CHICAGO PANEL DISCUSSION

Chairman Elson: Those of you who have been coming to the meetings of this Academy must conclude that arbitrators are, indeed, a very introspective lot. For 32 years we have covered almost every aspect of labor arbitration. It's not surprising in the light of this history that this process of self-examination and group analysis should finally focus on the decision-making process, and in particular on how decisions are reached. By contrast, the judiciary does not seem to have the same need. Individual judges, including some of the celebrated, have written about the decision-making process and reflected on the subject. But I know of no comparable group effort on the part of the judiciary to come to grips with this type of problem. It's interesting to speculate on why arbitrators have this strong need to probe the decision-maker's mind and judges do not. Part of the reason may be because of the finality of awards. Arbitrators seldom know the parties' reaction to their decisions. The judges, on the contrary, are seldom left in the dark. Their decisions are the targets of appeals, lengthy briefs, and arguments. Even the Supreme Court finds its decisions dissected at great lengths in law reviews and the press. It may be assumed that conscientious arbitrators and judges strive for perfection. One can only conclude that the institutional framework of the judicial process perhaps gives the judges a stronger sense of inner security.

Panel Member Bernstein: In Title VII cases, the arbitrators and the courts seem to work independently of each other. To the extent they look at the same fact situation, they tend to look at them in the same way.

Now the area where we did get down to serious differences was in the fair-representation area. And the reason is, with the development of the law since *Vaca* v. *Sipes* and *Hines,* which in effect recognized that the union has a statutory duty of fair representation, the issue of whether or not an employee has been accorded that fair representation, either in a decision not to arbitrate or in the presentation in the arbitration, is subject to litigation—to review by the courts—because that duty is ultimately based on a statute and not on the agreement. But it carries along with it also the issue of whether or not the employee has been accorded justice by the employer.

So the twin questions of the duty of fair representation and

the merits of the employer's action become intertwined in the courts. This means, in effect, that the court is acting as a judicial review system. This is an appellate review, in effect, of the arbitration decision or of the decision to arbitrate. What has happened recently in the developments in this area is that these twin questions, which really are analytically separable, have become intertwined to the point where in the decision-making process the courts will present both issues to a jury: Has the union violated its duty of fair representation? If so, has the employer fairly treated the employee in the action which is the subject of the litigation?

The courts ought to stay out of this area. I must say that Judge Tone and Judge Will are on one side of this, and Mr. Friedman and I are on the other. Our general thesis is that the courts ought not to be reviewing arbitration decisions, and that if the court does decide that the union, in fact, has violated the duty of fair representation, whatever that may be, the case ought to go back to the arbitration process itself with certain safeguards, about which Mr. Friedman and I disagree.

The whole issue of fair representation has introduced such a host of complexities, including tripartite arbitration, representation of dissident groups, conflicting interests among employee groups, that here, I think, is where the decisional process in arbitration and the judicial decisional process really come in conflict.

Panel Member Friedman: The decisional process starts long before the case gets to the arbitrator. It starts when the foreman fires the worker or when he refuses to honor what the individual thinks is his seniority. The decisional process goes on when stewards decide how to present the grievance in the grievance procedure, and it goes on all the way up to the level at which the arbitrator finally hears a case. If the case has been well prepared and has been handled well in the grievance procedure, the arbitrator gets a case which has been very much refined and clarified. As complex as the case may sound to the arbitrator, he is hearing a case that has really been distilled as much as lay people can do in a process of this kind. Because union stewards and foremen, personnel directors and international representatives, are lay people, the law as developed in fair representation creates an especially troublesome concept. The union finds itself more and more making a decision as to whether or not to advance a case to the next step of the grievance procedure, or whether or not

to take the case to arbitration. The union finds itself more and more considering whether or not the decision it makes may subject it to a suit for unfair representation. That, I think, diminishes the amount of time and interest the union can pay in making its decision based upon the true merits of the case. I think that is unfortunate. It is especially a problem because the courts have created what is more and more a labyrinth of rules —sometimes conflicting rules—which are exceedingly difficult for the union and, I think, as well for personnel officers of companies to fathom and to find their way through.

