARRETT: Arguments very frequently, I find, are based on so-called "precedents," cited from other arbitration cases in other collective bargaining relationships.

I am mindful of the fact that at our annual meeting in Santa Monica one of the speakers seemed to disparage such use of precedents and went so far as to say that in his experience these so-

called precedents usually consisted of language which was dredged out of an opinion, where the facts really did not have any resemblance to the case the arbitrator was supposed to decide.

I would like to hear from you what your experience has been with the citation of precedents from other arbitration relationships. Has it been useful? Is it a waste of everybody's time? Where do you stand on that?

MR. SHERMAN: I believe that citation of arbitration awards from other companies in the same industry may indeed be helpful—helpful certainly to a greater extent than arbitration awards from other industries. I find that in some industries, where small companies are involved in arbitration, both the representatives of the company and the union are relying heavily upon arbitration awards issued for larger companies in the same industry. I find that both parties are in effect asking the arbitrator to interpret and apply these arbitration awards to their particular bargaining relationship. This would be particularly true in an industry that engages in pattern bargaining, where the contract provision of the smaller company is precisely the same as that of the larger company where the cited arbitration cases were decided.

With respect to the use of the precedents, I would suggest that it may be appropriate, if not necessary, for the arbitrator in his opinion to cite other arbitration awards which have not been cited by the parties to him. However, I would distinguish awards cited by the parties from awards which are dug up by the arbitrator as a result of his independent research. I have a feeling that some arbitrators not only use other awards to confirm their independent judgment based on the evidence presented to them, but that they also proceed to discuss these arbitration awards dug up in this independent research to an extent which I believe lengthens the opinion unnecessarily.

MR. AARON: I find citing of precedent and reliance on it to be rather futile in most instances. One exception I would make is an umpireship where the same contract has been interpreted by a predecessor umpire. I think there is a certain value and stability in the relationship, and although I have always reserved the right to differ if I felt the previous ruling was incorrect, I am inclined to require strong evidence to that effect and would much rather

follow what has already been decided by the previous umpire in a case which seems to me to involve pretty much the same issue.

The fact of the matter is that one or the other of the parties sometimes just wants another crack at it, with a different man, hoping for a different result. I do think there is value to stability in a particular relationship. But, as far as the rest of it is concerned—even in an industry which has provisions similar to Section 2 (b) in the steel industry—when you look into these other cases, the situations are sufficiently different to make the precedent not particularly valuable. That is not to say that the analysis of another arbitrator whose decision has been cited is not helpful. He may raise questions in your mind and approach a matter in a way that is highly suggestive and useful, but that is quite a different matter from taking his decision as a binding precedent.

CHAIRMAN GARRETT: Tom, as a non-lawyer, do you have any comments on precedents?

MR. KENNEDY: No, except that I would follow very much what Ben has said. I do only ad hoc arbitrations and I do not get into many situations where there is an industry-wide contract. I do read other arbitrators' opinions, try to get ideas as to how they have handled similar cases, but I wouldn't use another case from another industry or company and cite it as precedent in one of my cases. I don't do that.

However, I do go a little bit further than Ben does with respect to prior decisions under the same contract. If I find that an arbitrator has already ruled on a provision under the same contract, I will not change the decision, even though I think the other decision is wrong.

CHAIRMAN GARRETT: I think, related to this problem of precedents, you have the problem that law students spend a lot of time worrying about, namely, what is the difference between the holding in the case and what is dicta?

I suppose, as a general proposition, many of us would say that a sound operating rule is never to decide more than you have to in order to dispose of the case. As a matter of fact, reading some opinions, indeed, some of my own, the obvious purpose is to deal with more than is necessary for a decision of the specific case.

I would like to ask you, Gerry, whether in your judgment this is sometimes desirable or even necessary.

MR. BARRETT: I would prefer to start out, as a general rule, with the proposition that dicta should be discouraged and be eliminated from an opinion. That calls for a good bit of self-restraint on our part.

I would then go on from that general rule and add that there may be circumstances where, from either what the parties had implicitly or explicitly stated at the hearing that dicta may at times be necessary, that they, in fact, are seeking broader coverage in the ruling than the narrow issue they had submitted. I find myself, however, generalizing on this question. If I may take a moment, it might be helpful to draw on a specific type of situation.

