



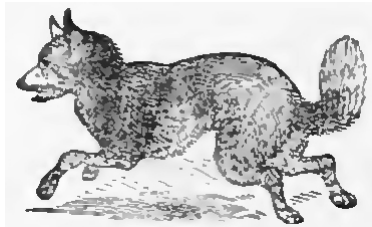
FABLES IN LAW, CHAPTER 4

LEGAL LESSONS FROM FIELD, FOREST, AND GLEN

D. Brock Hornby

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

— *The Editors*



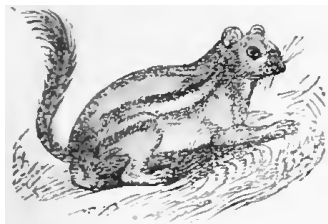
THE FOX'S PROFESSIONALISM

Fox was representing one of the Magpies on a charge that the Magpie had defamed Snail in calling him slow. This Magpie had left her position as a reporter on the *Forest Glen Gazette* in order to become a full-time blogger, and it was on her blog that she made

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the comment about Snail. The Magpie had little money, and Fox discovered that the legal issues about whether a blogger should be treated like a traditional journalist were uncertain and difficult. Fox could not charge the Magpie for all that she did on the case, but Fox gave it abundant attention nevertheless, because she found the controversy interesting and the challenge professionally fulfilling.

Moral: A true professional is motivated by more than material gain.



THE GOPHER'S ENLIGHTENMENT

Owl needed to appoint an advocate for a destitute creature who was challenging her eviction from her den, because Raccoon (who usually took such cases) was unavailable. Owl persuaded Law Professor Beaver to take the case for free, using Gopher, one of his law students, for assistance and for the educational value it would provide Gopher. In the first conference before Owl, Gopher was in terror, having an image of arbiters as stern and unforgiving. But when Beaver and Gopher walked into Owl's chambers along with the opposing advocate Snake, Owl opened the proceedings by thanking Beaver and Gopher for taking the case and expressing the tribunal's gratitude. Snake was not only cordial, but made helpful suggestions to Gopher about advocacy as the case progressed. Although Owl and Snake never realized it, Gopher was dumbfounded, altered her views about the nature of advocacy, decided that unfettered aggression was unnecessary, and resolved to live her professional life with collegiality and courtesy. Gopher became a fine advocate and eventually succeeded Owl as a respected arbiter.

Moral: Never miss an opportunity to be cordial and to exemplify proper professional behavior in the presence of young professionals.



THE IRONY IN THE OWL'S COURTROOM

Advocates litigating civil cases in Owl's tribunal charged their clients high rates, and many earned a lot of money. But the stakes were high, the clients expected to win, the advocates had to go through much tedious pre-trial preparation such as discovery and motion practice, matters were often highly contentious and, as a result, many of the advocates became disillusioned or at least professionally dissatisfied with their day-to-day work life. Advocates defending criminal cases by court appointment, on the other hand, earned only a modest income, and they and their clients seldom expected to actually win a case. Instead, those advocates' goal was to ensure a fair process and to obtain the best outcome available to a particular defendant under the circumstances. Although their clients often faced dire prospects, these defense advocates obtained professional satisfaction in helping them as best they could, their clients were often (not always) grateful, and the advocates received accolades from the arbiters and courthouse personnel for their dedication to justice.

Moral: Satisfaction comes more frequently to those with sensible and modest goals.

THE BENEFICIAL RITUAL

When a Forest Glen creature wanted to plead guilty to a criminal charge rather than go to trial before Owl, Owl required answers to a lengthy list of questions to ensure that the creature was

acting voluntarily and intelligently, understood the rights the creature was giving up by pleading guilty, and had in fact committed the offense. Indeed, the Three Vultures insisted that Owl be assiduous in asking these questions. Since the advocates knew all the questions in advance and coached their clients on the correct responses, the process became ritualistic and predictable. Nevertheless, in preparing their clients on how to answer, the advocates were compelled to educate them on all their rights and risks, and the danger of an uninformed plea was reduced to near zero.