The doctrine of fair representation as originally enunciated by the Supreme Court simply was a doctrine that required a union to negotiate fairly for all members of the class without discrimination based on race. From that entirely laudable decision, the concept has gradually grown and is really starting to mushroom in recent years to include arbitrary action, discriminatory bad-faith action (whatever those words mean), negligence in the presentation of a case in arbitration, failure to make an adequate investigation, failure to give notice of an arbitration to a grievant, failure to file a grievance within contractual time limits, perfunctory presentation by the union attorney, and failure to permit participation by dissident or minority employees in the process.

The trend has also been that more of these cases become jury cases, that the remedy more and more becomes damages rather than the back pay and reinstatement which would be available in an arbitration. And more and more the courts, in spite of the strictures of the *Trilogy,* are taking it upon themselves to determine the merits of a grievance at the same time they are determining the question as to whether or not the union acted fairly toward its member. Are we moving from the concept of a majority representation to a concept of parliamentary or proportional representation? I think if you just visualize where this can go, it can make not only arbitration but contract negotiation an impossible, confusing morass.

Panel Member Cohen: I think we are all aware of the fact that we are sometimes called upon to apply harsh terms of a collective bargaining agreement, or a statute which the judges may feel is terribly inequitable, and, in fact, we sometimes apply terms of a collective bargaining agreement which we feel are counterproductive to both parties and don't serve any useful purpose even for the victor; the victor is the victor but is being

defeated, given the terms of a particular grievance. I say that it hurts. It offends our sense of equity, our sense of our proper role in terms of our value system; yet we make those decisions.

Why do we make those decisions? I think we make those decisions because those are the decisions that are consistent with our sense of self, with our role perception as professional decision-makers. I think all of us have had cases where our value system was offended.

Insights into decisional thinking may be extremely complex. We need to raise the hard questions. We may never have all the answers. So what? This is not the only area of human experience where we continue to raise questions and where we do not really have all of the answers and, indeed, may never have. But certainly the effort is exciting and worthwhile, and every bit of new insight can only be helpful to further the process.

Judge Will: There is a fundamental difference between the role of the arbitrator and the role of the judge. Alex Elson said we spent no time on the difference between problem-solver and decision-maker. I would suggest to you that that's the basic difference between the role of the arbitrator and the role of the judge. Ninety-five percent of the cases that are assigned to a district judge never go to a decision, never go to a trial. We are engaged in problem-solving, resolving controversies without a hearing, without a trial, without a decision, in 95 percent of the cases. To that extent we are more mediators, I suppose, than we are arbitrators. So there is a fundamental difference in the role of the judge and the role of the arbitrator to the extent the judge participates in resolution of controversy on a nondecisional basis in the overwhelming majority of the cases which he has assigned to him.

When you get to the decisional process, however, I suggest that there is not a substantial difference in the ultimate objective, or even in the technique. There is a difference in the procedures. You don't have the pretrial procedures in arbitration that we have in legal cases. And there are some reasons for that because, as has been described earlier, there is a considerable pretrial process which has been gone through in the whole grievance procedure before you get to arbitration; this is not present at the court level.

On the other hand, I really believe our pretrial process helps to facilitate the orderly ultimate proceeding at a hearing or a trial because we make the parties stipulate all the uncontested

facts and we don't listen to evidence about facts that are not in dispute. We make them get their exhibits all lined up in advance. We make them identify their witnesses and make them available, if necessary, for deposition and so forth. Some of that, of course, takes place in the grievance process. But it doesn't, to the degree it happens in the courts, take place anywhere near as comprehensively in grievance as it does in pretrial.

I know the arbitrators have problems. There's a difference between expendability and independence. It is a factor in the decisional process; it is a factor in the procedural process. No question about it. I don't have to be liked. I would be happy to be liked by the lawyers who appear before me, and their clients. But I don't have to be liked. Respected? I don't have to be respected, although I would like to be respected. I do not have the problem of getting business by satisfying, so far as possible, the people whose controversies I attempt to resolve. That's what expendability does. On the other hand, I am subject to review which the arbitrators, by and large, do not have. I think this all levels out; we both try to do justice and we both try to reach the right result.