Some time ago I had a case which started out, apparently, as a routine promotion case. A vacancy arose in the job of truck driver. The company promoted a junior man; the senior man was grieving. The company's defense was that a new policy had been adopted which required for every job in the bargaining unit a high school diploma as a minimum educational requirement. The senior man who was grieving did not possess a high school diploma; the junior man did. That is the ground on which the company justified its action.

Now, at this point the critical problem emerges: essentially what kind of attack is the union going to make? In this particular hearing, the union argued that the company could not unilaterally adopt such a requirement and that the company was required to bargain with the union on a matter of this kind. This particular educational requirement was included by the company in its job description which, in addition to describing the job, also listed the minimum requirements for qualifying for the job. So the effect of what the company had done in this instance was simply to amend the kind of document the company had in the past always unilaterally promulgated. The parties joined issue, then, on the matter of whether the company possessed the unilateral right to adopt this kind of educational requirement.

We went at it for several hours and it became apparent that

the union had no case, that this was the kind of requirement the company could, both under the contract and under practice, adopt unilaterally. I sat there wondering, as perhaps many of us might have, whether this kind of requirement, that is, a high school diploma for the job of truck driver, was a reasonable sort of requirement, and whether it was needed in order to perform the job of truck driver.

The union never said a word about that point at any time during the hearing. I was left in complete ignorance of what, if any, educational requirements might be necessary to do this job—what kind of forms, for example, a truck driver might be required to fill out and what kind of education might reasonably be required in order to perform those elements of the job. As I walked out of that hearing I was convinced that the union had no case.

I think the question that remains is: how do we dispose of this kind of matter in an opinion? Bear with me on the merits of my conclusions. We certainly ought not to get into that discussion. The opinion was written to the point, stating the arguments of the parties. It was held that the company did possess the unilateral right, as it has always exercised in the past and as specifically stated in the contract, to change job descriptions, including the power to change minimum requirements for qualifying for jobs. And when you get to that point, you then begin to wonder, should I add any more, and if so, what should I add? You do this because you possess the gnawing feeling that the union could conceivably have won this case if it had approached the matter differently.

You can debate the merits of adding a simple little statement, which, in substance, might say: "The sole issue presented in this case has been whether the company possessed the unilateral power to take this action, and this opinion is confined to disposing of that issue." I submit, if you issue that kind of an opinion, both parties cannot help wondering what you had in the back of your mind that you were not willing to state in the opinion.

You might conceivably go further and say: "All that this opinion passes on is whether the company possesses the unilateral right to take the action, and this opinion expresses no view concerning the reasonableness of the action." If you do that, you are letting

the cat out of the bag and inviting the losing party to come back with a different approach the next time around.

I find that kind of matter somewhat troublesome, which is why I raise it here for the rest of you to consider. I am not sure I am consistent myself in the way I handle the problem. I feel, though, that if we begin to discuss the reasonableness of the requirement, or if we go even further and rule flatly that this kind of requirement is unreasonable as related to the job of truck driver, when there is no union argument or evidence in the record on the point, we are failing to confine ourselves precisely to what the parties have elected to place before us. And I don't think it makes too much difference whether what is being arbitrated is the grievance itself, or whether what is being arbitrated is a submission agreement, because in either case we can readily tell from the arguments of the parties and the briefs they submit just which question it is they want decided.

CHAIRMAN GARRETT: I think you have opened up a rather interesting question, if I evaluate the nuances properly. Ben, do you have any suggestion or comments?

MR. AARON: I have one suggestion that I think Gerry has made for himself. My reaction would be to raise this at the hearing and ask the parties whether they want the ruling on the narrow question or whether they want the other question considered, and point out to them, if they limit the issue as they apparently did in this case, they will get an answer which is perhaps unsatisfactory to deal with the broader question.

MR. KENNEDY: It might be interesting if the company said it wanted the decision on the narrow issue and the union said it wanted in on the broader issue.

MR. BARRETT: The obvious reason for the dilemma is that our questions invite the submission of a possibly decisive issue which the grieving party failed to detect.

MR. AARON: I would expect them to reach an agreement on the issue when they submitted it. If they couldn't reach an agreement, they wouldn't get any decision, unless they agreed to let me determine the issue on the basis of the record as I saw it. But I don't see any point in leaving the question undecided

simply because they can't agree. I would tell them they were wasting everybody's time, including mine, and I would not decide it.

