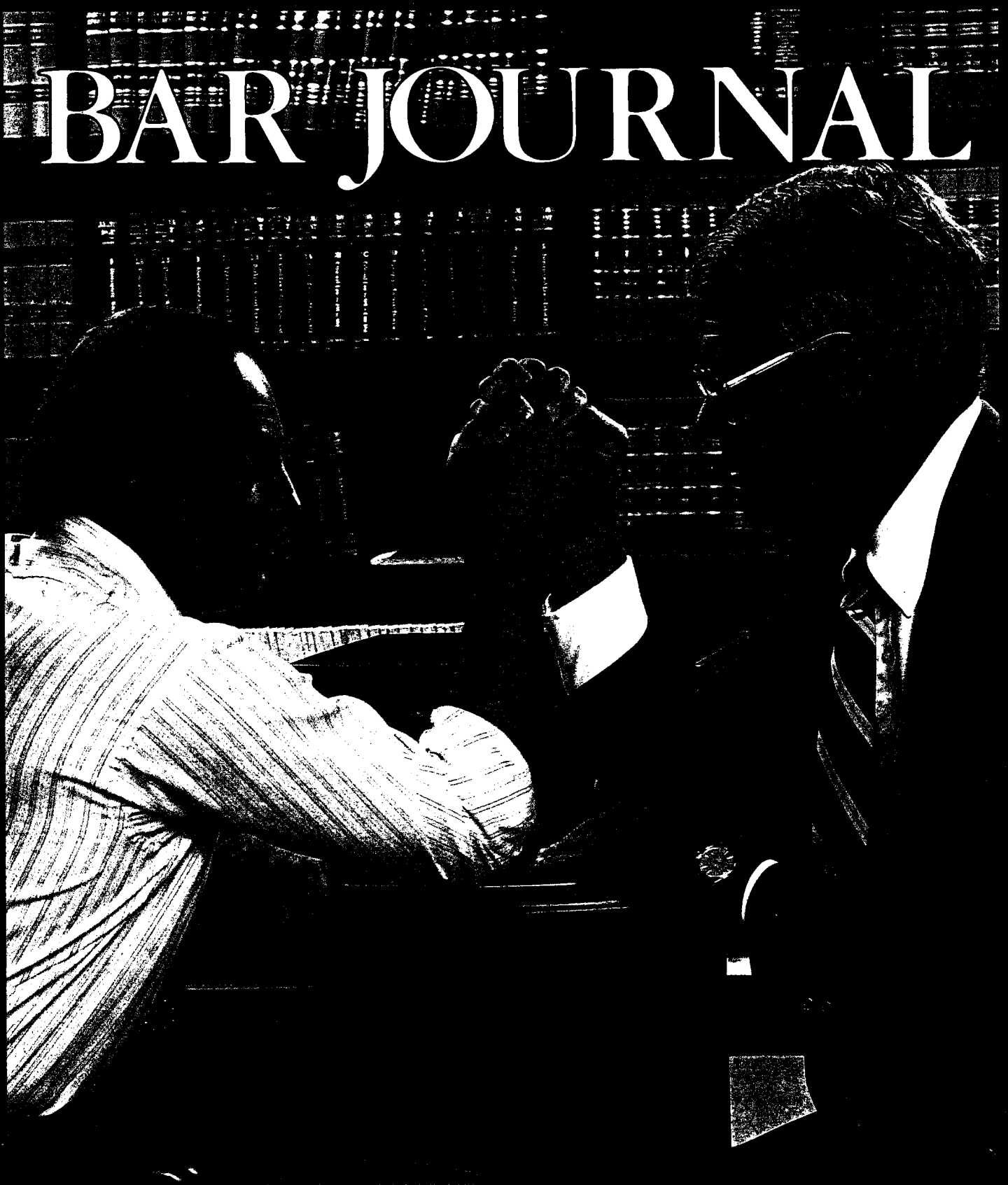
ARIZONA OCTOBER/NOVEMBER 1984

BAR JOURNAL



- A CALL TO CURTAIL THE DISCOVERY WRESTLING MATCH
- PARALEGAL SERVICES AND AWARDS OF ATTORNEYS' FEES
- THE DEFICIT REDUCTION ACT OF 1984

Waltz me around again, Willie...

Reflections on discovery practice, sharp elbows, junk yard dogs, and the elusive spirit of cooperation.

