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ESSAY

LITIGATION IN 2050: A BACKWARD-FORWARD, TOPSY-TURVY LOOK AT DISPUTE RESOLUTIONS

LAWRENCE J. FOX*

Litigation in 2050: A Backward-Forward, Topsy-Turvy Look at Dispute Resolutions was originally commissioned by the American Bar Association Center for Professional Responsibility. Along with two companion pieces reflecting varying perspectives on the same subject, it was presented as part of the Seventeenth Annual Conference on Professional Responsibility, presented at Scottsdale, Arizona, June 6-9, 1991. It appears here with the permission of the American Bar Association.

The law has got to be stated over again; and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago.¹

ANYONE who ventures into the act of prognostication is well served not to ignore the wise counsel Justice Holmes offered in 1886. And, if any lesson is clear, predicting the future of the law is an even more treacherous activity today than it was 105 years ago. Throwing caution to the wind, however, I accepted this assignment—to predict the state of litigation in the year 2050. I viewed it as a chance to engage in a combination of predicting, dreaming, and fantasizing that I hoped might clear some cobwebs from a brain otherwise bogged down in the day to day practice of law.

To get some handle on this intimidating project, I thought it might be instructive to look back an equal number of years—to 1932—to see how hard it would have been for a lawyer back at the early years of the Depression to predict what would happen in 1991—to see the extent to which things had changed as well as to see how much they were the same. I did not have the time or inclination to engage in a major research project, but I found, if you will, the perfect “Cliff Notes” of the practice of law in 1932—the bound volume of the ABA Journal issues for that year.

I must confess that I spent literally hours pouring over the densely-packed, nearly 1,000 pages published that year, fascinated by the window the Journal provided not only the state of the practice of law back then,

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1. Wells, *A Strangely Accurate Prophecy*, 18 A.B.A. J. 300 (1932) (citing Justice Holmes' November, 1886 address to the Harvard Law School Association).

but also on the strikingly different look to the graphic arts that is reflected in the Journal's dull paper, uniform type, and dearth of photographs. As opposed to today's lively, colorful publication, 1932's Journal is all text with but a few black and white images, mostly of distinguished, all white, virtually all male leaders of the organized bar.

Turning to content, I was surprised to find that so many issues being addressed in 1932 were strikingly similar to those we are still (or once again) grappling with today. While a complete list would only postpone my obligation to start my adventure into prognostication, several examples provide a good object lesson.

1. *Hard Ball Litigation* - An article on the "Ethics of Advocacy," while reflecting the now quaint notion that in 1932 there was no pre-trial discovery, warned the litigator to eschew the desire of the client to "treat 'em rough."

2. *Problems of Police Brutality* - An article, "Lawlessness in Law Enforcement" teaches us that the use of forced confessions obtained by the "third degree" was commonplace in 1932, that in my hometown of Philadelphia "cold storage" was regularly employed for this purpose, that brutality was charged in 20 percent of all arrests in New York, that the enlightened exception to the use of violence against detainees was, surprisingly, Chicago, and that the recent videotaped arrest in Los Angeles at least reflects that such events are less frequent than they apparently were fifty-nine years ago.

3. *Judicial Salaries Inadequate; Judicial Elections Criticized* - While judicial salaries were deemed far too low and judicial raises equally unpopular—an article notes that some judicial salaries have not been increased in a "generation,"—the 1932 Journal also attacks an uninformed electorate participating (or rather not participating) in judicial elections among candidates who are put under inappropriate pressure to raise funds—shades of the Chicago Greylord case and the white envelopes that recently got eighteen judges in Philadelphia into so much trouble. The suggested solution for the latter is a greater role for the organized bar in rating candidates for judicial elections, thus ending the need for judicial primaries.

4. *Abolish Diversity Jurisdiction* - No fewer than six articles in the 1932 ABA Journal address the then infamous Norris Bill calling for the proposed abolition of diversity jurisdiction or alternative reforms that would raise the jurisdictional limit to \$7,500 or \$10,000. The perennial arguments we hear echoing today regarding the crush of litigation in the federal courts, the fact that prejudice against out-of-staters in state courts was a Nineteenth century notion whose time has passed, and the absurdity of giant corporations being treated as citizens of, at most, two states, were met in 1932 by a staunch ABA asserting the identical arguments the 1991 defenders of diversity (still including the ABA) muster in the halls of Congress today.