Is there any difference in the process by which we do it? This morning I listened to Ted Jones talking about the difficulty of finding facts, the problems of recollection. I will tell you, he's absolutely right. The least reliable way to reconstruct history is to listen to people who were there tell about it. You'd better start looking for documents or measurements, scientific evaluations, length of tire marks on the road—something objective. Because you will get the same transaction or the same episode reconstructed in such a divergent fashion from different people, it will be difficult, indeed, to come to any objective conclusion as to what the facts really were unless you find some objective facts which don't suffer from the frailties of human recollection. But that's true of arbitrators and judges alike. We both have the problem of trying to get some idea of what really did happen.

We have talked about irresolution with respect to decisions and factual determination first. I agree. Sometimes it takes you 30 seconds to resolve it, and sometimes it takes you much longer. But at some point you have to resolve it. Having resolved the facts, you then try to put them together, given the law or the contract or whatever it is you're dealing with, into what appears to be the just result. There isn't much point in talking about whether decisions are made by intuition or analysis,

whether they are subjective or objective. The fact is they are both, and they vary in degree depending on the case. I don't know any judge who starts out like the mother who made decisions all the time, and when she was asked how she could make decisions so fast, she said, "Why not? What's right's right."

I don't think judges start out knowing what's right in a given case. Nor do I think arbitrators start out knowing what's right in a given case. I think they do attempt to make an analytical evaluation of the facts, apply them to the contract or the law or apply the contract or the law to the facts, and then arrive at what appears to be the just or right result.

We all suffer from the fallibility of being human beings. Only God knows what is really right, except for His Mother. On earth we can do justice only by being absolutely integrative of a fair procedure. Justice is a product of due process, of a fair proceeding.

I once sat at a luncheon in Yugoslavia with a justice of the supreme court in Yugoslavia, and I said to him, "Mr. Justice, this may be an impertinent question, but I'm very interested, indeed, as to what is the principal problem of being a judge, or the processes of justice, in a one-party, authoritarian society. Do you have to worry about what the government or the party thinks when you decide a case?"

And he said, "No. That really has not been a great problem to me. I was a trial judge in Zagreb for a long time and now I'm on the supreme court. I have had a pretty good chance to look at the law in operation in Yugoslavia. That's not really the problem. I don't think I have ever consciously, maybe unconsciously but not consciously, decided a case on the basis of whether or not Tito would like the decision."

So I said, "That's very interesting. What is the principal problem of justice, of being a judge, in Yugoslavia?" He said, "It is the difficulty of having the public understand the absolute necessity of maintaining the integrity of the procedures."

I said, "You could say that in Chicago!"

Judges and arbitrators both have limitations on the extent to which they can reach what they may intuitively and subjectively feel is the right result. I have concluded that the limitations on the arbitrators' and the judges' powers to reach the right result are not that much different, although I think judges have a little more flexibility. I'm not at all sure that part of it isn't the fact that we do have review of our decisions. I think if I were an

arbitrator, I might be a little more cautious in reaching the result, although I'm not sure of that, because I'm really compelled, so far as possible, to do justice, given the facts and the law as I find them. Sometimes I'm frustrated.

As for fair representation, I have tried some of these cases. I don't know how you can decide a *Vaca* v. *Sipes* case or a *Hussman*-type case and not get into the subject of whether or not the unfair representation resulted in an unfair result. How do you decide whether there was adequate representation without looking at whether or not the result was unfair? No court is going to reverse an arbitration decision just because the employee didn't get adequate representation even though the employee won. That has to be the silliest exercise of all. So you inevitably get into the question of whether or not there was a just result. When you determine there was an unjust result, what is the sense of sending it back for further arbitration so the arbitrator can now, with adequate representation, come to the conclusion as to whether or not there was a just result?