MR. KENNEDY: The thing that bothers me about dicta is where to draw the line between dicta and the reasoning which is necessary to convince the parties of the merits of the decision. This is troublesome.

CHAIRMAN GARRETT: I think it is apparent in many relationships that you are not really fulfilling the parties' needs unless you provide a much broader set of principles in your opinion than may be necessary to dispose of a specific case. This is a situation which can arise, I suppose, more often in permanent relationships where you have a tripartite board. It also, I would suggest, can arise sometimes in an ad hoc arbitration.

There I agree with Ben, that the thing to do is to bring it out in the open at the hearing, which leads me to ask you a question about your specific case, Gerry. As you outlined the situation, the union said nothing about the reasonableness of requiring a high school education in respect to truck driving.

What went through your mind as to why nothing was said about this? It would be my experience that the union representative would rise to that kind of opportunity with alacrity, and I would wonder whether possibly the identity or the political situation of the grievant might not be involved in the failure to raise such a question.

MR. BARRETT: In the particular case the union was represented by an attorney who spends most of his time searching titles. That is the reason it was not raised.

This still raises the question: If we, presiding over the hearing, become aware of potentially sound arguments that the parties are failing to advance, do we let them alone or do we get into the act?

CHAIRMAN GARRETT: I am not sure that that is as much a problem for this panel as it was for last year's panel under Lew Gill's chairmanship. With your permission, I would like to shift the emphasis of the discussion a little bit to a rather broader question: To whom do we address our opinions?

I would like to start the discussion of that, Ben, in the form of a question to you, by recalling that many years ago Harry Shulman was quoted as saying—I believe I heard him say it in Philadelphia —that he, consciously, in writing his opinions, was addressing himself to the people in the shop, such as the man who had the grievance and the foreman who was involved, and that he wanted those individuals to be the people who would grasp what he was trying to get across and to accept the reasonableness of his analysis.

What is your comment on that?

MR. AARON: My comment is that what Harry could accomplish is not available to most of us. Maybe he did get the man in the shop to read his opinion. Theoretically, I suppose that is whom we should address the opinion to, but I get the feeling over and over again that the last person who is ever going to see the opinion is the grievant or someone similarly situated. I get the feeling that the only people who ever read that opinion are the representatives of the parties, and sometimes I am forced, for my sins, to read in a management or union paper what purports to be a summary of the opinion—an unbearable experience.

The fact of the matter is, Syl, I think increasingly, either for that reason or for another which I will suggest in a moment, many arbitrators do not write their opinions for the man in the shop at all, or even for the parties who presented the case. I think arbitrators sometimes write for an industry or for a national audience. They may write for noble reasons, such as contributing to general education in an industry on a problem common to a number of different companies, or through a desire to make themselves known to a broad community, or for obvious less noble reasons.

It may be that arbitrators also cannot accept the kind of anonymity which one would have to submit to if he wrote only for a particular grievant or, indeed, for the parties themselves. Arbitrators have not achieved that happy philosophy that Don Marquis expressed about poets, when he said a writer of a new volume of poetry drops his rose petal into the Grand Canyon, then sits back and listens for the echo. I don't think that arbitrators are willing to accept that.

When somebody has worked very hard on an opinion that strikes him on due mature reflection as being nothing less than brilliant, he likes to see it appear in BNA's *Daily Labor Report* or *Labor Arbitration Reports* or in CCH and I think he feels that the immediate audience is just too limited.

I think one tends to overcome this feeling as the years roll by, but it is a very strong impulse. Sometimes, I suppose, the arbitrator feels that what he has to say is sufficiently novel, so that he does want a larger audience. He uses the particular occasion to get these views circulated broadly to possibly influence other developments in the field. But the notion that the arbitrator, as Harry Shulman said he was doing and perhaps did, writes for the man in the shop is certainly an exceptional situation, because the man in the shop seldom sees those decisions.

CHAIRMAN GARRETT: Tom, what do you think?

MR. KENNEDY: I am not sure that we can write very effectively for the man in the shop. Most of us are pretty far removed from his world.