5. *Convincing the Law Schools to Increase Ethical Training* - An arti-

cle, *Legal Ethics and the Law Schools*, describes pressure from the ABA Section of Legal Education to insist that law schools teach ethics, pressure that is reported to have been met by “lack of interest, opposition and unwillingness” to “develop professional character” of their students. Another article, *Commandments of a Lawyer* reviews which schools are teaching ethics and how they approach the subject.

6. *Problems of Professionalism* - The 1932 ABA Journal observes “one can be justly alarmed at the extent to which the non-professional idea has invaded the Bar.” Another particularly instructive article, *An Organized American Bar*, notes with dismay the invasion of the legal profession’s turf, citing examples which portend shrinking business for lawyers. The author notes:

- Lay people handling workmen’s compensation claims.
- Businessmen turning to accountants over lawyers.
- Trust companies acting as executors and trustees.
- Title companies passing on titles.
- Collection agencies enforcing debts.
- Arbitration increasing in specialized industries.
- Mergers reducing the number of clients.
- The declining prestige of courts.
- Litigation superseded by administrative proceedings before agencies like the ICC.

Indeed, with the bar having passed 160,000 lawyers in 1932 (with 44,000 law students), the ABA Journal addresses “the overcrowding of the bar” by asking the question in an editorial whether it is “time to take steps to reduce this flood tide?”

7. *Delay in the Courts* - ABA President, Guy Thompson, opines that the “litigant cannot respect a system of so-called justice that defers for years adjudication of his demand,” noting statistics regarding delay of which the cities involved would probably be proud if they were able to act that speedily today—St. Louis, fourteen months; New York twenty-four to twenty-six months; though not Detroit which even then had delays of forty-two months.

While this wonderful volume, as you can see, suggests that in some ways nothing changes in the law, there are some items I noted that demonstrate how much things can change across 59 years. For example, reflecting a different level of pressure to gain admission to law school back in 1932, the prestigious Columbia Law School accepted 280 of the 409 students who took its entrance exam. I also found it charming that those who attended the ABA annual meeting in Washington in the fall of 1932 (no summer meetings then—no air conditioning) were able to book a single room at the luxurious Hay-Adams Hotel for four dollars per night. Finally, there were more than a few passing references in the 1932 Journal to the availability of “quickie” divorces in such then-popular vacation spots as Hot Springs, Arkansas and Havana, Cuba.

Leaving the Journal, but not the perspective of 1932, I then thought of those developments that had occurred in the intervening fifty-nine years that would have been difficult to predict back then. These break down roughly into matters legal and matters technological. Turning to the former, can we imagine how the lawyer practicing in the last full year of the Hoover Administration would have reacted to predictions of the following:

1. The number of lawyers in 1991 approaching 1,000,000 (including thousands who do not practice) or six times the number of 1932, despite the fact that the population only doubled.
2. Law students numbering 140,000, with the better law schools regularly receiving twenty or more applications for each class room space.
3. Law firms with offices in five, ten, or more cities employing over 1,000 lawyers and two or three times that number of non-legal personnel.
4. Lawyers earning extraordinary sums, with the average partner at the top twenty firms (2,121 lawyers in all) earning an average of \$890,000.
5. Constitutional litigation - the application to the states of the fundamental rights found in the Bill of Rights resulting, *inter alia*, in *Gideon v. Wainwright*, a dramatic increase in the use of lawyers (now required for criminal defendants) and a vast field of litigation enforcing these protections.
6. Class actions aggregating claims of thousands of investors and totaling hundreds of millions or even billions of dollars under, *inter alia*, the antitrust laws or new federal securities laws that demand full disclosure.
7. Strict liability for the producers of thousands of products deemed unreasonably dangerous to the consumer.
8. Asbestos litigation. Need I say more?
9. A national legal press that chronicles (breathlessly) every personnel change (partners leaving their original firms!), law firm mergers, the profitability and growth (and dissolution—even bankruptcy) of the largest firms, management upheaval and falls from grace of the “stars” of the profession, featuring pictures (graciously provided) of the subjects of these gossip rags’ attention.
10. Advertising in yellow pages, on television, and even by targeted direct mail that leaves in the dusty, cobwebbed archives of the profession the 1932 obsession with avoiding improper client solicitation.
11. Environmental laws and Superfund litigation that seek to hold responsible for the damage to our environment those who blithely dumped and stored massive quantities of toxic material at a time when all were insensitive to the damage caused.
12. An ABA that includes in its membership almost 400,000 lawyers—over one-half the practicing profession—operating on a budget of

\$64,000,000, contrasted with 27,000 members, a \$200,000 budget and eight-dollar dues in 1932.