What I must say to you as arbitrators is: What is your responsibility with respect to the ruling of the jury or the ruling of the judge that this was an unfair result? Do you just ignore it? Pay no attention to it at all? A tribunal consisting of a judge and a jury has listened to the evidence, heard the law, decided the case. Now, are you going to start from scratch and conclude that the jury or that judge, having heard all the evidence, having considered the law, is to be ignored? Pay no attention to it? Or is there some kind of stare decisis? Are you bound by it? Is it res judicata? It's really the same parties. Historically in the United States, that would constitute what's called res judicata, which means, it has been decided. The issue has been decided. It is no longer justiciable, no longer debatable.

I have no desire to decide any more cases than absolutely necessary. All of us have a limit to our judicial decisional capacity, and it's tough enough to decide cases. But the fact of the matter is, you cannot decide an unfair-representation case without deciding whether or not the result was right. Once having decided that, I don't know where that leaves the arbitrator the second time around. You want to have another crack at it? Blessings on you!

Judge Tone: I agree that almost all of us who judge are attempting to fulfill the role we perceive for ourselves and the expectations of society in that role. I think that applies not only

to judges, it applies to juries. Occasionally a jury decides a case according to its notion of how it ought to come out, ignoring the principles the judge prescribes. But most frequently, based on my experience, a jury understands it is bound by procedural and substantive rules and tries to follow the rules. It's not uncommon, for example, for a jury to find a criminal defendant not guilty when the defendant has not taken the stand. It seems to me that most laymen, looking at that situation without any instruction on the approach they're supposed to take, would think if the defendant is unwilling to take the stand and say he's innocent and tell his story, there must be something wrong; he must be guilty. Typically, jurors don't take that attitude.

That's just an illustration, I think, of the strengthening of one's role perception when placed in a position of decision-making responsibility. So I think that Professor Lasswell and Judge Frank have grossly overstated their case. Of course our predilections have something to do with how we approach questions. Obviously we are creatures of our experiences and our environment.

One of the problems, I think, of one who is trying to perform his decision-making function in an analytical and objective manner is waiting until he has all the information he is supposed to get before he reaches a decision. In the courtroom of the Supreme Court of Illinois there is inscribed on the wall opposite the judges' bench, where they can all see it, the Latin words which, translated, mean "Hear the other side."

There is a human tendency toward prejudgment that I think all decision-makers have to fight off. There is, first of all, in some of the best of decision-makers a strong ego and a considerable self-confidence, a confidence in one's own judgment and intellectual powers. I think judges and arbitrators have to remember that there is more to come. Part of the instinct toward prejudgment we have to fight off, I think, is anxiety. Those of us who have to make decisions approach all but the easiest cases with some anxiety about whether we're going to have difficulty in reaching the right result. That leads us to seize on the opportunities to get started solving the problem as early as we can. I think that we all would profit by fighting off that tendency as long as we can. It is, of course, necessary to make tentative decisions during the course of consideration of a case. Even during the course of reading briefs, it's necessary for appellate judges to make some subsidiary judgments along the way in order to allow the analytical process to proceed.

Turning to another subject, should the judge or arbitrator raise issues that are not touched upon by the parties? There seems to be a difference of opinion. There is some sentiment to the effect that if the lawyers on both sides have seen fit to stay away from a particular issue, due respect to the adversary system and to their judgment, perhaps, indicates that the decision-maker should stay away from it. The problem with that is that at some point the decision-maker has to be satisfied with the integrity of his decision, and if the issue the parties have chosen to ignore seems to him to be a critical one, somehow or other he has to face up to that and do something about it. It's much better to realize it, I should think, at a time when the parties can deal with it themselves rather than after the case is over and in the course of the decision-making process. Sometimes the decision-maker doesn't stumble on the issue himself until the record is closed and, if there are written submissions, until briefs are written. Then there is the problem of whether to call for the views of each side on this issue or to go ahead and decide it without taking it back to the parties. The best procedure usually is to get the views of the parties on the issue they have not addressed.

