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A Little Known History of Truth

STEVEN H. GOLDBERG*

Looking out from the office, the lawyer watched hordes of people pouring in from the countryside, clogging the streets, filling the taverns, and fighting for the limited places of shelter against the suddenly harsh weather. Tax time was a boon not only to government, lawyers, and accountants; it was harvest season for restauranteurs and innkeepers.

"Why do we go through this every year?" the lawyer asked no one in particular. "It's a zoo. There must be a better way."

"Maybe," said the clerk, "but it brings in business. There's someone here to see you."

The receptionist brought in a middle-aged, sad eyed man who told the lawyer about his troubles.

The man and his pregnant wife had traveled a full day from their home, twenty miles away, planning to stay in the city for only a day or two. Unable to find room in any of the inns, they had settled for space an innkeeper had been willing to rent in an adjoining stable. Even stable space had been in great demand. The innkeeper had charged an exorbitant rate and had required the man to sign an agreement that the couple would vacate by Friday noon. The innkeeper was expecting one of the area's many princes to stable his horses over the weekend.

A hollow laugh escaped from the man, as he told his story. "I'm not supposed to know it, but that bloodsucker is going to charge the Prince even more than he's charging me."

The lawyer tried to pay attention, but it was Friday. The work week was almost over. The man's story was not particularly interesting. Who needed another stable case, anyway? Innkeepers were always putting people in stables, charging high rates plus the hotel tax, and not forwarding the tax to the government. It was a harmless custom, interrupted occasionally by litigation from a disgruntled patron, unhappy with the straw stuck in his britches, or by a tax collector who, falling into the stable drunk, woke up the next morning alongside the sleeping proof that the innkeeper was not forwarding hotel tax for every patron.

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* Charles A. Frueauff Research Professor of Law and Director of Trial Advocacy, Pace University School of Law. This was written in response to a call from the W.M. Keck Foundation for essays on the topic: To what extent should the ethical responsibilities of a lawyer in civil litigation include the obligation to assist the judge or jury in arriving at the truth? I am grateful to the W.M. Keck Foundation for pressing the important dialogue about how our legal system and those who work in it ought to serve our society and for forcing me to think again about why we lawyers are who we are. It took me almost thirty years of trying cases, deaning, and teaching to fully understand that meaningful truth is the people one encounters in searching for it.

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This man was neither a tax collector, nor the kind to complain about a little straw. Why was he here?

As if reading the lawyer's mind, the man said: "I didn't realize how stressful the trip was for my wife. She's weak. I'm afraid the baby might come early. I told the innkeeper we would be staying longer. He said we had to leave." The man threw up his hands. "I said we'd pay more, but he said I'd signed an agreement to leave by noon, today. If we didn't leave, he'd have us evicted." The man shook his head, "Do you believe it? Just for some horses. Can you help me?"

Not a chance. The lawyer wanted to move the man out of the office without being rude. There was nothing to do for him. The man had agreed to leave the stable — in writing, no less — and if he did not leave, he would be evicted. Who made a written agreement about a stable rental? Not that it mattered; an oral agreement was just as enforceable. Maybe reading the document with the man would persuade him that no lawyer could help.

"Let's look at your agreement."

"I never got a copy. The only thing I have in writing is this," he said, handing the eviction notice to the lawyer. "I got it just before I came here."

"You did agree to leave by this noon, didn't you?"

The man nodded, sadly. "I didn't think at the time that we'd have any need to stay more than a couple days, so I signed the agreement." The man brightened and became earnest. "But I'll say I didn't agree to leave today, if it'll help, if it'll give our child a chance to be born in a safe place."

The lawyer decided not to explain that the man's denial would be worthless in the face of a signed agreement and not to broach the subject of why no lawyer could help him to offer false testimony. What the man needed was some other solution, something that would work.

"Are you sure there's nowhere you can find a roof over your heads for a night or two?"

"I've searched everywhere within ten miles. There's nothing. Farmers' sheds have waiting lines three deep."

"You sure the innkeeper understood you were worried the baby might come tomorrow?"

"Oh, he knew, but he cared only about the Prince and his horses."

The lawyer sighed. "I'm sorry. I don't know what I can do to help. The law's on the innkeeper's side. You made an agreement. He has a right to enforce it."

The man's desperation leapt out at the lawyer. "If you go to Court to fight the eviction for me, will that get us the extra day?"

The lawyer knew the Court would approve the eviction by the end of the afternoon, so there was no need to explain to the man that a lawyer's ethics prohibited using the system for delay. Not that the man was in a mood to be impressed by the profession's ethics.

"The eviction will be effective by the close of court today, unless you persuade a jury it's not legal."