As surprising as these developments would be to our 1932 practitioner, perhaps these items do not reflect as dramatic a change in the practice as the developments in technology that have occurred over the same period. I have often thought that modern litigation could never be possible without the Xerox machine. With no way to copy everything that is not moving, can one really imagine the massive document case ever occurring?

Other examples of technology changing the practice of litigation abound. Without the jet airplane, there would be no "airplane lawyers," my name for those peripatetic litigators (and their colleagues who practice in other areas) who view their offices as merely places from which to make travel reservations for their next deposition 2,500 miles from home, their next closing, or their next court appearance in a distant court room where a routine *pro hac vice* motion will ensure their ability to make their once-in-a-lifetime appearance before a judge against opposing counsel they will never meet again.

Similar change has been wrought by, first, Federal Express, and now the fax machine. Gone are the days when leisurely reflection and careful consideration of proposed documentation or pleadings could occur, when lawyers could assert, sometimes disingenuously, that the draft had not arrived by post and buy another day for cogitation. Now with Federal Express guaranteeing next day delivery and facsimile machines confirming instantaneous transmission, demands for "comments in an hour" cannot be ignored, improving the speed but not necessarily the quality of legal services.

Since depositions were not available in 1932, the concept of videotaped depositions would have had a double improbability of being predicted from that vantage point. A lawyer from that era would have a great deal of difficulty imagining a trial as a video presentation of previously elicited and taped testimony.

Finally, any discussion of technological changes hard to predict in 1932 would not be complete without discussing the digital computer whose first example was not even experimentally demonstrated until 1948 in Philadelphia. From word processing ability that has literally revolutionized the way documents are prepared and edited to the use of databases like WESTLAW and LEXIS, putting on the desk of anyone with a computer terminal access to all reported cases and far more, how could anyone have predicted such advances from the perspective of FDR's first presidential campaign?

* * *

Having made excuses for how difficult this assignment is and apologized in advance for my inadequacies in tackling this task, let me turn then to my predictions. Of course, for starters I confidently predict that

the issues of underpaid judges, judges selection, police conduct, diversity jurisdiction, rampant commercialism in the legal profession and "what-to-do-with-too-many-lawyers" will still be the centerpieces of discussions in 2050. On the other hand, I will not predict another six-fold increase in the number of lawyers or another 5000 percent increase in the cost of rooms at the Hay-Adams.

But, to venture beyond that which history clearly teaches us will remain current, I assume that as I was leaving the ABA Seventeenth National Conference, all the rarified discussions regarding ethics, together with the dry mountain air, caused my total collapse into a Rip Van Winkle sleep. I then awoke in the year 2050 to find myself still in Scottsdale attending the seventy-sixth Annual Conference on Professional Responsibility. With no clue as to what happened in the intervening years, I imagined the following colloquy between a still forty-seven-year-old Larry Fox and a surprisingly well-preserved spry 100-year-old Jeanne Gray.²

FOX: Where am I? What happened? I just remember falling and then . . . then nothing? Who are you?

GRAY: One question at a time, ol' boy. You are in Scottsdale, Arizona, at our IBA Conference on Professional Responsibility. You have been in a deep coma for almost sixty years and as luck would have it, the doctors finally found a cure for your disease, just as we were about to meet. I'm Jeanne Gray, remember me? I'm now the emeritus director of the IBA Division of Professional Responsibility and they told me you might awaken any minute, so I came to see you. The rest has done you good; you look just like you did back in 1991.

FOX: I wish I could say the same, though you do look . . . well, . . . distinguished. What was my disease? What's the IBA?

