



FABLES IN LAW, CHAPTER 5

LEGAL LESSONS FROM FIELD, FOREST, AND GLEN

D. Brock Hornby

We are pleased to present the second installment of what we hope will be a second trilogy of Aesopian legal fables by Judge Hornby.

— *The Editors*



WHAT THE BEAVER KNEW AND WHAT THE DONKEY DID

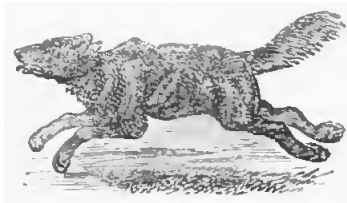
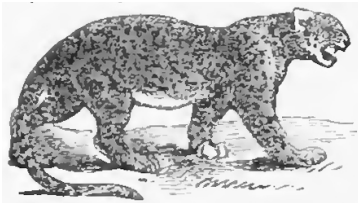
Professor Beaver had taught and written about Evidence law for many years. Some of his stock lectures became so famous that they were used regularly in continuing legal education for advocates

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in the Forest Glen and elsewhere. His lectures were very popular. Beaver came to believe that his academic knowledge would make him an excellent trial advocate, and he took on some high-profile cases. But his success rate at trial was abysmal because, despite his academic knowledge, he was unable to engage jurors.

At the same time, the renowned Donkey of Barnyard fame had a stellar record of winning difficult high-profile cases. The Magpies always covered his successes even though he was from a different jurisdiction. As Donkey aged and became tired of the pressures and stresses of trial advocacy, he cut back the number of cases he took and obtained a position as adjunct law professor at the law school where Beaver taught. Although the Gophers (law students) loved to hear Donkey's self-aggrandizing tales about his courtroom exploits, it turned out that he was not adept at conveying information in a way that was organized and easy to remember and apply. So although Donkey was popular, his Gopher students did not learn much beyond his stories.

Moral: Knowledge of a subject does not guarantee the ability to use it successfully in practice; conversely, those who possess practical skills are not necessarily able to convert their natural abilities into lessons that others can learn and apply.



THE COUGAR AND THE WOLF SCORCH THE FOREST (OR AT LEAST THEIR CLIENTS)

Advocates in the Forest Glen handled most of their lawsuits collegially, kept them simple, avoided running up unnecessary expenses in preparing for trial, and obtained an early trial date from Owl. But a lawsuit over the effects of acid rain on the forest and its

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denizens involved such high stakes that one side brought in Wolf-Pack and the other side brought in Cougar Group, expensive advocates from outside the Glen, to prosecute and defend the case. WolfPack and Cougar Group had never practiced in the Forest Glen previously. They fought over every possible issue, from what documents they should disclose, to who the experts should be. They refused to agree on even modest extensions of time, filed multitudinous motions, took depositions of everyone they could think of, accused each other of professional malfeasance, and generally made Owl's existence painful. The process delayed the proceedings and cost their clients huge amounts of money.

Moral: Advocates who regularly confront each other in disputes generally learn to behave with civility and collegiality, but advocates who work in a larger and more anonymous environment tend to misbehave and try to take advantage of each other.



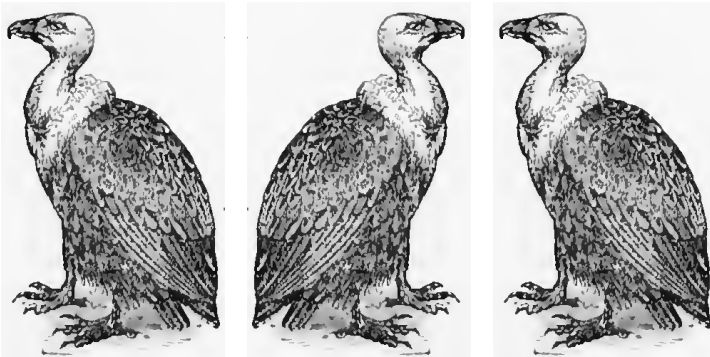
THE OWL'S NEW RITUAL

When Owl was still a new jurist, Fox and Snake asked her to conduct a settlement conference of a civil dispute. They both provided confidential settlement memoranda to Owl in advance, and came to the conference with their clients. Owl prepared thoroughly, studied all the case documents, read the confidential memoranda, and researched what Forest Glen juries had awarded in similar cases previously. As a result, she believed that she knew exactly where the case would/should settle. She told the parties her view at the outset

of the conference and received nothing but objection and argument from clients and advocates on both sides. After almost a full day of wrangling, Owl did settle the case in the general neighborhood of what she had originally predicted, but everyone was unhappy.

