

## **YOU ARE EITHER PART OF THE PROBLEM OR PART OF THE SOLUTION**

On Saturday, June 3, 2000 a revolutionary event took place at Boston College Law School. The judges of the trial court spent several hours listening to members of the trial bar. The second extraordinary aspect of the occasion was that the members of the trial bar spent several hours talking, debating, agreeing and disagreeing with one another in a spirited intellectual debate. The discussion was about how we practice and how we can improve our skills in the preparation of jury trials.

It was an event in which those who were not present will bemoan their absence. There was electricity in the air. People dared to speak about the things that effect their practices and about the problems that upset and disillusion them. It was one of those rare instances at a legal conference when the debate in the conference room was as interesting as the comments in the foyer during the coffee break. It was also apparent that the conference organizers had given a good deal of thought to the format. It was arranged to facilitate the free exchange of opinions and ideas. The chair encouraged follow-up questions and solicited suggestions for improvements in resolving discovery disputes.

One of the presenters at the conference was attorney Norman Fine, Esq. He is a highly skilled and well-respected member of the trial bar. His topic was discovery use and abuse. Attorney Fine proposed the creation of a Discovery Motion Session (DMS). It would be a specially designated motion session staffed by a Superior court judge on a rotating basis. Its purpose would be to resolve discovery disputes. A party would mark-up its motion and request a date for oral argument. The details are still under review. It would be a compromise between those who want a complete return to the motion session of years past and those who want to remain with the 9A-motion practice.

The reason this information is now germane five months later is because attorney Fine has recently been named chair of the Bench/Bar committee. It is expected that the DMS will be one of the topics under discussion.

The issue of discovery abuse is a highly charged and contentious issue in civil actions, especially between members of the plaintiff and defense bar. One of the likely results of a limited discovery motion session is the self-discipline it will instill in those who are tempted to circumvent the rules. An attorney who values his reputation will be unlikely to advocate specious arguments in front of a trial judge, and his fellow attorneys who may be in attendance. A swift and certain process that holds attorneys accountable for discovery abuses will also

influence clients' expectations about what is permissible in the Commonwealth's courts.

The other salutary effect the DMS will have is that many of the associates who prepare and argue discovery motions will learn the lessons that were taught when the motion sessions existed. One's word is one's bond. The maxim applies to the written word as well as to oral argument. A whole generation of lawyers many of them associates has never experienced the sobering lessons imparted by judges such as Lynch, J.

The pace of legal work, the demands of clients, and the cost of litigation frequently preclude the tradition of an associate "carrying the bag" of a senior partner. It is no wonder some discovery disputes, under the present system, turn into "life events" for them in which no objection is too unreasonable and no delaying tactic too risky.

The discovery abuses that exist are deeply imbedded in the legal culture. For some, a risk/reward analysis makes discovery abuse worthwhile. There are frequently no judicial sanctions. If there are court imposed sanctions they are usually nominal. In the meantime, the economic disparity between plaintiffs on the one hand, and big business and powerful insurance companies on the other, favor those who can string things out, delay and obfuscate. It should come as no surprise that attorneys are merely exhibiting a Pavlovian response. They are rewarded for discovery abuses, sub silentio, by their clients. When they and their clients violate the court's discovery rules they are not effectively sanctioned.

In Rome, centuries ago, the question was asked: "But who is to guard the guards themselves?" Today, the question posed to the bench and bar is who is to equitably enforce the rules by which we practice? It is the responsibility of the trial court's judges to teach attorneys what is acceptable discovery practice. The DMS is an excellent and focused solution to a problem that has reached worrisome proportions.

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