GRAY: You had an overdose of too much ethics; it came into conflict with your psyche's natural desire to maximize income and just overwhelmed your equilibrium, putting you into a coma. The IBA? Oh, of course, there is so much you wouldn't know about. How things have changed! Remember the old ABA? Well it's still around, but it's just another one of those parochial national bar associations that worries about local issues. The *must* organization for dedicated professionals is the International Bar Association. It has almost a million members in the thirty-five countries of the United Market. Its headquarters are in Seoul, Korea.

FOX: The United Market?

GRAY: How will I ever find the patience to describe everything to you! In 2034, all of the countries of Europe and North America, Brazil, and Argentina in South America, and Japan, Korea, China, Indonesia, and Thailand formed an economic union, similar to the old Common Mar-

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ket, but far stronger. We have common laws for banking, securities transactions, antitrust, products liability, and a common commercial code. This was the only way to achieve an integrated global economy.

FOX: This is all too much for me. I think I'll just go back to Drinker Biddle & Reath and get on with my life as a litigator. I wonder if anyone will remember me? Can you make me plane reservations—

GRAY: (interrupting) I wouldn't be so fast to race back to Philadelphia, if I were you, Larry, though I'm sure you'd enjoy the one hour flight. Drinker . . . let's see. I'm sure it no longer exists. So many of those small firms were swallowed up, first in the national merger mania that took place around the turn of the century, and then as we approached 2034 and the international financial service conglomerates added law firms to their stable of companies. You know, one of those Philly firms, I think it was yours, first became a part of Latham & Watkins. By then we were down to twelve major firms . . .

FOX: (interrupting) But how could that have happened? I always thought that conflicts would prevent the firms from growing too big?

GRAY: You don't want to know what happened to our conflict rules. It was right around the time of merger mania that the ABA finally changed the Uniform Rules of Ethics (they were adopted after endless debate in 1998) to provide that even if lawyers worked for the same firm, so long as they worked in offices in different states, they didn't have to be considered colleagues for conflict of interest purposes. What a change that was. You would have been shocked to see Los Angeles lawyers from Skadden Arps litigating against that firm's Madrid office.

FOX: (choking) Madrid?

GRAY: (continuing) The opponents of the change were in shock, but those who said the ethics rules had to recognize the new "realities" and economics of the practice of law won the day. The result wasn't that surprising because by then the Big Twelve controlled so many seats in the House of Delegates. It was not long after that that the ABA went into a steep decline and all of this became irrelevant.

FOX: What do you mean?

GRAY: Well, today with the internationalization of the practice and the new approach to dispute resolution, the concept of conflict of interest basically doesn't exist, at least not under the current version of the United Market Standards of Appropriate Conduct for Lawyers, Bankers and Accountants.

FOX: We lawyers don't even have our own code anymore?

GRAY: Well, once the law firms became part of the international financial conglomerates, there was no reason for a special code for lawyers.

FOX: But what about conflicts?

GRAY: The only limitation now is that an individual lawyer cannot undertake a representation adverse to another client of that lawyer. It's

not at all unusual for a lawyer to take a matter adverse to a client of a colleague down the hall, and, of course, cases against clients of offices in different states or countries are legion. No one knows how much of this is going on because no one even runs conflict checks anymore. Now I know that all sounds improbable, but it's true.

FOX: What's this new approach to dispute resolution?

GRAY: This is such a complicated topic I hardly know where to start. But the United States as an economic force really went into eclipse after 1991. First, the financial hegemony you could have anticipated from Japan and Germany became a reality. But over time, Korea and Brazil and then China saw their economies surge. Back in 1991 you might have expected the United States to export its method of litigating disputes, but quite the opposite happened, in part because the United States became just one of ten principal economies, and not even in the top five. Many blamed the United States' decline on our lumbering, expensive, and out-dated legal system. You might remember how critics of our economy were always pointing out how many fewer lawyers there were per capita in Japan (as if that explained Japan's booming economy). Well, there were even fewer in China. So our jury system came under attack as asking those least qualified to decide matters beyond their ken; discovery was characterized as a monumental waste of time; and even the philosophical underpinnings of the adversary system were blasted as fostering gamesmanship over a search for the truth.

With no economic clout to repel these arguments, the new world order for dispute resolution in the international court system took on a different form entirely.