I do believe, however, that the basic question is, as you indicated, whom are we writing for? In reading decisions, I am sure of one thing, that different decisions are written for different audiences and sometimes different parts of decisions are written for different audiences. I have read some that I know the man in the shop cannot understand. I am not critical of that, because it is important at times that decisions be written for some other audience.

I can think of at least ten different groups that we might be writing our decisions for.

CHAIRMAN GARRETT: Would you care to tick them off for us?

MR. KENNEDY: Well, I just happen to have them here.

*First,* the representatives of the union and the representatives of the company.

*Second,* the counsel for the union and counsel for the company.

*Third,* the grievants themselves.

*Fourth,* the supervisory group of the company.

*Fifth,* other arbitrators, so they might have the benefit of our reasoning when they are faced with similar problems.

*Sixth,* students of labor relations. Certain cases frequently serve this purpose.

*Seventh,* the courts. If the case is likely to go to court, perhaps we had better word the decision in such a way that it will be ready for the court.

*Eighth,* the legislators. Perhaps we are interested in having the opinion affect legislation in the field.

*Ninth,* the general public. Perhaps if we write an arbitration decision in a major longshore strike, we may be very much interested in having the general public understand what is involved in it.

*Tenth,* the arbitrator himself, because I find one of the most important reasons for writing decisions is that when I try to get it down on paper, it makes me think it through a lot more carefully.

CHAIRMAN GARRETT: Tom, I noticed one omission there. Perhaps this is somewhat irreverent, but do you ever suppose that somebody is writing opinions for potential clients?

MR. KENNEDY: That is just possible, but, of course, it has not occurred to me.

CHAIRMAN GARRETT: While I have you on the grill, I would like to ask you about another problem, Tom, which you might put under the general heading of "throwing a bone to the loser."

Years ago we used to hear the advice rather frequently that it was the highest form of the arbitrator's art to be able to give the decision to one party and the language to the other. Is there any reason to believe, Tom, from reading the published opinions, that something of this attitude still prevails, and, if it does, do you see anything wrong with it?

MR. KENNEDY: I think it is done at times. I generally do not

approve of it. Here again I think you have to get into what is really meant by throwing a bone to the loser.

If I am able, in the reasoning of the decision, to show the loser that I think it would be to his disadvantage to win, I will do this. I think this is desirable, but I am not particularly interested in just throwing him a bone.

MR. AARON: Have you ever been successful in that last endeavor, explaining to a loser why he should not have won?

MR. KENNEDY: Always.

MR. BARRETT: There is another aspect to that same question which we might look at for a moment.

You have decided the case in favor of the one party. Is it then appropriate, under the guise of throwing a bone to the loser or however you want to phrase it, to go on and point out that if this case had involved a difference in fact A and fact B, then it would have gone the other way; that if it had involved a difference in facts C, D, and E, it would have gone a different way, and that the only reason the grievant has lost is because it did not?

You are then, in effect, deciding bushels of cases when you should be deciding only one.

MR. SHERMAN: Are you really throwing a bone to the loser when you incorporate some qualification in your doctrine? I don't think this qualifies as throwing a bone to the loser; it may be necessary to protect yourself.

MR. AARON: I might add that sometimes the parties ask for something which is very close to a declaratory judgment on the meaning of a particular rule. If it is clearly understood that is what they want, you don't run into any difficulties about exceeding your proper authority. Then it is very likely that in explaining the rule, although you may decide the case in a specific instance against the grievant, you can make it clear that in other instances which have been or will be challenged it will go the other way, if the parties want that as a means of avoiding other grievances.

This has the effect of reassuring the loser in this particular case that he won't lose in different situations under the same rule.

MR. BARRETT: I think at this point we ought to note a distinction between serving as a permanent umpire under a contract and acting in an ad hoc capacity. I think with the added knowledge we have in an umpire situation because of familiarity with the parties and their problems, we may possibly proceed to decide more than the immediate issue before us, in amplifying the decision for similar types of cases that might come up in the future. I would be inclined to express caution, however, in a situation on a one-time ad hoc basis, that we ought not undertake to decide more than what is in fact before us, unless the parties have clearly said they want more decided.

MR. KENNEDY: I concur.

CHAIRMAN GARRETT: Perhaps we might consider another problem in this area.