BY NOEL FIDEL

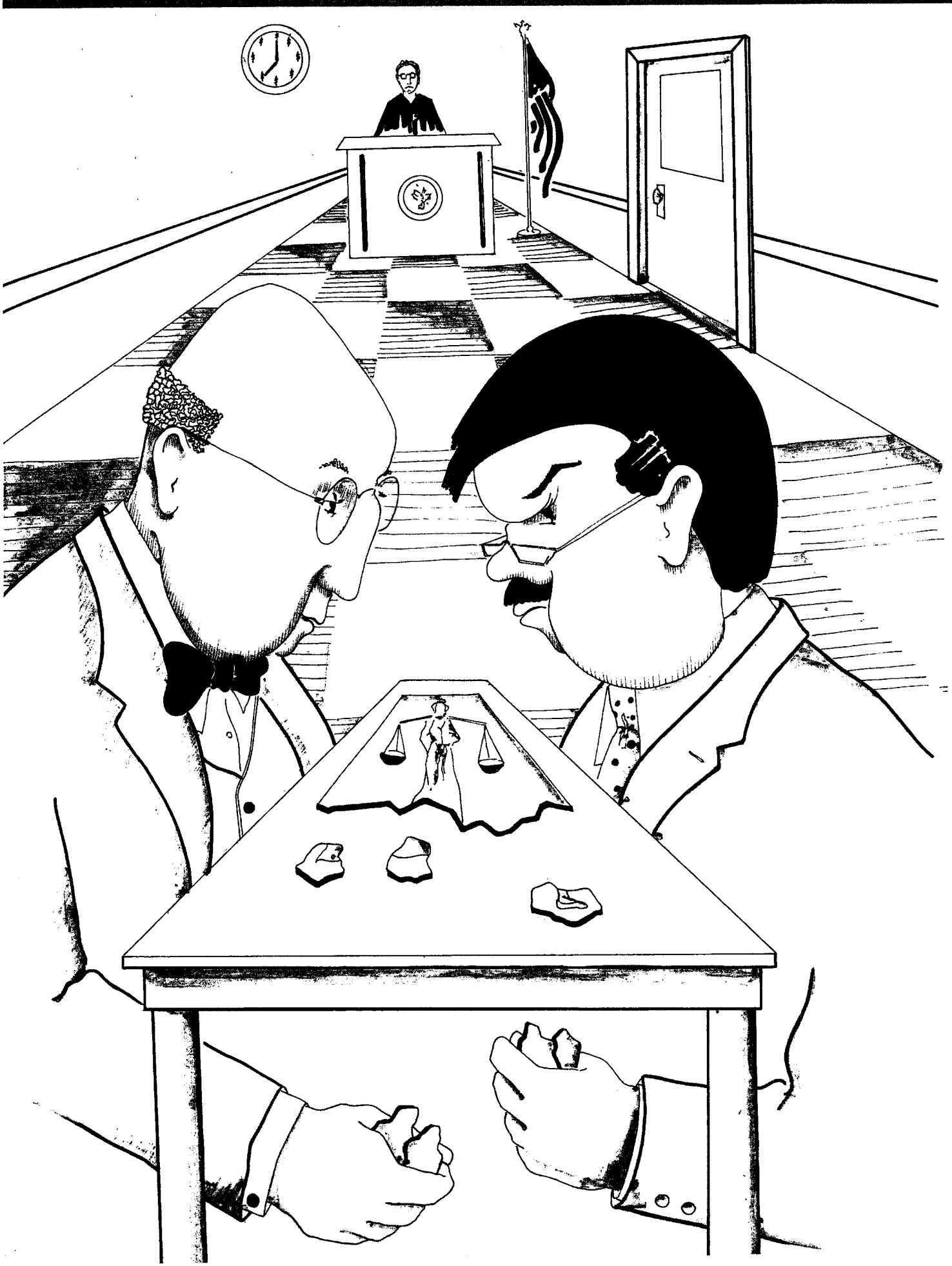
Part I

I had a talk not long ago with an experienced litigator from a large firm, a man used to giving hard blows and taking them. He seemed to be losing his zest for battle, his keen edge dulled by the endless, needless discovery clashes that are the stuff of modern litigation.

