

CHAPTER 5

DECISIONAL THINKING

WEST COAST PANEL REPORT*

HOWARD S. BLOCK, CHAIRMAN

Introduction

In a familiar scene from "Fiddler on the Roof," Tevye enters the small town square and encounters a group of men engaged in a heated debate. After listening intently, he nods toward one of the protagonists and states: "I think you're right." Whereupon the adversary retorts: "Tevye, how could you reach that conclusion in view of points A, B, C, D, and E"—explaining each in great detail. After pondering these additional facts and stroking his beard in the process, Tevye responds: "You know, I think you're right!" Whereupon a voice from the rear asks: "How can they both be right?" To which Tevye replies: "You know something, you're right, too."

*Members of the panel are Howard S. Block, Chairman, Member, National Academy of Arbitrators, Santa Ana, Calif.; Irving Bernstein, Member, National Academy of Arbitrators, Professor of Political Science, University of California, Los Angeles, Calif.; Reginald H. Alleyne, Member, National Academy of Arbitrators, Professor of Law, University of California, Los Angeles, Calif.; Honorable Warren J. Ferguson, United States Court of Appeals, Ninth Circuit (who was unable to continue after appointment to the Circuit Court); Honorable Mariana R. Pfaelzer and Honorable Malcolm M. Lucas, United States District Court, Los Angeles, Calif.; Jerome C. Byrne, Gibson, Dunn & Crutcher, Los Angeles, Calif.; Roland C. Davis, Davis, Cowell & Bowe, San Francisco, Calif.; and R. King McCulloch, Airlines Division, International Association of Machinists, Washington, D. C.

The panel conducted its deliberations during six meetings beginning in October 1979 and ending in May 1980. This report represents general agreement, but it should not be assumed that every panel member endorses every statement or conclusion.

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Unfortunately, judges and arbitrators (sometimes hereinafter referred to as the “decision-maker,” “trier of fact,” or “trier”) do not have Tevye’s broad range of choice. After weighing the competing alternatives, we must reach a single conclusion. Nowhere is the decision-maker’s dilemma more brilliantly delineated than in the following excerpt from Mr. Justice Cardozo’s classic inquiry into The Nature of the Judicial Process:

“What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking a legal consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making. The elements have not come together by chance. *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis.”¹

Cardozo’s observations focus upon the *decision-making function* from the vantage point of an appellate judge. In addition to deciding cases, the trial court judge and arbitrator also perform a vital *fact-finding function*; the importance of this initial fact-finding function in the judicial process is sometimes overlooked in the general preoccupation with upper court opinions, a point amplified in our discussion on “Decision-Making.” The panel’s inquiry has centered upon both the fact-finding and decisional aspects of the trier’s role.

¹Cardozo, *The Nature of the Judicial Process* (New Haven and London: Yale University Press, 1921), at 10–11.