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The man's head slumped. "You mean I have no chance?"

Much as the lawyer wanted to help, the client needed the truth. "Not unless the innkeeper doesn't show or something else unexpected happens."

The man's face lit up. "You mean I have some chance?"

It was not the reaction the lawyer expected.

"Any time there's a contest, there's a chance. But your chance is so small that it's not worth your time or money."

"That's up to me isn't it? The smallest chance is worth it, if my wife won't have to deliver our child in the middle of nowhere." The man sat up, his jaw jutting out. "Besides, what's right here? Aren't truth and justice important? What kind of justice is it if a pregnant woman has to give birth in the open so a Prince's horses can be pampered?"

Right? True? Just? Little words; big ideas. But did the man really care? A society needed rules and predictable behavior in order for its citizens to better live together. The big picture — the truth and justice of overarching principles that make society work — required vision beyond the emotions of any single case. But no "other foot" hypothetical about evicting a prince who had agreed to leave, so that a pregnant woman could give birth under shelter, would help the man appreciate that bigger picture. The man cared only about the little picture, about a place for his child to be born — not even a hotel, just a place in a stable. Isn't that what clients are supposed to do — be concerned with their own problems? And what are lawyers for, anyway? Law makers do big pictures. Lawyers do little pictures.

"All right," said the lawyer, "I'll represent you. But you understand I think you're wasting your time and money. The court's going to evict you."

"Thank you," the man smiled. "It's my time and money to waste. And don't be so sure it'll be wasted. I have a good lawyer."

* * *

"What in the emperor's name are you doing?" the innkeeper's angry lawyer burst into the office and threw the response to the eviction order onto the lawyer's desk. "Your client hasn't a leg to stand on."

The lawyer smiled at the friend, who was often an adversary in court. "Sit. Don't get your robes in an uproar. Want something to drink?"

They sipped and talked and then got down to business.

"My client intends to contest the eviction."

"He agreed to leave by noon today. He has no choice."

"Can you prove it?"

"Of course, this is just another hotel case," the adversary laughed. "In fact, in this case there's a written agreement, if you can believe that."

The lawyer smiled at the adversary. "Hard to believe that an innkeeper would

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bother with a written agreement, let alone keep it around so that some tax collector could find it." The smile turned to laughter. "Want to show me a copy?"

The adversary returned the grin. "I don't have it with me, but my client swears he told your client about the weekend reservation for the stable and that your client agreed to be out by Friday noon."

"If you'll get the agreement to me before court, we can probably avoid a hearing."

"I will, if I can." The adversary's face took on a conspiratorial expression. "But you're right about records and the tax man. I'll check with my client and see what I can do."

"Please," the lawyer said. "It will save us the expense of the hearing."

"C'mon," the adversary sat back and focused hard on the lawyer. "Even if I can't produce the document, that doesn't change the truth that your man made the agreement. I can't believe you'd be a party to an attempt at legal blackmail."

The adversary's tone sharpened.

"If your client thinks that forcing my client to take the time to come to Court to prove up the agreement will cause him to forget it, because the eviction isn't worth the trouble, your client's got another think coming."

The lawyer paused. "You don't think my client has a right to test the strength of your client's interest in evicting him?"

The adversary looked surprised. "I don't think it's ethical for you to waste my client's money and the court's time with a matter you know your client will lose, if the truth comes out."

It was the lawyer's turn to be surprised. "You don't really think a citizen ought to be denied the right to have a court decide a dispute, just because the citizen's lawyer believes that truth is on the opponent's side, do you?" The surprise turned to a grin. "It might be cheaper and faster that way, but it's not a process you can trust."

Just then a troop of mounted soldiers passed on the street. The lawyer pointed to the phalanx. "That's how they decide matters. That's what's causing so much unrest in the land, today. People think they have no way to be heard, no process for grievances, nothing but arbitrary decisions. How much better is it if lawyers, instead of soldiers, make unilateral judgments about truth?"

The adversary stood up to leave. "You're serious, aren't you? You think a civil client ought to have the same right to a lawyer that people charged with crimes have."

"No. I'm not sure that the government should ensure counsel in civil cases. But I'm sure that a client willing to pay for a lawyer ought not have that lawyer close the courthouse door on the theory that lawyers are the ones to decide how disputes should be resolved. Deciding is what we have courts for."

"That's not what I mean, and you know it," said the adversary. "I meant that I didn't think that you, personally, would take that kind of case to the courthouse."

