



EX POST

Well, things really are getting foggy now,
aren't they!

Owl

*D. Brock Hornby,
Fables in Law (forthcoming)*



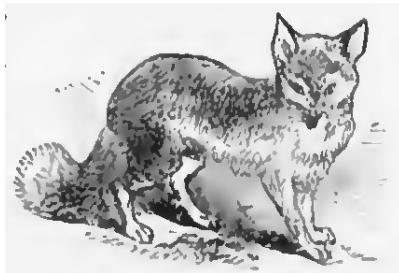
FABLES IN LAW, CHAPTER 1

LEGAL LESSONS FROM FIELD, FOREST, AND GLEN

D. Brock Hornby

We are pleased to present the first of three (and perhaps more) collections of Aesopian legal fables by Judge Hornby.

— *The Editors*



THE FOX'S FOUNDATION

Fox was representing Hedgehog in a dispute over whether contractor Mole had properly supervised the workers repairing Hedgehog's den. Fox called Hare as a witness and asked Hare

D. Brock Hornby is a District Judge on the U.S. District Court for the District of Maine.

whether Mole had supervised the workers properly. Opposing counsel Snake objected, claiming “Lack of foundation.” Judge Owl said to Fox, “You need to lay a foundation before I will permit that question.” Fox then proceeded as follows:

Fox: “Hare, have you ever been to Hedgehog’s den?”

Hare: “I have been visiting there on a daily basis for the past three months.”

Fox: “Did you have occasion on your visits to see Mole at work?”

Hare: “Well, I saw him a couple of times, but during the repairs he was hardly ever there.”

Fox: “How do you know that?”

Hare: “Hedgehog was ill, and I visited with him daily, all day long, during the repair period.”

Fox: “How many times did you see Mole inspect the building site during that period?”

Hare: “Twice. Five minutes each time.”

Fox: “What did you observe about Mole’s condition?”

Hare: “Each time he appeared bleary-eyed and unsteady on his feet.”

Owl: “Objection overruled.”

As a result of the careful foundation that Fox was prompted to lay, the jury found Hare’s testimony very important.

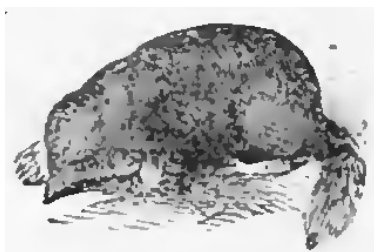
Moral: An experienced lawyer does not object for lack of foundation unless certain that the foundation cannot be laid.

THE MOLE IN HIS OWN WORDS

Snake prepared carefully for each witness in each case. For witnesses he cross-examined, he had a list of leading questions, with alternate lines available, depending upon the answers. As an inexperience-

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rienced advocate, he tended to use leading questions for the witnesses he called for his own side of the case as well (unless there was



objection), so that their testimony would support his theory of the evidence and the argument. In questioning his client Mole, Snake thus proceeded as follows:

Snake: “You have been supervising construction workers for 10 years, correct?”

Mole: “Yes.”

Snake: “And during that time no one else has ever questioned your job performance, correct?”

Mole: “That’s right.”

Snake: “You have never been inebriated on a job site, correct?”

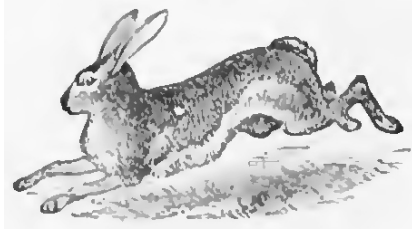
Mole: “Correct.”

Snake: “And you never saw Hare at Hedgehog’s den during the ten occasions on which you came to supervise the repairs, correct?”

Mole: “Correct.”

Experienced opposing counsel Fox never objected that Snake was improperly leading his own witness. Although Snake obtained the answers he wanted, the jury never got to hear Mole tell in his own words what happened. As a result, in deliberations they were skeptical of this version.

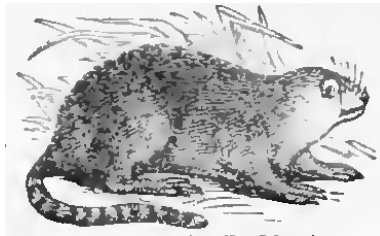
Moral: Unless your witness is unreliable, let him tell his story in his own words. Juries pay more attention to the words of witnesses than to the words of lawyers.



THE HARE'S FINAL ANSWER

Snake was cross-examining Hare over Hare's testimony that Possum had a carrot in his possession. Snake succeeded in getting Hare to agree that, at the time, dusk was falling, Hare was in a hurry, and he was some distance from Possum. Snake concluded the line of questioning by asking Hare, "So you don't really know what Possum was carrying, do you?" Hare blurted out in response, "Of course I do. I saw him take something long and orange out of his mouth and heard him scream, 'This carrot tastes awful.'"

Moral: It is safer not to ask the final question. Instead, one can argue later, after the record is closed, that the witness could not be confident of what he saw.



THE UNIMPEACHED MUSKRAT

Fox was cross-examining Muskrat who had proven to be a credible witness against Fox's client. Fox had in her hand a copy of

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Muskrat's deposition transcript.

Fox: "So, Muskrat, did I hear you on direct examination say that the waterway around the dam was large?"

Muskrat (pausing): "Yes."

Fox: "Do you remember that I took your deposition on January 12 of this year?"

Muskrat: "The date sounds about right."

Fox: "And was there a court reporter there recording everything that you said just as there is here in the Glen today?"

Muskrat: "Yes."

Fox: "And did you then swear to tell the truth, the whole truth, and nothing but the truth, just as you did today before this jury?"

Muskrat: "Yes."

Fox: "And did you not then say – and I quote – that the waterway around the dam was *huge*?"

Muskrat (puzzled): "Yes."

Whereupon, Fox walked triumphantly back to counsel table, threw down the deposition transcript, and said to Owl, "No more questions," looking meaningfully at the creatures on the jury. The jury, however, was nonplussed by Fox's performance.

Moral: Not every difference in the choice of adjective amounts to impeachment.



THE SNAKE'S NOT-SO-BRILLIANT BRIEF

Snake filed a legal brief with Owl. Snake had worked on it late into the evening, fortified by a little wine. Some of Snake's arguments were brilliant, but they dripped with sarcasm and vitriol. Fox, on the other hand, filed a brief whose logic was simple and plainspoken, without histrionics or memorable utterances. As Owl studied both briefs in deciding the controversy between the parties, she virtually winced each time she had to re-read Snake's brief. Owl was much more comfortable re-reading Fox's less vehement brief. In the end, Fox's more temperate argument prevailed in Owl's decision.

Moral: For persuasion, simple statements generally wear better and longer than sarcasm and bombast.

To be continued . . .