One comment about the *Vaca* v. *Sipes* problem: Judge Will correctly points out that the judge who is hearing an unfair representation case can't avoid getting into the merits of the controversy. I take it that if it's clear that the underlying grievance was without merit, the plaintiff cannot prevail. But perhaps some kind of an intermediate ground that would allow the contractually guaranteed arbitration to proceed is a possibility. I think it would require varying what I understand to be the rule laid down by the Supreme Court in *Vaca* v. *Sipes,* and certainly the rule as understood by the lower court decisions that follow it, which is that if the underlying grievance has no merit, that's the end of the matter regardless of the unfair-representation issue. I suppose we could have changed the rule to require an inquiry into whether there is probable cause to believe the underlying grievance has merit. If it were decided in those terms, at least the decision of the court on that issue would not have preclusive effect. But I agree generally with Judge Will. Once the matter gets into the court, it's pretty hard for the court not to decide the substantive issue, and it really doesn't make much sense from the standpoint of decisional economy for the court to decide it and then send it back to arbitration to be decided again.

I suppose that when the inadequate representation is the performance of the representative of the grievant, the arbitrator is pretty much in a position of a judge trying a case in which one side is inadequately represented. I guess in that situation judges often feel they ought to step in and see that justice is done and ask some of the questions that ought to be asked. Sometimes, in fact, the inadequately represented litigant ends up with better representation than the other side in such a situation. But the arbitrator, I should think, could often cure that difficulty if he detects it in that situation.

(Second Day)

Panel Member Cohen: In one of my early cases I recall that I reinstated the grievant who was discharged. Some six or seven months after the award was received by the parties, I had occasion to have another case with the attorney for the company who, before the hearing, said, "Weren't you aware of the fact that in that case some six months ago in which you sustained the grievance and reinstated the grievant, the union was just as interested in getting rid of him as the company was?" I said, "I'm very distressed at one level because I thought I had good radar and my radar should have picked it up. But even if it had picked it up, my award would have been the same." I think what I am saying is that most of us are extremely conscious of the fact that the potential for this exists and that the grievant has the right to every consideration of his position. If the arbitrator feels a good case is not being put in by the union, he, of course, becomes more active than he usually likes to be because he feels he has the responsibility to uphold the interest of the grievant even if the union doesn't want to do so and isn't doing so adequately.

Judge Will: I don't subscribe to the proposition that either an arbitrator or a judge is just a skilled referee who is supposed to see to it that the legal combatants fight fairly, or the nonlegal combatants fight fairly, and then at the end of the fight render a decision as to which one won. I think our job is to preside, so far as possible, over a rational search for the truth. Under those circumstances, I think it's a responsibility for an arbitrator or a judge to let the combatants present their cases and ask their questions. But after they have finished—and I wait in my proceedings until they have asked all the questions—and if I think

there were questions that should have been asked and weren't which are relevant either to my determination, if it's a bench trial, or which will help the jury, then I will interrogate a witness. I've never asked a question which I thought would help one side or the other. I must confess that's one of the things that bothers me about this business of stepping in to help the inadequate representative. But you can ask questions which have been unasked and which are, in your judgment, relevant and make a contribution to this effort to find out what the truth is. I do not subscribe to the ancient concept that a judge or an arbitrator should be seen but not heard. But my ultimate position is: Please, as arbitrators, don't let the inadequate, unfair-representation case go to a decision because I'll end up getting it! You can do us a lot of good if you will see to it that there are no unfair representations in cases you decide. You can do it by playing what I would conceive to be the proper role of an arbitrator or a judge, which is to make the proceedings before you as orderly a search for truth as you can.

Panel Member Cohen: To Judge Will: That Saturday morning when we raised the question of how active the judge or the arbitrator should be at the trial, I was really very inspired by your statement that when you were selected as a judge, you felt you were selected to serve over a tribunal which would engage in an objective search for the truth. I was so inspired that the following Tuesday when I appeared at a hearing before two attorneys whom I had had in the past on several occasions, I found myself getting terribly active. Here I was, by God, going to serve and search for the truth! I could read the expressions on the faces of those two attorneys: this isn't the Marty Cohen we have known.