Herb, I would like to throw this one to you. We have been talking primarily in terms of a single arbitrator, be he a permanent arbitrator or an "ad hocer." How about a situation where you have a three-man arbitration board with partisan representatives on it? The question is, to what extent does the man in the middle permit the partisan representatives to influence the writing of his opinion? I suppose the hard question arises when the partisan members, as sometimes does happen, agree that they want a certain proposition to be stated in the opinion and you, Herb, as impartial chairman, disagree. How do you field that ball?

MR. SHERMAN: I would start with the proposition that the arbitrator, to the extent that he reasonably can within the bounds of his conscience, should fit himself into the role the parties want him to serve. Therefore, I would say, if the tripartite members of the board desire a certain principle be set forth in the award, that the impartial chairman should incorporate this in the award if it does not exceed the bounds of honesty, if it does not shock his conscience; that he should do this, even if it would not have been the original or initial proposition of his own; only in an extreme case, where he believes that it would be completely dishonest or would shock his conscience, should he refuse to do so.

MR. AARON: How often does this arise? I honestly don't think I have ever had a case where in the opinion itself, as distinguished

from the award, the partisans insisted that certain ideas be expressed that I had not included in the opinion.

I have had the reverse situation often, where the partisan arbitrators have objected to the phrasing of a certain point in the draft. But I have never thought that what I had written was so immortal that it could not stand elimination if the parties had objections to it, so long as it didn't change the basic conclusion which the parties had accepted.

I wonder, is this really a big problem in tripartite arbitrations?

CHAIRMAN GARRETT: Have any of the panel members themselves specifically encountered this kind of problem?

MR. KENNEDY: No, but it would be unusual with me, because I very infrequently have a tripartite panel any more. I am happy to report that they are becoming more and more scarce. I don't think I have ever seen a tripartite decision where the arbitrator took one side and the representatives of the parties took the other side.

CHAIRMAN GARRETT: I have encountered situations which potentially presented this problem, but in one way or the other, as by throwing up large clouds of dust, it has never come to a head. I take it, that is probably what most men would do with that type of problem.

I think we have to recognize that the parties themselves do have a vital interest in what goes into these opinions, and I certainly share Herb's feeling that we should go very far indeed in taking a reasonable view of their wishes.

I think, perhaps, we on the panel have done enough talking among ourselves. I would like to open the discussion to questions from the floor.

JOSEPH BRANDSCHAIN: With submission to the court—I start in this deferential manner because I hope this Blue Ribbon Panel has not lured us into a feeling of self-satisfaction that all is right with opinion-writing and that there is no room for improvement.

I would like to make a plea for closer attention to style in writing opinions. I think we have to heed the admonition in Ben Aaron's disclaimer, that the average arbitrator does not have

time to write a short opinion. I think it is incumbent upon him to take the time to write a short opinion, in order to satisfy, at least me, as part of your public, and the rest of your public also.

In the days Tom Kennedy alluded to, there used to be a cliché or bromide that after-dinner speakers indulged in of comparing the speech with a girl's skirt of the time—short enough to be interesting, long enough to cover the subject.

Certainly, the opinion should be long enough to cover the subject, but as to whether it is interesting, that is another question.

My point is that opinions should be precise, direct, and models of clarity. I think there is much to be desired on this score in many of the opinions I am forced to read, and I am forced to read many of them. I think this is a problem which is shared not only in the writing of arbitration or court opinions, but in the articles that our learned members write for various publications, and even the prepared addresses that are delivered before our annual meetings.

My personal opinion is that sentences are not constructed in short, direct, pithy language, but that there is an attempt or an effort to write in an involved, complex, elliptical style, which is not even worthy of articles written in the academic world for erudite journals.

CHAIRMAN GARRETT: Joe, if I can pick up something you said a moment ago before I lose it, you used the phrase, we should take the time to write short opinions. Before that sentiment gets lost, I would like to ask the panel members, if I may, to comment on some of the problems that are inherent in that good advice.

MR. BRANDSCHAIN: I will finish in one second.

I might say, not by way of washing your back, Syl, that I find that most of your opinions are really short and direct opinions. Because most of us have limited time in which to read them, our problem is to pick up a case and try to find out what the arbitrator decided and why he decided it that way—but quickly.