"If we are going to decide disputes in the courts, because courts work better

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than individual lawyers, or soldiers, or kings, or whomever, then some lawyer will have to speak for each litigant. If every lawyer decides a certain case is no good, the citizen is barred from justice." The lawyer smiled. "But I don't have to resort to the 'last lawyer in the land' justification for this case. Pregnant women about to be thrown out into the cold aren't my least favorite cause."

"So you're going to attack the law allowing specific enforcement of contracts?"

"Actually, no. Specific performance isn't a bad concept. Neither is eviction, for that matter. I'm just representing a man who wants to go to court to contest this eviction."

"But you know the truth," the adversary protested.

The lawyer stood up to walk the friend to the door. "Truth is a pretty big idea, counselor. See you in Court."

* * *

The adversary called the innkeeper as the first witness.

"Did you rent a stall in your stable to Joseph for two days?"

"Yes."

"Did Joseph agree that they would be out by Friday noon?"

The lawyer rose. "Objection, your honor. Violates the original documents rule."

The face at the bench showed aggravation, as the Judge motioned the lawyer and the adversary to approach.

"What's the problem?"

"The problem, your honor," said the lawyer, "is that the question requires the witness to testify to the contents of a writing."

The Judge's face could not hide the disbelief. "You mean this agreement that counsel has asked about is in writing?"

"That's correct."

The Judge frowned at the lawyer, then turned, reluctantly, to the adversary. "Why don't you bring out the writing and let's get beyond this technical garbage."

"The written agreement is no longer available, Judge," the adversary said, contritely. "That's why I'm producing this secondary evidence."

The Judge turned back toward the lawyer with obvious impatience. "If an original document is not available, secondary evidence is allowed."

The lawyer was not sure why the agreement was not available, but decided to play a hunch.

"Secondary evidence is not appropriate, if the original is unavailable through the bad faith of its proponent, your honor."

"Are you contending that the innkeeper destroyed the document on purpose?"

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"I believe that to be the case, your honor, and am willing to inquire of the witness in pursuit of that proof."

Without waiting for the adversary, the Judge motioned to the lawyer to get on with it. There was no doubt that "on with it" meant quickly.

"Isn't it true that you contend that my client entered into a written agreement about the length of his stay in your stable?"

"Yes."

"That particular agreement was so important to you that you asked him to make it in writing?"

The innkeeper hesitated. "Yes," he said slowly.

"That was just two days ago, wasn't it?"

"Yes."

"Do you make sure in your business that you keep important documents where you can get at them?"

"Well, sure."

"Do you usually make this kind of a written agreement?"

"No."

"Why on Earth did you do it here?"

The innkeeper's face got red, before he said in anger: "I had a Prince and his party coming in. They had reserved the whole stable for their horses."

"For more money than you were collecting from my client for the same space?"

"Yes."

"But you can't find this agreement that is your key to making more money?"

"No."

"You have to pay tax to the state when you rent stable space to people, don't you?"

"Yes."

"But you don't have to pay tax to the state when you rent space for animals?"

"No."

"The tax collector doesn't assess you for rental to people in the stable, unless something in your records appears to tip off the tax collector, isn't that right?"

The innkeeper squirmed. "How do I know what the tax collector does?"

The lawyer and the adversary returned to the bench, where the lawyer said: "Your honor, my opponent is an honorable lawyer. I know that if this witness gives false testimony, my adversary, having offered the witness, will take the extraordinary step that our ethics impose and will attempt to remedy the falsehood. That will create great tension between the innkeeper's right to have confidences respected, and my adversary's obligation to the Court. Rather than have me ask this witness if the document was destroyed to avoid paying tax on the rental of the stable to my client, it might be easier for everyone, if my adversary conceded that the original documents rule applies in this case. It requires no admission of something improper from the innkeeper, reduces the

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chance that the innkeeper might commit perjury, and avoids the need for remedy should my adversary's witness give false testimony."

The lawyer looked at the adversary for a sign that the hunch was correct, that the adversary, too, thought the innkeeper might have destroyed the document to keep from tipping off the tax collector.

"It's not worth the time going further with this," said the adversary, conceding the point, but without admitting that the client destroyed the agreement. "I have another way to prove the agreement without forcing my client to return to the inn to retrieve it."

The lawyer did not recognize the next witness. The man, who turned out to be from the same town as the lawyer's client, testified that he had contracted with Joe to have some carpentry finished by the following Monday, when he and his family were to move into their new home.

When asked by the adversary if the work would be finished on time, the witness responded: "I was really worried when I met Joe here yesterday afternoon in the tavern. I asked him whether he was going to get my work done on time, because everything was scheduled to move on Monday. He said not to worry, because he had agreed to leave here by Friday noon. I remember him saying, distinctly, 'An agreement is an agreement.' "

The lawyer, knowing that nothing could keep Joe's admission out of evidence, looked over to the client for confirmation. Joe looked back and shrugged in resignation.