"It's absurd," he said. "I get the other guy's standard oppressive set of 400 interrogatories and send back evasive answers. I send my firm's standard oppressive set of 400 interrogatories and get back evasive answers. We write letters. Maybe we go to court. In the end we each reveal what we knew from the start we would have to reveal. The game goes on, but there's no fun in it."

The waste of clients' money matches the waste of lawyers' time. Plutarch said, "Though boys throw stones at frogs in sport, the frogs do not die in sport but in earnest." While lawyers sport with discovery with the professionalism of barkers playing "hide the pea," their clients pay in earnest. If the clients only knew how little their money bought them! There is likewise awful waste of judges' time and public money. What judge has not had this experience? Having taken the trouble to prepare for a complex discovery motion, the judge is occupied with another matter when the lawyers arrive for argument. "What do you really want?" says the first lawyer to his opponent. They huddle. Minutes later they approach the judge's secretary. "Tell the judge we've resolved the matter and the motion is withdrawn."

It is, of course, better that the lawyers reach a last minute resolution than none at all; but all



It speaks poorly of our profession that judges must order lawyers to do what they ought to do as a matter of common sense and courtesy. Yet common sense and courtesy, like cooperation, are often found wanting once discovery fights begin.

too often they have made no prior effort. The clients pay for pleadings and a courthouse trip, where a phone call would have sufficed. The public pays for the wasted time and effort of the judge and courthouse staff. And the lawyers pay more subtly in the loss of enthusiasm, the dearth of quality they suffer in the numbing drudgery of a discovery-mired practice.

Everybody talks about discovery; what can we do about it? Is there some way out of this hollow game?[1]

There are ways out. I don't propose to deal in this article with the rule making proposals that circulate these days for the quantitative limitation of discovery. While such proposals may have merit, they are not my quarry here. I am hunting more qualitative game: the spirit of cooperation.

To operate properly our legal system requires many forms of cooperation between opposing counsel. We are now making greater efforts to induce such cooperation in matters of discovery.

We start with the fundamental requirement that discovery be conducted in good faith. As a result of newly amended Rule 11 (a) and newly adopted Rule 26 (f), Arizona Rules of Civil Procedure, an attorney's signature on a discovery request, response, or objection now constitutes his certification that:

1. To the best of his knowledge the pleading is well grounded in fact;
2. He has made reasonable inquiry into the facts;
3. The pleading is not interposed for harassment, unnecessary delay, or to needlessly increase the costs of litigation.[2]

A pleading signed in violation of these rules will be cause for an award of costs and attorney's fees.

Scrupulous personal adherence to these rules will go far to reduce discovery abuse. Problems will arise, however, which are readily susceptible to cooperative resolution if lawyers will only try. As a means of insisting that lawyers try, most judges on the Superior Court in Maricopa County now send a version of the following order when a civil discovery motion is filed:

> The Court acknowledges receipt of (discovery motion) and orders the following: Counsel shall confer to attempt to resolve their differences or to reduce the areas of dispute. Oral argument will be set and this matter will be considered only upon filing of a statement by moving counsel certifying that *after* personal consultation and sincere efforts to do so, counsel have been unable to satisfactorily resolve the matter. Counsel are reminded that the Court will impose sanctions against the losing party in accordance with Rule 37 (a) (4), Rules of Civil Procedure, in the absence of substantial justification of the losing party's position.

We adapted this order from Rule 11 (b) of the Rules of Practice of the United States District Court, the District of Arizona. Although some judges wish to experiment with the language of the order, there appears to be a consensus that following a period of experimentation some variant should be proposed as a local rule.

Are we just whistling in the wind? I don't think so. The civil judges on our court who use the order have experienced a 70-90% reduction in discovery motions which proceed to argument. This large reduction consists probably of three kinds of cases. First are the cases, as in our example, where the lawyers make no effort to solve the problem before turning to the court. Second are the cases where one lawyer deliberately makes his

The Honorable Noel Fidel has written articles which have appeared in Trial Magazine, Proof of Fact, The Arizona Bar Journal, *and* Summation. *He graduated from Dartmouth College in 1966 with an A.B., and from Harvard Law School with a J.D. in 1969. He was a member of the firm of Langerman, Begam, Lewis and Marks, P.A. from 1973 to 1982, when he became a judge of the Superior Court of Arizona in and for Maricopa County.*

1. The two parts of this essay contain notions that I have aired in part on three prior occasions. First was a lecture to an ethics class taught by guest professor Roxana C. Bacon at Arizona State University College of Law in November of 1983. Second was a seminar conducted by the Arizona Trial Lawyers Association in Phoenix, Arizona, in May of 1984. Third was a question and answer session with trial lawyers and summer interns of the Phoenix law firm of Sacks, Tierney & Kasen in June of 1984. To the extent that these ideas were sharpened by the challenge of questioners on those occasions, I am grateful to the participants.