There are many complex contract-interpretation issues that come before us. And we're a little bit afraid that if we become too active even in what we think is the objective search for the truth, we may be upsetting relationships, agreements, things that have been working—and that's not a bad test of collective bargaining. So we have to exercise extreme caution when and how we raise questions in the interest of the objective search for the truth, especially in contract-interpretation cases. I am distressed, however, by what some of my colleagues indicate when they say that even in discipline cases—where I think the danger of interfering with an ongoing relationship and messing it up is not as great as it happens to be in some of the complex contract-

interpretation cases—it's an adversary proceeding and they don't want to raise questions for fear it will have some impact on how the parties feel about their impartiality. The inspiration that we should engage in a rational search for the truth should not cause us to be fearful of raising a question simply because it might have some impact on the notion of our impartiality.

Judge Tone: You subscribe to the old adage of the British bar: A speaking judge is not a well-tuned cymbal.

Mr. Benjamin Aaron: I would like to reassure Mr. Cohen that there are plenty of arbitrators who generally adopt the view of Judge Will and aren't afraid to intervene. I know I speak for a number of my colleagues in that respect. And I make one comment on the duty of fair representation to dissent to what Judge Will said. If I understood you correctly, Judge Will, you said that it's foolish to say that the trial judge, in a case involving an alleged failure of the duty to represent fairly, should not look at the merits because what's the use of going ahead unless you first reach the conclusion that the grievant, or the plaintiff, has been unjustly treated. It seems to me that really begs the question, which is: Who is to decide whether the grievant has been unfairly treated? The worst possibility, it seems to me, and the one that the parties could not really have contemplated, is that a jury should decide that question.

It may be that Justice Douglas was a little exuberant in *Warrior & Gulf* when he said that the ablest judge lacks the experience and training and the information on the law of the shop to decide as well as an arbitrator. But I submit that in most instances the judges are *not* as capable of deciding these questions as the arbitrators. In most instances it's far better for the court not to get into those questions. I do not go beyond that on the question of whether you simply refer every case back and that damages are never a proper remedy.

Judge Will: I would be happy if I never saw an unfair-representation case, if you arbitrators took care of the situation at the arbitration level. But when I do see one of those cases, it is impossible to decide it on the in vacuo question of whether or not there was adequate representation without looking at the results. It is silly to say a grievant who was inadequately represented and who should have lost on the merits should now go back and have another hearing before an arbitrator so that he can lose all over again and perhaps file another unfair-representation case after he loses the next time. The law has the concept

that once you have had a fair hearing before a fair tribunal, and you have had adjudication, you shouldn't have the opportunity to relitigate the question which you have already litigated. If I understand it correctly, the arbitrators' position and the advocates' position would make the arbitrator a court of appeals from the court of appeals. In other words, if it goes back for further arbitration after adjudication by either a district judge or the court of appeals, then you would have the arbitration proceedings resumed and repeated, and if the arbitrator concluded that the court of appeals or the district court, or both, had been in error, he would then award the grievant reinstatement, back pay, or whatever it is that you're going to award.

Judge Tone: In most unfair-representation cases I have seen, it is impossible to evaluate the unfair-representation claim without getting to some degree into the underlying grievance—into the merits of the underlying grievance. So the question really is: What does the court do with that? One solution would be simply to put a low level of determination on it and say the standard for the court is simply whether there is probable merit in the underlying grievance and let it go at that. But I guess the usual rule is that in order to maintain an unfair-representation claim, the grievant has to show both that there is merit in the underlying grievance and that the representation has been inadequate. You would have to change that substantive formulation in order to have the matter of the merits of the grievance go back to the arbitrator.

I'm very much impressed with the argument that what the parties bargain for is a determination by the arbitrator on the merits of the grievance and that it shouldn't be a court or jury that ultimately decides that. But I do think it's important to remember that we would have to change the formulation of substantive law to get that result.

Judge Will: The whole question of unfair representation requires that you hear the evidence with respect to what happened, including the evidence on the merits. Judge Tone said you might say, "Well, I'm not going to think about the merits except to see whether or not I think there's probable cause." But the fact of the matter is, you will hear all the evidence on the merits before you can determine whether or not there was fair representation because the two are as inextricably intertwined as any two things in life can possibly be. There isn't any sense in talking about whether or not there has been fair representa-

tion or unfair representation if nobody has been hurt by what happened. If you conclude that, as inadequate as the union representation of the grievant was, it wouldn't have made any difference if he had had Clarence Darrow and Alex Elson both representing him because he would still have lost, there's no point in having another hearing on it.