Thereafter, Owl decided not to reveal at the outset her views about where a case should settle, but instead invite the parties and their advocates to explain their positions and their case values first, and then gradually inject her views into the ensuing discussion. The parties and their advocates were much more content with their resulting settlements.

Moral: There is a ritual to bringing opposing parties to agreement. It is important that clients hear their advocates make their best arguments and also hear their opponents' best arguments to produce a more realistic risk assessment; advocates want their clients to see how vigorously they have advanced their interests before urging a compromise.

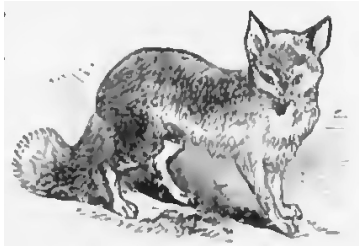


THE VULTURES' FACTORS

In explaining a decision, the Three Vultures sometimes enumerated several factors that they deemed worthy of consideration in resolving a particular legal issue, even though one or two of them alone should have been determinative of the outcome. As a result, in similar controversies the Glen advocates and Owl felt it necessary to collect and consider evidence on all the Vulture-listed factors, and often they were unable to predict the outcome because of the number of

factors and the different directions in which they pointed. Those cases therefore became far more complicated and time-consuming to resolve, clients had to pay more, and other cases before the trial tribunals got delayed.

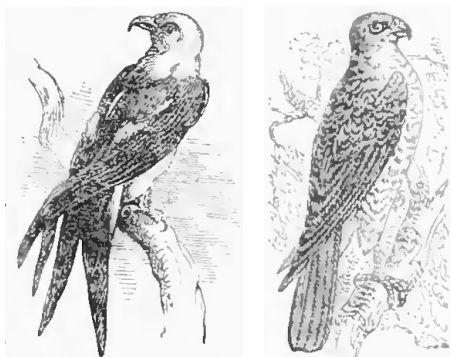
Moral: Decision-making rules devised to achieve the best possible justice in an individual case may, if they are too complex, end up reducing and delaying justice at large.



THE WISE FOX AND HER PRESENTATION ASSISTANT

Woodchuck was challenged when it came to exhibits. He could never find the right one. Early in his career, he used large blowups on poster-board, but he routinely lost track of them, and spent measurable time before the Forest Glen jurors looking for the correct one. With electronic evidence presenters, he never became comfortable with the zoom feature or the highlighting function that a witness could use, or with a laptop for maintaining all his exhibits electronically. As a result, the jurors were distracted in their ability to follow Woodchuck's case. Fox was equally challenged by exhibits and electronics. But she realized early that she needed help, and always brought an assistant who could find the exhibits, highlight electronically via a laptop, and generally make the electronic evidence presenter work. As a result, Fox's presentations were much easier for the jurors to understand.

Moral: It is a serious error for an advocate to ignore the physical mechanics of presenting the case.



THE SECURITY OF THE HAWKS

The Hawks were charged with maintaining security at the Forest Glen tribunal, maintaining custody of prisoners, protecting witnesses, and ensuring the safety of the arbiter and the jurors. They were professional and highly respected. They prided themselves on keeping abreast of developments in their profession everywhere. As the Hawks learned of violent attacks on trial tribunals in other jurisdictions, they urged increasingly elaborate security precautions in the Forest Glen to reduce the risk there to witnesses, tribunal personnel, and attendees. It was difficult for Owl and her colleagues to resist any measure that promised safety, and they therefore acquiesced. But as a result of these new security measures, the advocates could no longer easily approach Owl, and a separation grew between the arbiter and the advocates. Moreover, the security apparatus that Glen denizens had to penetrate in order to observe proceedings deterred them from attending court as observers. Despite the relative calmness of the Forest Glen, Owl herself grew more apprehensive because of the information about events elsewhere. As a result, Owl's tribunal grew more and more remote from both the advocates and the citizens.

Moral: Ensuring physical security for a tribunal sometimes carries a negative civic and social cost.

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