CHAIRMAN GARRETT: Would some of the men here like to comment on taking time to write a short opinion, because this gets us into billing and the question of study time, a problem I en-

countered only a few weeks ago. Somebody said, "Here is a five-page decision. How could it possibly take five days to write this up?" Has this bothered any of you gentlemen?

MR. KENNEDY: I have heard it remarked that if all of our decisions were published, it would take a lot more time to get them out. I think this statement is true. If people know their decisions are going to be published, they will spend more time on them and do them well.

CHAIRMAN GARRETT: I agree with you. A permanent umpire has more flexibility in this area than an "ad hocer."

PAUL PRASOW: I would like to offer a qualification to a statement made by some members of the panel with regard to the question for whom the opinion is written.

In my experience it seems the answer to that question depends on the nature of the case. I often find that the opinion reads like a Christmas card when you reinstate the grievant. With regard to other kinds of cases, for example a legal case, you are writing your opinion for the court and that is a much different matter.

MILTON H. SCHMIDT: I would like to concur in Ben Aaron's observation, and while I have not received a Christmas card for a reinstatement decision, I have received letters, one of which said, "I have read your opinion, and if this is an example of your opinion-writing, I know your opinions will long outlive you, and for my money, I hope it is soon."

I want to join with Joe Brandschain in expressing my feeling that we can do much more in making our opinions shorter, clearer, and more readable. I think there is a great deal of confused writing in arbitration opinions. I think we should certainly avoid all Latin phrases. I feel also that we might avoid the cliches. I am annoyed by phrases like, "This is a matter for the parties at the bargaining table." I have never done any bargaining, but I doubt whether it is all done around the table. I think most of these fundamental issues are resolved at a bar or some place like that.

IRVING BERNSTEIN: I would like to ask a pithy question about

a problem I wrestled with recently on a panel: under what circumstances does an arbitrator write no opinion at all?

MR. BARRETT: I think the answer is, when the parties have told the arbitrator they don't desire an opinion or do not consider it to be essential. Short of that, I assume that he has an obligation to write some kind of an opinion.

MR. KENNEDY: Do you mean, write just an award, with no opinion?

MR. BERNSTEIN: Yes.

CHAIRMAN GARRETT: That raises an interesting question. I think the answer that most of us would give, if I may speak for the Panel, Irv, and they can correct me if I do not do so accurately, is that we assume that the parties want some kind of an explanation, unless they tell us otherwise. I think there is some basis for that assumption, if Scotty Crawford's experience can be relied on. I believe Scotty, for at least five years, has been giving parties the option as to whether they want a full-dress opinion, a short opinion or no opinion, and he has had virtually no takers for the no-opinon route. I believe the AAA has had the same kind of experience with its no-opinion option.

The closest I have come in my own experience to writing no opinion is to dispose of the case in a paragraph or perhaps a sentence or two. And there are some cases where the issue is so obviously whacky that you do the parties a service by brushing it off quickly. But I think, to go down the route of no-opinion, unless you have been told to do so, does raise some question, at least, of diplomacy.

LEW GILL: A lengthy speech in the guise of a question—

MR. BARRETT: Why don't you take the time to make it short?

MR. GILL: One subject I suggested to Syl, and which he apparently put in the waste basket, is one that I think calls forth violently different views among most members of the Academy.

Can you experts say whether it is appropriate for an arbitrator to seek to get the permission of the parties to send in his opinion for publication?

CHAIRMAN GARRETT: I am waiting for volunteers, gentlemen.

MR. AARON: I can't give you a definitive answer, but I will tell you this: I never do it because I am not interested in publishing them anyway. So I think, if you adopt that position, you don't have the problem. But as I understand it, the arbitrator cannot publish, or as I read the Code of Ethics literally, the arbitrator cannot publish the opinion unilaterally. He must obtain the consent of the parties. So then it is a question of whether or not it is violating good ethics even to suggest that the matter be published. I should think if the arbitrator feels this is important enough to be published, he has no option but to ask the parties, and I would not think there would be anything wrong with that.

MR. KENNEDY: Do you usually ask at the beginning of the hearing, or do you wait until you have written your decision to ask?

MR. AARON: I never ask at all, but you might wait until the end of hearing, when you have a better idea if it is important.