Mr. Lamont Walter: How does decisional thinking differ in situations where you are the sole arbitrator as opposed to where you are on a panel, whether it be an arbitration panel or a three-judge court? Intertwined with that question I think is, how do you test your doubts when you are the sole decision-maker? Do you discuss it with your wife? Secretary? Law clerk? Et cetera?

Chairman Elson: When I serve as chairman on a three-man panel, generally speaking the two other representatives are really partisan members and you can expect them to take the position of their respective clients. You get very little help from consulting with the other two members of the panel in a disciplinary or straight interpretative case. Of course, in interest disputes where you're really involved in the whole process of making a new contract, it's exceedingly helpful to have the assistance of the other partisan members, and you can talk about things much more informally and get their insights.

Panel Member Cohen: I haven't had too many tripartite boards recently. In fact, in most cases the parties are quite eager to waive the tripartite board and stipulate that you shall be the sole arbitrator and make the decision. When I do sit on one, however, in most cases I function as if the tripartite board does not exist when it comes to the actual decision-making process. I decide the case on the merits, knowing both sides are partisans in the kinds of boards we serve on and that somebody will sign on with me. There have been a few rare cases where you wonder if anyone will sign on with you, but you stick with what you think is the proper decision and call your executive session and take your chances.

And I have found a board helpful in very complex cases. In one case involving 19 different craftsmen in a rather substantial layoff, they were most helpful in keeping me from making statements in the opinion that were not completely accurate or might be even mischievous to the parties. I raised many questions with the board. They modified certain statements in the opinion.

Judge Tone: I have served on both the district court and the

court of appeals. In the court of appeals, of course, we don't have the same situation as you have in arbitration because we don't have any partisan members. At least we hope we don't. The judges arrive at their tentative decision about the case independently because they read the briefs before hearing oral argument. Then immediately after oral argument, in our court, they meet and discuss the case, and it's not uncommon to be aided in one's path to decision by arguments or insights of other members of the panel. Usually the three judges who participate in the tentative panel decision are not as thoroughly acquainted with the case as is the judge to whom the decision is assigned for writing ultimately will be. And whoever writes the opinion goes through a process that is very similar, I think, to the process an individual judge goes through when he reaches a tentative decision and sits down to try to explain his reasons. Sometimes in the course of writing he finds he can't support the decision that has been tentatively reached. If that happens, he goes back to his colleagues in one way or another and explains the problem. But there is a great deal of individual thinking, necessarily independent thinking, in the process of decision even on a three-judge court.

With respect to whom, other than judges, we discuss these things with, I discuss the problems of decision with my law clerks. I have never discussed them with my wife or my secretary. I haven't discussed them with my wife because, I guess, I have the feeling I might end up indirectly delegating some of the decision-making authority somehow if I did that. She might arrive at some expectations as to how the case ought to be decided and then I might be subtly, unconsciously, attempting to conform to those expectations. It just seems to me that the parties are entitled to have the judge receive only information and arguments about the case from them, or from an assistant who is part of the official apparatus. So, anyway, I choose to discuss matters only with the law clerks; those discussions are often helpful. I'm sure Judge Will, who has also served on both trial and reviewing courts, will have some more observations.

Judge Will: Well, obviously, I'd rather decide cases by myself than have to participate in a consensus with three judges. And I don't know what I would do if I had eight others I had to wrestle with. In any event, the panel decision is a much more complex process than the individual determination. I think I agree with what has been said here about panel arbitration. It

is really the impartial arbitrator who makes the decision. It isn't much different whether there are two other people on the panel or not.

