Fables in Law, Chapter 7

Legal Lessons from Field, Forest, and Glen

D. Brock Hornby

We are pleased to present the first installment of the hoped-for (see 19 Green Bag 2d 95 (2015)) third trilogy of Aesopian legal fables by Judge Hornby.

— *The Editors*

A Courtroom Circus in the Forest Glen

When it was time to try the acid rain case, Owl was both acutely aware of its importance to the forest and apprehensive of whether she was up to dealing with the knowledge and advocacy skills of WolfPack and Cougar Group. Instead of treating the case as just one more trial, Owl considered every ruling in terms of how the media would see it, went to great lengths to explain each ruling in detail, and from the beginning gave unaccustomed leeway to the advocates. The trial became far too long and the advocates' behavior turned the proceedings into a circus. Although Owl

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tried to regain control, she was unable to do so, and the Forest Glen denizens were deeply troubled by this example of their tribunal at work. Eventually, a mistrial was declared, and Condor was called in to preside at the new trial. From the beginning, Condor made clear that he, not the advocates, was in charge of the courtroom. Condor used some harsh rhetoric at first, but the advocates quickly came round. Condor also ignored the high-profile nature of the case and made his rulings promptly and concisely as he did in any ordinary case. The trial proceeded without incident to a conclusion, and the Forest Glen denizens and even the Magpies deemed it fair.

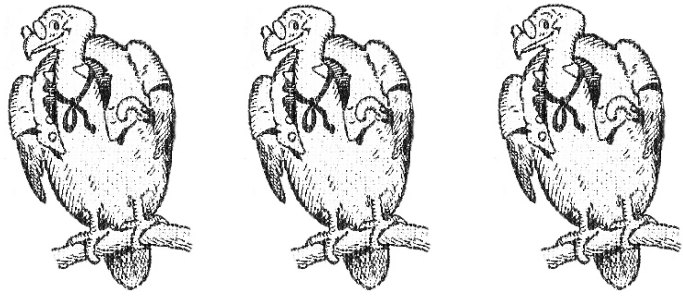
Moral: An arbiter must establish control of the courtroom at the outset. The importance of the controversy should not alter the arbiter's courtroom role and behavior.

The Wisdom of the Retiring Owl

The Forest Glen prided itself on the independence of its arbiters. When the Glen was first organized, the founders concluded that the best way to ensure fairness and to protect the Forest denizens from more powerful creatures or majorities who might oppress them was to give the arbiters life tenure and prevent their dismissal except for serious crimes. The system worked well for scores of years; many of Owl's predecessors were renowned for their courage in making fair and just decisions even in the face of popular resentment, and life tenure protected them from retribution. But as the conditions of life improved and creatures lived longer, the risk grew that arbiters like Owl would become senile or decrepit before they

retired or died. The authorities struggled to find a way to avoid that outcome without impairing the value of arbitral independence, but because suggestions of decrepitude could be used to mask disagreement with the arbiters' decisions, the authorities found no easy answers.

Moral: Judicial independence has many virtues, but it carries a risk in the case of arbiters who refuse to step down when it is time.



The Vultures' Cacophonous Chorus

There was no consensus among the Three Vultures over how to write appellate opinions. The First Vulture thought it critical that the decision announce a clear ruling at the outset, address all the reasons supporting the outcome, and provide a firm indication of the rules to apply, for maximum benefit to trial arbiters and advocates in future cases. The Second Vulture thought that the decision should demonstrate, in all its messiness and uncertainty, the difficult mental process by which the Vultures reached their conclusion, providing maximum transparency even at the peril of uncertainty in future cases. The Third Vulture was most interested in writing with wit and cleverness, stating matters provocatively so that the opinion would receive wide media attention and citation by other tribunals and academics. The result was a hodgepodge of writing styles, whispered criticism, and sometimes mockery of the opinions by the advocates and the arbiters.

Moral: Without agreement on the purpose(s) a written opinion should serve, there is sometimes dysfunctional dissonance in the appellate tribunal's work-product.

THE OWL AND THE FLOCK OF FILINGS

Owl became an arbiter in the Forest Glen before the digital revolution began. In those days the administrators for the tribunal gathered up the case files and brought them personally to Owl, often grouping them into categories (*e.g.*, requests for continuances; requests for extra pages in briefing; substantive matters). This process made it easier for Owl to deal with them. Sometimes the administrators even summarized the simple procedural ones orally, with Owl simply endorsing the request on the margin. The administrators did not present the cases to Owl when she was on vacation or in the midst of a difficult trial.

With the digital revolution came online electronic case filing. The advocates loved it because they no longer had to come physically to the tribunal, and could file at any time of the day or night. It became apparent that advocates expected 24/7 electronic access to an arbiter. The administrative personnel managed the system remotely from their computer terminals and notified Owl electronically whenever a matter, no matter how insignificant, required her ruling. Owl received these notices on her mobile devices even while she was on vacation and during the most difficult and complex trials. They were stressful for Owl because receiving them made her feel that she must rule expeditiously. Advocates were not sympathetic to Owl's plight because they faced their own stresses from client

access to them 24/7 by email. Owl silently blamed the tribunal's administrative personnel for creating the increased stress caused by the incessant electronic notices, even though the administrators had no intent to press her for immediate decisions, but were simply trying to fulfill their own administrative responsibilities, clear their electronic inboxes, and move the matters to Owl's electronic inbox.

Moral: Online case filing systems carry tremendous advantages for lawyers and judges, but they can increase perceived stress by eliminating the informal screening functions that human interactions sometimes serve.