MR. BARRETT: I would prefer not to answer your question in terms of what I thought was proper for other people, because I believe it to be a very personal decision. I concur with Ben. I never ask the question and never release anything for publication.

MR. KENNEDY: I never do it either, but sometimes I find my decisions are published and I often wonder how it happens.

MARK KAHN: I have been distressed at the fact, unless they have stopped the practice, that the American Arbitration Association asks the parties in advance of the hearing, and essentially without the arbitrator's knowledge, to allow publication.

I also do not approve of the implied obligation imposed upon the arbitrator by the Federal Mediation and Conciliation Service, which has been used as a crutch by many arbitrators, that he should at the time of the hearing ask the parties their attitude with respect to publication. I think in those rare cases, when an arbitrator feels a decision should be published, he should send the parties a query, preferably self-addressed, to both sides, after they have received the award. But the question should never be raised prior to the issuance of the award.

LLOYD BAILER: I have two comments or questions, depending on the way they are evaluated: First, as to the matter of dicta. What some people consider to be dicta is not dicta to others. Generally the principle to follow is that the arbitrator keep in mind that the parties want a certain principle decided by arbitration, but also, the arbitrator decides the case on the basis of the peculiar facts of that case.

The second point I have is this: I would like to know from the panel their view as to whether the arbitrator should make an independent investigation in connection with the facts of a case before writing his decision.

MR. SHERMAN: I believe I took the position that, as a general proposition, it is not advisable for the arbitrator to engage in independent research into other arbitration cases, unless he felt it was necessary to do so as some sort of check on his independent judgment. I suggest that the arbitrator should not spell this out in his opinion. To do so makes the opinion unnecessarily long.

MR. AARON: Wasn't your question related to other sources of evidence?

DR. BAILER: Yes, to look into BNA and read decisions that were not cited by the parties.

MR. AARON: I know a few years ago when Bill Wirtz, Bob Fleming, and I were doing some studies in due process, Bob organized some regional meetings throughout the country. At that time this question came up. The general conclusion that Bob found in the various meetings was that if an arbitrator did that, he owed it to the parties, in advance of handing down his decision or opinion, to advise them that he had found other relevant information which he intended to rely upon, and to give them the opportunity to comment. All of this suggests such a complicated procedure that, obviously, it would be better to avoid it if at all possible.

WILLIAM MCPHERSON: There was some comment from the panel about the arbitrator including in his opinion material that might be significant to a court, if he thought the decision might be appealed.

I wonder if there are any comments from the panel about the possible importance of including in the decision something that might be of interest to the NLRB, if the decision is one that might be carried there. It seems to me I recall seeing some NLRB decisions or opinions in which the arbitrator considered whether or not there was a fair hearing, but his opinion did not indicate whether we should, perhaps, in certain situations protect ourselves more carefully from misinterpretation by the NLRB.

MR. KENNEDY: I think the NLRB should be added to the ten audiences which I listed.

CHAIRMAN GARRETT: We have a certified expert on that, Ben Aaron.

MR. AARON: I don't know if I am certified or certifiable. It raises one of the major problems that the Board is still in the process of deciding. We have always assumed that the arbitrator, in a case where the grievant alleges violation of the agreement and the National Labor Relations Act, should say, "I am only looking at the contract issue, and it is for the Board to determine whether it is a violation of the Act."

But the Board has taken the position that it won't follow the Spielberg Doctrine of giving way to the arbitrator's decision, unless it is clear that the arbitrator has considered both. That rather upsets the whole theory under which most arbitrations have proceeded in the past. But I am not at all sure that the matter has been completely resolved. In fact, we have had, as you probably know, a committee appointed, of which I am the derelict chairman, to work out an attempt to make some policy recommendations to the NLRB. Unfortunately, the members of the committee became deeply involved in various problems, and we haven't had a chance to carry out as much of our work as we had hoped. Meanwhile, the Board has been issuing a rapid series of decisions dealing with this general problem. I think it is probably fair to say that their policy, although developing, has not yet solidified; hopefully, therefore, we may still have an opportunity to make such recommendations, if we can come to any conclusions acceptable to the membership as to what ought to be done.

CHAIRMAN GARRETT: In closing this session I suppose it would

be appropriate to more or less sum up the views of this panel in the words of Mark Twain, when he wrote: "Always do right. This will gratify some people and astonish the rest."