The lawyer leaned over and whispered in Joe's ear. "Did you see this man in the tavern?"

Joe nodded. "He was pretty drunk. I tried to get away from him as fast as I could."

"Did you talk to him?"

Joe nodded, again, his sad eyes carrying the full import of the admission. The lawyer did not have to ask whether the witness was telling the truth. Joe's expression confirmed that he was.

The lawyer, nevertheless, rose to cross examine the witness. If the jurors believed the man, they would find that Joe had agreed to leave by Friday noon. That would be the end of it. Joe and his wife would be evicted.

"Were you drinking in the tavern yesterday, when you say you talked to Joe?"

The witness appeared uncomfortable. "Well, yes. I had a couple ales."

"You were in the tavern for most of the afternoon, weren't you?"

The witness nodded, hesitatingly, his manner telling the lawyer everything.

"You have to speak out loud, so the reporter can write down your testimony."

"Yeah," the witness said, grudgingly.

The lawyer went after the truth that was certain to be there.

" 'I had a couple ales' doesn't mean you had just two, does it?"

"No."

This basically honest man was not about to perjure himself. The lawyer knew it and went for the truth. There was nothing to lose.

"You were drinking ale all afternoon, weren't you?"

"I guess."

"Enough so you might have been just a little tipsy?"

The man blushed. "Maybe."

Tipsy was admission enough. The jurors would know that a full afternoon of drinking meant 'drunk.' The lawyer switched gears.

"You didn't talk to Joe for very long, did you?"

"No."

"You remember that Joe told you he was planning to leave Friday afternoon?"

The witness looked perplexed. "Well, yeah. I know he was worried about getting home before the baby came."

"Joe had promised that his carpentry work on your house would be done by Monday, hadn't he?"

The witness seemed less wary. "Yes."

"Did Joe know that the timing was important to you?"

"He sure did."

"He knew that you had already arranged for moving?"

"Yep."

"Do you know that Joe is here fighting an eviction, so that he and his wife can stay, at least until the baby is born?"

"Yeah, I guess."

"If Joe is not evicted, you fear that your work will not be finished on time. Isn't that right?"

"Yes."

"You expect him to get the work done on time, because he promised you he would, don't you?"

The witness relaxed at the opportunity to say something nice about the man from his town. "You bet. He's as good as his word."

"And you and Joe had an agreement, didn't you?"

"Yes."

"It's possible, isn't it, that what Joe said to you at the tavern about a promise, when you had been drinking all day, is that he would keep his promise to you."

The witness seemed dubious, but not sure. "I don't know. Is that what he says?"

"You testified, didn't you, that you remember Joe saying in the tavern that, 'an agreement is an agreement?' "

The befuddled look returned to the witness's face. "Yeah, I'm sure he said that."

"Could the agreement he was talking about have been the agreement he had with you?"

"I don't know. I don't think so."

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"You have some trouble remembering things after you have been drinking a bit don't you?"

"Sometimes."

"You were drinking all afternoon yesterday when you talked to Joe?"

"I guess."

"When Joe said 'an agreement is an agreement,' you're not sure that Joe wasn't just trying to reassure you that your work would be done by Monday, are you?"

The witness looked down and finally raised his head. "No, I'm not sure. He might have been talking about our agreement, but I thought . . ."

The witness' voice trailed off and the lawyer sat down.

The adversary asked no questions on redirect, not wanting to risk any further deterioration of the witness's testimony. But the witness had been hurt, maybe too much. The adversary decided on a different course.

"Judge, I call the defendant for cross examination under the rules."

The lawyer had not had an opportunity to talk to Joe about testimony. Time had been short and there had been no reason. The lawyer had no intention of calling Joe to testify and had no reason to believe the adversary would. Now, as Joe took a seat in the witness stand to be interrogated by the adversary, the omission seemed ominous.

"Joe, did you agree that you and your wife would leave the stable by Friday noon?"

It was over. The innkeeper might not be able to testify to the contents of a written agreement, but the adversary was free to ask Joe for an admission.

The lawyer was closing the file when Joe responded, "No."

The adversary turned to stare at the lawyer. When the lawyer made no movement, look, or statement in response to the stare, the adversary sat down.

The lawyer asked no questions of Joe.

The adversary stared, again, at the lawyer. When there was still no acknowledgment of the inquiring gaze, the adversary rested the innkeeper's case.

The lawyer asked to approach the bench and when both lawyers were in front of the Judge, moved for dismissal of the innkeeper's eviction case.