2. The certification required by Rule 11 (a) is broader than the elements I have cited, and it applies to all pleadings, not just to discovery pleadings. Rule 26 (f) is pointed in applying the requirements of Rule 11 (a) to matters of discovery. See also Code of Professional Responsibility, DR 7-101 and 7-102, discussed in Part Two of this article.

Whether the lawyer routinely chooses to sow and reap hostility or to reduce it is superficially a question of style and profoundly one of character.

adversary do discovery "the hard way," holding out for the game of it until his opponent gets tough enough to press the issue to the court. Third are the cases where one lawyer just doesn't get around to dealing with discovery until his opponent gets tough enough to press the issue to the court. There is obviously some overlap between these categories, but I believe they comprise most of the discovery matters filed in our court and most of the matters settled without hearing once our "talk or be damned" order goes out.

It speaks poorly of our profession that judges must order lawyers to do what they ought to do as a matter of common sense and courtesy. Yet common sense and courtesy, like cooperation, are often found wanting once discovery fights begin.

There is a negative aspect to our order. Case preparation time is circumscribed in Maricopa County by effect of Rules 3.4 and 3.6, Local Rules of Practice, and V(a) through (c) and (e), Uniform Rules of Practice. Lawyers must certify trial readiness within nine months of filing or face placement on the inactive calendar for imminent dismissal, and discovery must be susceptible to completion within 60 days of the time that certification of readiness is filed. Assume your adversary makes a shell game of discovery. You need the information you've requested to bring your case to a certifiable state of readiness. Time is running short. You file your motion. Ten days or more pass. An order arrives in the mail. The courthouse has rumbled and grumbled and delivered itself of a mouse. You get no hearing date, no prospect of the timely relief you're seeking, no indication of the faintest judicial interest in your problem, just an order to try and reason with the guy who's been waltzing you around. Has the court just given your adversary 30 more days to delay your preparation of your case?

There are solutions to this problem; however, they may require some adjustment of your practice. First of all, if you have waited till time is short to press the issue of discovery, you have waited too long. On the "fast track" of Maricopa County the last minute is not as good as the first.

Early in your case you must now assess the discovery you need and the time you can reasonably allot to each phase of it. Set deadlines by which you must turn to the court if you don't get your adversary's cooperation. At each stage of discovery demonstrate and *document* your willingness to cooperate in resolving discovery problems that arise.

Consider an early discovery conference with your opponent once interrogatories and documentary requests have been served. The potential benefits to each of you are many if you meet in a cooperative frame of mind. Set a schedule for meeting your mutual discovery needs with reasonably extended time where necessary. Discuss and clarify ambiguities in your respective discovery to spare the delay of later useless answers. Cover the cost and logistics of complex documentary production. Set timetables for taking depositions.

Are you reluctant to embark on early discovery where settlement remains an open question: By all means pursue settlement at each useful moment, but don't delude yourself. The fast track denies you the luxury of ignoring discovery and forestalling preparation in the (usually vain) hope that a last minute settlement will spare you such expense.

There are multiple benefits to an ongoing documented effort toward discovery cooperation, whether or not that effort starts with an omnibus discovery conference. You may invoke a cheerfully cooperative response from your opponent. Whether the response is cheerful or begrudging, you may get what you need as your opponent recognizes that you've set yourself up to look like the good guy if a discovery dispute ultimately reaches the court. Finally, if a dispute remains unsettled after reasonable cooperative efforts on your part, you can certify those efforts at the time you file your motion, demonstrate that you have already done what the court would normally order you to do, and request that your motion be promptly set for hearing. (A cover letter would serve well to call attention to this procedure). Thus you may relieve yourself of the delay of our standard order to confer.