That may be true in arbitration; it's not true on an appellate court level where you have three people. You do talk back and forth and you do start with a tentative decision; you start with a much more tentative decision than you do at the trial level, I should tell you, because when I start a trial I have no preconceptions as to what the result should be. When I listen to appellate argument, I have already read the briefs and I have read the record of the court below, and the probabilities are that I have a preconception of what the result should be. You have a conference immediately after the oral argument, and you may discover that your preconception is different from that of one or more of the other judges. You have this colloquy which goes back and forth, and somebody finally is assigned to write an opinion. And if that person has a different conclusion than you have, you may have to start thinking about writing a dissenting opinion. But you're likely to wait until the proposed majority opinion comes along to see whether or not you're going to dissent so that you can have the benefit, first, of the arguments which two of the judges at least have found persuasive, and you can also have the opportunity to point out their error if you are still of the opinion that they're making a mistake.

So it's a fairly complex process with a three-judge appellate court panel. I think that is a good thing. While I prefer as a matter of personal convenience to decide a case all by myself and I work very hard and discuss it with my law clerks—but nobody else—the appellate process does get the benefit of the interchange of ideas between three knowledgeable judges who have as much background as is possible to get at the appellate level.

But I want to enter a caveat right here. That is, it's not easy by just taking a look at the record at the appellate level to get the full flavor of what happened at the trial. So you do the best you can. One of the reasons why I think people like Phil Tone are great appellate judges is because they have had trial court experience. I think that's a useful thing to have because you're in a better position to evaluate what happened below if you have been around and seen it happen. The appellate court decisional process is not simple, but I think it's good.

Chairman Elson: I should add, just speaking as an arbitrator,

that I find it's a pretty lonely process—this business of resolving one's own doubts. I will confess that I frequently make an exposition of the case to my wife, but I don't invite her opinions. But it helps me to air what the problem is and to hear what I am saying about the problem, and sometimes in the process of doing that I do get some help. I think one of the big problems in decision-making is just this business of resolving those doubts, and any techniques of that character certainly can be helpful.

Judge Will: You ought to decide the case before you and not some other theoretical or hypothetical or possible future case. When that case really comes, it will have some other facts which you did not even anticipate and which may or may not compel a different result than you have hypothesized, and there's nothing worse that judges can do, including the Supreme Court, than to decide cases that aren't before them. I don't think arbitrators ought to decide anything but what's before them, and I don't think judges ought to decide anything but what's before them. That's difficult enough. I have seen opinions, too—not only by arbitrators but by judges—which threw out a bone to the losers, or which hypothesized about what the result might have been if the facts were different. I think that's a mistake on any decision-maker's part.

Judge Tone: It would not be an overstatement to say that some of the most important determinations of the Supreme Court—or the practical effect of the Supreme Court decisions—have been from dicta rather than from what the Court actually decided. The Supreme Court is greatly given to pronouncements on issues that are not before them. They, as an institution, I think, have departed very substantially from the common law concept of growth of the law through deciding questions that are actually presented.

Panel Member Bernstein: One other thing you do not want in a decision is for the arbitrator to decide that there's a clause in the contract that nobody talked about that he thinks is determinative, but the parties never had a chance to comment upon. That's one of the most grievous errors.

Judge Will: I do not think a judge or an arbitrator ought to decide a case just on the issues which the parties have presented if he or she really thinks there is a material issue that has not been considered. I don't think they ought to decide it on the basis of that issue without going back to the parties. But once

or twice a year my law clerks will come to me and say, "You know, they just missed this whole point which we think is relevant." Sometimes I agree with the law clerks, and sometimes I think they have a point which isn't relevant and we ought to decide the case on the issues which the parties have raised. But where I come to the conclusion that they're right—that the parties have just blown one issue which seems to us to be material—we'll go back to them and ask them to brief it or, if necessary, even to present evidence or affidavits, whatever may be appropriate. But I wouldn't decide the case. That's kind of showboating, it seems to me, and I don't think a judge ought to do that, or an arbitrator either. I would not decide a case on an issue which the parties have not discussed or not considered, but I wouldn't ignore it. If I thought it was relevant or significant, I would go back to them and say, "Okay, you tell me why this is not relevant, why you didn't consider it. And if it is relevant, go brief it or go marshall your evidence or whatever it takes to get that issue before me."