The adversary stared disapprovingly at the lawyer and, then, argued for denial of the motion.

The lawyer agonized while the Judge considered the motion for dismissal and while the adversary (maybe no longer a friend) stared.

Finally, the Judge spoke. "I'm going to deny your motion for dismissal. The case may not be very strong, but the evidence about Joe's statements in the tavern is strong enough to have a jury consider whether Joe agreed to leave by Friday noon, entitling the innkeeper to evict."

Final arguments did not take long. The adversary took most of the time. The lawyer took only the time it took to say to the jurors:

"It is your task to decide whether Joe and his pregnant wife, Mary, should be

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evicted from the stable solely on the evidence of a man who had been drinking all afternoon and who has admitted he is not sure whether Joe's statement, 'an agreement is an agreement,' was about Joe's agreement with him or about something else. I am sure that you will do justice in this case."

As soon as the jury retired to deliberate, the adversary walked over to talk with the lawyer.

"Your man lied when I asked him about the agreement."

The lawyer said nothing.

"I take that to be an admission that I'm right," said the adversary.

The lawyer looked at the friend. "You know that our ethics do not allow me to divulge a client's confidences, so you can take my silence to mean only that what my client said to me is something that I cannot repeat, without permission, even if it would help my client."

"You have an obligation to the Court, too," the adversary said in an animated whisper. "You have a duty not to offer false testimony."

The lawyer stared at the adversary. "I didn't offer any testimony. Joe was not my witness and was never going to be. It was always my intention to rest after your case."

The adversary persisted. "You're supposed to remedy any testimony that you know to be false. You know the truth here."

The lawyer spoke carefully. "I am obligated to remedy any testimony that I have offered in the belief it was true and then find was false. Had I offered testimony that I later found to be false, I would have remedied it. I didn't offer Joe's testimony. You did."

"I suppose you didn't cross examine the man from the tavern in a way that would lead the jurors to decide something you knew not to be the truth?"

"I cross examined your witness, who had not told the jurors that he was drunk. I cross examined your witness in a way that might have led him or the jurors to conclude he was not sure of what he heard."

"And you argued to the jury that justice was on your side," the adversary accused.

The lawyer smiled. "Isn't it?"

The jury thought so. By nightfall it returned with a verdict in Joe's favor.

Joe was about to thank the lawyer, when a man ran in to the courthouse calling for him.

"Joe, hurry; it's time."

The lawyer nodded and Joe ran out of the courthouse toward the stable.

* * *

As the lawyers left the courthouse and walked down the now empty street, the dark of the night was invaded by light from a suddenly bright star overhead. The two lawyers, startled by the sudden light, paused on their way to the tavern.

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"You knew the truth," said the adversary with a sorrowful voice. "You should have said something to the judge or to the jury, so that they could reach a result that matched the truth. If we don't stand for the truth in this God forsaken world, who will?"

The lawyer smiled and turned to the friend. "What would you have me do? Let you prove up a written contract by oral testimony when the rules prohibit it? Should I not let the jurors know that your only evidence of an agreement was from a witness who was drunk at the time he purports to remember clearly? Should I rewrite the ethics and the laws that protect client confidences, because I know better than the law makers what is best?"

The adversary shrugged and the two lawyers began, again, for the tavern.

"Truth isn't so simple," said the lawyer, as they walked along the empty road. "Our truth isn't God's truth. Our truth is the kind that comes from fidelity to a system for resolving disputes according to rules. The adversary system doesn't guarantee the truth. No after-the-fact system for finding out what happened can guarantee truth. Best we can do is design and be faithful to a way of resolving disagreements that will keep us civilized and relatively happy with the results. Our justice isn't perfect, but that's okay. Human beings and their problems aren't perfect either. At least we give everyone with a stake an effective say before someone else decides what is right and what is wrong. We, lawyers, have an important role in making sure the system works, but we're not the system. We aren't the ones who determine truth. Lawyers aren't Gods. When it comes to resolving disputes, the courts are the Gods. Lawyers are just the tools of the Gods."

The adversary smiled. "Kind of long winded, aren't you?"

The lawyer returned the smile. "Yeah, but sometimes it's important to affirm what we're about. Truth is important, but hard to come by. We have a special and sometimes difficult role in making it happen."

"Okay, enough," said the adversary, as they continued toward the tavern, "I'm ready for an ale. You're buying."

Suddenly a group of three riders were visible on the top of a knoll far to the east across the desert.

"Do you think that's the Prince and his retinue coming to find there is no room in the inn for their horses?" asked the adversary, with a rueful smile.

The lawyer looked out over the barren sand. "Who knows? Truth is, there are lots of different travelers on the desert."

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