A further benefit is that your cooperative effort, if unsuccessful, will support your request for sanctions once you call for the court's help. Judges are turning with increasing willingness to awards of costs and attorney fees as a reinforcement to our expectation of discovery cooperation. Though lawyers have complained of an inertial predisposition against discovery sanctions among judges, such resistance is fading. There is a punitive element to an award of sanctions, and one resists being punitive. However, the sanction inquiry, broadly viewed, is less one of punishment than of cost allocation: where, under the circumstances, should the costs of the discovery dispute be most fairly allocated? The essence of Rule 37, Arizona Rules of Civil Procedure, is that in the absence of substantial justification, he who causes the cost should bear it. What judges are coming to recognize, and what lawyers seeking sanctions should stress, is that to leave the discovery costs and fees where they have fallen is simply one alternative, and not

necessarily the best one.

But I have allowed my theme to shift from strings of harmony to the cacophony of sanctions. I have talked about judicial techniques to induce cooperation and to penalize the withholding of it. Now I want to return to the question of lawyers' attitudes.

Mr. Dooley said, "Politics ain't bean bag."[3] Neither is litigation. Is it judicial fantasy to expect opposing counsel to cooperate? Have I traded my judicial robe for the jupes of Pollyanna? In this adversary process must not lawyers act adversely each time the opportunity arises from the sound of the opening gun?

Having asked myself these questions, I encourage you to read the second portion of this article, where I will try to answer them.

Part II

I now wish to take a wider angle. In this second part I will not be discussing discovery so much as the ethics of cooperation. It will be obvious that the opinions I express are highly personal and non-empirical. One man's fact is another man's fancy. However, as I said at the outset, we are hunting qualitative, not quantitative game, and so must launch into the realm of intuition.

Lawyers lately are a defensive bunch. Open any bar publication and, as likely as not, you will find the bar president defending against the critic of the day. Whatever the attack, whatever the defense, public antipathy toward lawyers goes on in apparent perpetuity.

Hostility is a by-product of our profession; as advocates within an adversary system inevitably we sow it at times in others and reap it within ourselves. Yet far more often than not the lawyer can choose without cost to his client to ameliorate the antagonism of an adversary encounter. Whether he routinely chooses to sow and reap hostility or to reduce it is superficially a question of style and profoundly one of character.

You know the Sandburg lines:[4]

> Why is there always a secret singing
> When a lawyer cashes in?
> Why does a hearse horse snicker
> Hauling a lawyer away?

Why indeed? What kind of a lawyer was Sandburg snickering about?

Let's listen to a more recent critic, a businessman experienced in the rough and tumble of the world, fresh from a deposition encounter with a lawyer. In the May 14, 1984 issue of the National Law Journal under the pseudonym M. Van Derveer, he describes the episode, beginning as follows:

> When I review the personalities of the thousands I have known in my 60-plus years, I conclude that I genuinely enjoy most, and, at worst, am neutral about the remainder. The rare exception is the gold-plated son-of-a-bitch who engenders one of the basest emotions, that of unadulterated hate and contempt. I have had the unfortunate experience of having been exposed to such an individual recently—a member of the legal profession, a litigator.

Commenting on the "consistently rude, coercive, threatening, abusive, and insulting" posture of the lawyer toward deponents and opposing counsel alike, the writer characterizes his subject as "The Junk Yard Dog."[5]

Each of you reading this description instantly conjured up the images of several lawyers that it fits. You have your list. I have mine. (For a comprehensive list, talk to almost any court reporter.)

A more subtle counterpart to the Junk Yard Dog is Hard Way Harry, master of the stone wall. Though he may refrain from rudeness and abuse, his discovery practice ranges from denial to evasion. Don't approach him about

---

3. Barbara C. Schaaf, *Mr. Dooley's Chicago* (1977), at 108.
4. Carl Sandburg, "The Lawyers Know Too Much," in *The Complete Poems of Carl Sandburg*, revised and expanded edition (1970).
5. M. Van Derveer, "Face to Face With an Abusive Attorney," in The National Law Journal, May 14, 1984, page 13.

scheduling depositions; he'll send his subpoenas, you send yours. If you want a document or a straight answer, get a court order; you won't get it any other way.

What makes people act this way? Are we lawyers a preternaturally bilious bunch?

Most of us don't act this way, of course. The lists of Junk Yard Dogs and Hard Way Harrys are relatively short. Yet they have their imitators, and the dangerous myth abounds that one must act as they do to succeed. Law students, hearing tales of horror, wonder if the entry price to this profession is their conscience.