FOX: Yeah, well, we always had a few international cases that got arbitrated, but that was never much of a factor in my practice.

GRAY: That was 1991. Today, any dispute between citizens of different countries must be adjudicated in the International Dispute Resolution Forum. And any company that does business in more than one country is deemed a citizen of each. Since seventy-five percent of the economic production of the United Market is produced by giant conglomerates doing business in more than one country, more than seventy-five percent of commercial disputes go to the International Forum.

FOX: Forum. That doesn't sound good; what happened to the old courts?

GRAY: You haven't lost your nose for spotting trouble. Matters that come to the International Forum, or "IF" as we shorthand it now, go through a three-step process. First, the parties are sent to a Master of CMP.

FOX: Cut the jargon. What's CMP?

GRAY: Oh, I'm sorry. The idea has taken such hold that everyone uses that abbreviation to avoid the mouthful: Master of Conciliation, Mediation and Pacification. You remember the ol' ADR idea. Well this is

its ultimate manifestation, the institutionalization of the rampant antipathy to adjudication that first reared its ugly head back in the '80s. Now, under international rules, if you have a dispute the parties must submit the matter to one of these Masters, who are all either psychologists or psychiatrists. No one can go further in a dispute until this step has been completed and the Master certifies that his or her soothing approach has not solved the problem. Parties can be lost in CMP land for more than a year, 'til the Master is prepared to certify that the parties have approached this in good faith. Takes all the blood and guts out of a good dispute, if you ask me.

FOX: Sounds like group therapy if you ask me.

GRAY: My thought exactly, and worse yet, no lawyers participate in the CMP process!

FOX: Well, yeah, but once you get that behind you, I guess you finally get to litigate. That would be a breath of fresh air.

GRAY: Not so fast, Larry. Remember, I said there were three steps under International Dispute Resolution Forum Rules. The second doesn't apply to every case, but it does apply in most. If the dispute involves what is called a "specialized area of knowledge" such as advanced genetic engineering, space laboratory manufacturing, an alleged defect in a solar-powered helicopter, mental telepathy, or whatever, the dispute is then referred to a member or members of the International Expert Resolution Panel. There are literally hundreds, if not thousands, of such specialists from around the world who are matched with the dispute by means of the Central Computer Assignment System.

FOX: Whatever happened to a jury of your peers?

GRAY: Stop spitting into the wind, Larry. That idea went out of style with neckties, or virtually so. While we in the United States continued to hold on to the antiquated notion of trial by jury, the rest of the world agreed with those critics here at home that jurors were not capable of deciding these complex issues. And, as science became more sophisticated and certain, and jurors started rejecting fundamental scientific principles based on their sympathetic views toward plaintiffs, accepting the discredited testimony of scientific charlatans, the scientific community finally won the day. When cases involved technical matters they would be decided by someone from that field, not by some uneducated and misguided jury.

If I sound a little facetious, it's just 'cause us old timers still aren't buying. But that makes no difference now. The technocrats sealed their victory years ago when that jury in Philadelphia found liability against the manufacturer of the old AIDS vaccine, even though not a single Ph.D. could be found to testify that there was a causal connection between the vaccine and the class action plaintiffs' conditions. The jury actually went along with the testimony of a kid who had won the Westinghouse Science Search!

So, now we take all scientific disputes that haven't been massaged into

settlements to the world's leading neutral experts, who conduct their own investigation, call the witnesses they want to hear, and render a decision that can only be appealed to a panel of scientific peers.

Again, you will note lawyers are virtually absent from the proceeding. You're allowed to consult a lawyer, of course, but frankly the clients are looking to hire colleagues of the neutral, or at least advisers from the same field. So in this "brave new world" the scientists have replaced us. The only lawyers who really find work are those who have Ph.D's in obscure areas of science.

FOX: Well, you did say there was a third part of the process. I hope that is kinder to lawyers than the other two.

GRAY: That's certainly true; the international procedure has a final step. For those cases that don't settle in CMP, and for those few that either don't go for expert adjudication or in which the expert declines the referral, there is a final step, the closest we come to what you remember from the halcyon days of litigation in the '80s. The case is referred to the international panel of judges, with assignment to that division of the Court located closest to the place where the claim arose.