Moral: Ritual has a purpose when preparing for the ritual compels a defendant to consider carefully the choices to be made.



THE DAMAGING DONKEYISMS

Snake decided that it was time to improve his trial advocacy. He signed up for a course taught by a famously successful advocate who was not from the Forest Glen, namely, Donkey, of Barnyard fame. Snake and other junior advocates spent a week with Donkey in the Barnyard, learning and practicing his techniques. By the time Snake returned to the Forest Glen, he had unconsciously adopted Donkey's mannerisms, his folksy style and accent, and even uttered the occasional hee-haw. But at Snake's next trial in the Glen, the jurors were distracted by these Donkey characteristics, finding them counterfeit coming from Snake.

Moral: It is important for an advocate to be authentic. Jurors quickly detect phoniness.



THE BOASTFUL WOODCHUCK

Like many advocates, Woodchuck was a garrulous fellow. He loved to talk about his cases and to dress them up in a way that made him shine. After a little wine, he was particularly entertaining. One evening at a dinner party he regaled listeners with what he depicted as his great successes in representing Chipmunk, a longtime client. Woodchuck did not actually disclose confidential information but, when Chipmunk heard through the Forest Glen grapevine that Woodchuck had been talking about him and his legal affairs, he was offended. Thereafter, Chipmunk (who had always paid Woodchuck promptly and without question) took his legal business to Frog, and told Frog why. Frog was careful not to repeat Woodchuck's error.

Moral: Circumspection on the part of an advocate is not only ethically appropriate, but also good business.



THE UNRELIABLE OTTER

In law school, Woodchuck's professors drummed into him the strategy of pleading in the alternative and arguing two defenses simultaneously even if they were somewhat inconsistent. ("The stop-light wasn't working; alternatively, if it was working, it was green.")

Woodchuck found that the strategy worked well in his summary judgment motions before Owl and in appellate briefs before the Three Vultures, and that frequently he could win a motion or an appeal on one of his alternatives even if the other failed. But now Woodchuck had his first case where he was defending his client before a jury.

The case was this: Woodchuck's client, Professor Beaver, did extracurricular consulting on engineering and water issues. The dispute at trial was whether Otter, who worked part-time in Beaver's consulting business, had obtained discarded pine logs from the Forest Glen managers on the basis that in exchange Beaver's business would inspect and repair the Forest Glen dam at no cost. As it turned out, Beaver submitted a substantial bill for the inspection and repair services and, as a result, the Glen managers wanted payment for the logs. They sued Professor Beaver, and Woodchuck defended him.

In the course of the trial, Woodchuck called Otter to the witness stand.

Woodchuck: What was the market value of these logs?

Otter: Nothing. It was a favor to remove them, for most folks would have charged good money to take them away.

Woodchuck: Did you say anything to the Glen managers about a quid pro quo for the discarded logs?

Otter: Absolutely not.

Woodchuck: Did you say to them that Beaver would do a complimentary inspection and repair of the dam in exchange for the logs?

Otter: Of course not. As I recall, we never talked about the dam.

On cross-examination, Otter was shaken in his testimony that the dam inspection and repair and what it might cost had never been discussed at all. As a result, Woodchuck called him back on redirect to clarify:

Woodchuck: If you had discussed dam inspection and repair with the Glen managers, would you have had authority from Beaver to say that he would perform those services for free?

Otter: No, I would not. Beaver always wanted all his money.

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Woodchuck followed the argument-in-the-alternative strategy in his closing argument, urging the jury that the evidence showed that the logs were worth nothing, that Otter never spoke to the Glen managers about a complimentary inspection and repair by Beaver and, if Otter did speak about it, that Otter had no authority from Beaver to do so.

In deliberations, the jurors concluded that the various denials and statements were unlikely *all* to be true. They therefore lost confidence in Otter's testimony and Woodchuck's defense and gave their verdict against Beaver.

Moral: Alternative versions of the facts may work for judges and lawyers who are trained to compartmentalize their thinking, but jurors applying common sense generally prefer a single consistent narrative.