Polonius told Laertes, "This above all: To thine own self be true."[6] Can we say the same to the young lawyers of our profession, or should we tell them, "Sharpen your elbows; practice meanness; learn techniques of treating others that will make your better self recoil?"

I side with Polonius. And in my view, those who play false with themselves, those who tender pieces of their conscience in the market of expedience, do so not from circumstantial necessity, not because their profession requires it of them, but as a matter of personal, ethical choice.

Let's take a look at some rationales frequently offered for the sharp elbowed, hard-way approach to litigation.

First and most sanctimonious is, "I owe it to my client." That's baloney. You owe your client the best of yourself, not the worst of yourself.

Disciplinary Rule 7-101 of our Code of Professional Responsibility, entitled "Representing a Client Zealously," provides in part as follows:

> (A) A lawyer shall not intentionally:
>
> (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . A lawyer does not violate this Disciplinary Rule, however, by

---

6. Hamlet, Act I, Scene iii.

acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

Disciplinary Rule 7-102, entitled "Representing a Client Within the Bounds of the Law," provides in pertinent part:

> (A) In his representation of a client, a lawyer shall not:
>
> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
> (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

You never owe it to your client to violate these rules.[7] Where lawyers play the margins, where they withhold consent to reasonable requests of opposing counsel, where they act discourteously, practice harassment, and evade appropriate disclosure, the result more often than not is to increase the cost, duration, and acrimony of legal proceedings to the detriment, not the benefit, of the client.

A second rationale one hears is, "I owe it to my partners. This is the way the heavy hitters do it in our firm." I'm skeptical. There are clusters of lawyers within certain firms who bring a harder edge to litigation than do others; yet law firms tend to tolerate divergent style in those who bring energy, talent, and enthusiasm to their work. You may perceive a pressure that is not there. Those, however, truly expected by employers to act in personally unconscionable ways should think back to Jeb Magruder's explanation of his role in Watergate: "I lost my moral compass." If to satisfy your partners you must lose your moral compass, leave them, or you'll steer yourself to empty shores.

Finally, one hears not so much a rationale for meanness as a nagging doubt about its opposite. Do nice guys really finish last? I think not. I believe that the Junk Yard Dogs and Hard Way Harrys of our profession are more often the losers than the winners. There are exceptions, of course; every dog will have his day. But their road is not the likely road to success. Other lawyers learn who they are. Judges learn who they are. Their paths grow harder, strewn with obstacles of their own making.[8] They dissipate their strength in masquerades of toughness, and they tend to end up isolated and alone.

Let's return to the first of first principles: "Don't do to others what you don't want done to you." It is the Golden Rule, the distilled essence of the Ten Commandments, the generating force of the Social Compact, and the cutting edge of human ethics. It is not, I hope, impractical to suggest that it has a place in legal ethics as well.

So a word to the Junk Yard Dogs and Hard Way Harrys: If you take satisfaction in your style, spare us the sanctimony. You act as you do because it pleases you and not because you owe it to your clients or to your profession. That is your character; accept it. Carl Sandburg sings for you.

As for all the others, and particularly the law students and young lawyers who worry whether they are tough enough for this hard field, don't confuse strength with abrasion. You can be firm without being rigid; you can be insistent without being petty; you can practice courtesy without weakness; you can choose your battles and make them count. Readily cooperative, you can save your clients time and money and preserve your own combative energy for those fine tests of wit and planning that are litigation at its best. And you can be successful without relinquishing those qualities that make your efforts worthy in your own eyes. □

---

7. For an extensive discussion of this subject, see Shakman and Cummins, "Can a Litigator be a Gentleman?" in 9 Litigation 2, Winter 1983, at 49.

8. I don't wish to suggest that one should be provoked to respond in kind. Far from it. See Fisher and Ury, *Getting to Yes* (1981), for more calculated and effective techniques of dealing with such adversaries.

AUTHOR! AUTHOR!

The Editorial Board of the State Bar of Arizona is interested in receiving articles by Arizona attorneys for publication in the *Arizona Bar Journal*.

Articles should be approximately 10 pages long, double-spaced and should be of interest to the legal profession in Arizona. Please do not submit articles that have been previously published in other publications.

Please submit articles to: Patty Davis, Editor, State Bar of Arizona, 363 North First Avenue, Phoenix, Arizona 85003.