FOX: Now I would get to show my stuff, right? Old-fashioned discovery, depositions, motions, jury trials.

GRAY: I guess I'm full of disappointments for you today. That's not correct. First, no juries in international proceedings. Second, pre-trial proceedings have been turned upside down. At this stage each side is responsible for producing the information to the other side fully and completely without the need for any action on the part of the opposing party. The lawyers are under enormous pressure to make full disclosure and failure to do so—ah, this is the part that will really get you—exposes the lawyer to liability to the opposing party. The lawyer's only defense to the charge is fraud on the part of his client.

So, instead of lawyers sitting around thinking of evasive non-answers to interrogatories, construing document requests in the narrowest manner possible, and directing witnesses not to answer deposition questions, litigators act just like securities lawyers preparing a prospectus for an initial public offering, scared to death that they might leave something out of their pre-trial disclosure statement that will come out later, to their detriment. And you can imagine how the lawyer-client relationship is destroyed when a lawyer who is caught having omitted a material fact is required to blame the error on the client.

FOX: Sounds like litigators can have as many sleepless nights as the old SEC types. I'll bet liability insurance rates have soared.

GRAY: Oh, they have all right but, of course, the insurance companies always rely on the fraud exception when the lawyer gets sued for this claim. As you know, Larry, some things never change.

FOX: Well, after all those pre-trial proceedings, I guess you finally get

down to a trial like in the old days. I guess that's one place where I would feel at home, right Jeanne?

GRAY: I don't know how to tell you this but I'm afraid you would hardly be qualified.

FOX: What do you mean? I've got all that experience. I was once the meanest deposition-taker in my firm. Motions were my specialty and, while I admit none of my big cases ever went to trial, I knew my way around a courtroom, albeit from my pro bono experience.

GRAY: But did you major in film in college?

FOX: Film? I was a political science major, that was the best major for being a lawyer.

GRAY: Well it hardly is now. Today, if you ever get to try your case (which as you can see almost never happens), we use the mixed media approach. Plaintiff's counsel assembles a videotape in which he combines excerpts from testimony of witnesses taken before trial (much like the old depositions, but all testimony is elicited this way) in any order he pleases, charts, graphs, and photographs and explanations pre-recorded by counsel. He then sends it to opposing counsel who prepares her own presentation in the same way. Any objections are taken to the judge, and the trial of the matter simply consists of the judge watching the televised presentations. We've eliminated those old formalities—introducing evidence, qualifying witnesses, endless objections, putting one witness on all at once—and the case is presented both quickly and without interruption. So you can see this puts a premium on the production qualities of the final videotape—which makes film makers the very best litigators. The ability to edit and splice is far more important than withering cross-examination. The idea actually got started in the states, where a few jury trials still take place. The juries loved it there 'cause it's just like watching a soap opera (they are *still* popular), except the jurors miss the commercials. The idea was so popular and so efficient for juries that the International Dispute Resolution Forum decided to adopt it for their judge trials.

FOX: How is this elaborate resolution process funded?

GRAY: That's a big change too. When the International Forum first got established there was a great deal of pressure for the English rule as a means of cutting down frivolous litigation. Of course, we Americans balked. Finally a compromise was reached. The parties share the cost of the CMP process. If the case goes forward, the cost of the science expert and/or judge, as well as the omnipresent translators, is charged to the parties as the expert or judge decide, usually against the losing party. Indeed the entire system is self-funded from the parties that come before it. No one wanted to see a repeat of the United States' experience where Congress refused to raise judicial salaries for thirty-five years.

FOX: Well I guess this world of litigation 2050 doesn't leave much room for a guy like me. The procedures have changed; the philosophy has changed; the role of the lawyer has changed . . . (mumbling).

GRAY: Perhaps it would be best if you just wrote an eyewitness history of what the practice of law was like back in 1991.

FOX: Yeah, I guess so. Those were the days.

FOX: Oh, by the way, you never told me what happened to ol' Drinker Biddle & Reath.

GRAY: You're right. We digressed a bit. But, if I'm not mistaken, Drinker became part of Latham & Watkins which, in turn, merged into Daiwa/Prudential/Credit Suisse, the eighth largest financial conglomerate in the world.

FOX: I wonder if they'll pay my pension . . . when I get to sixty-five.