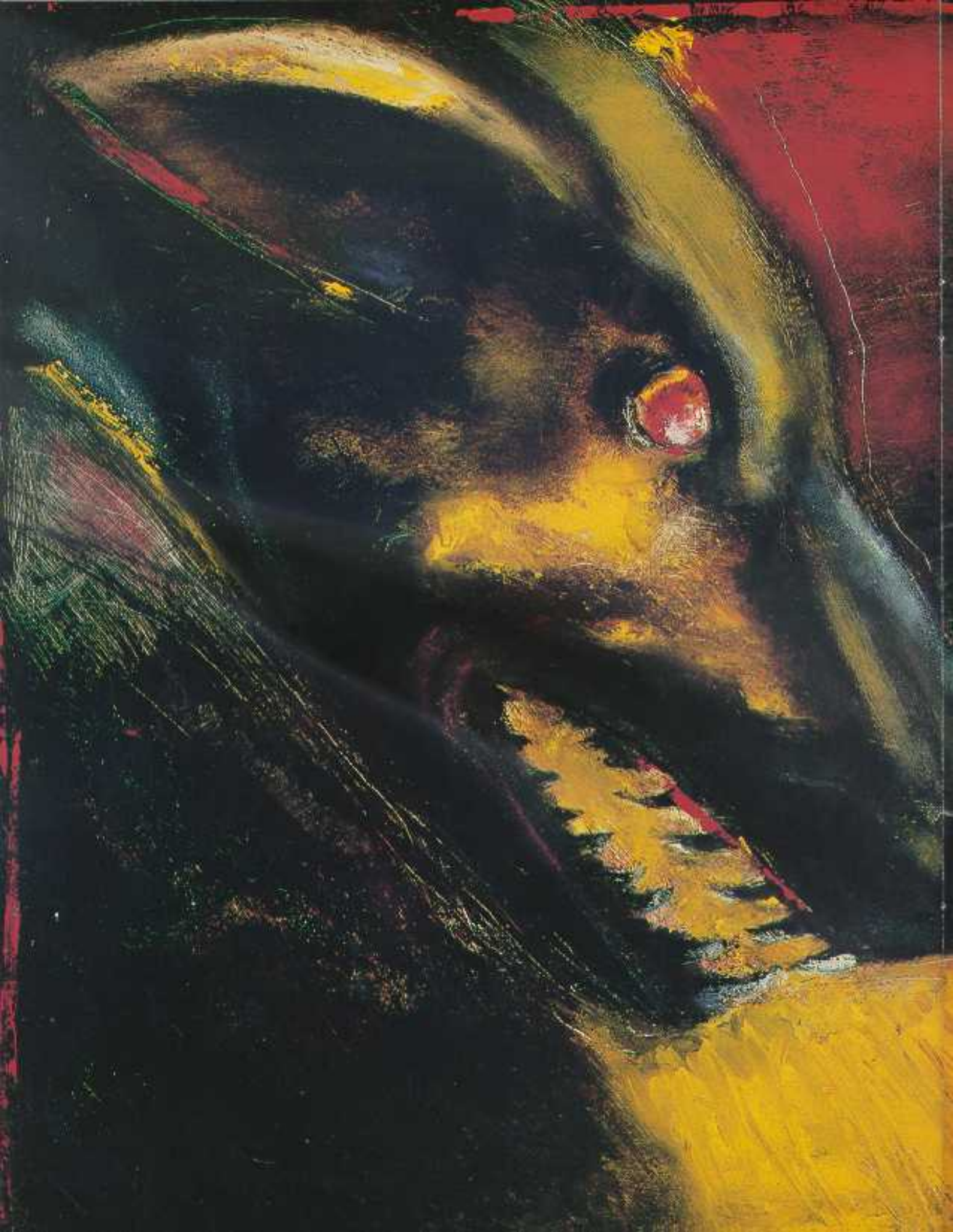

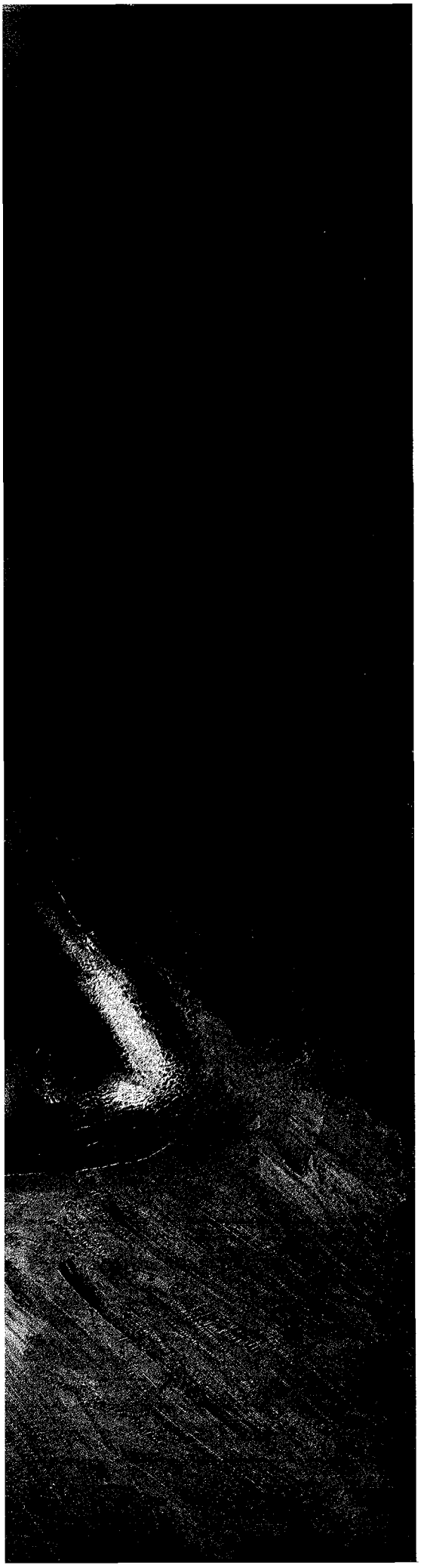

Christianity AND THE MAD DOG Litigator

DAVID G. CAMPBELL

In the fall 1990 issue of the *Clark Memorandum,* Joseph Allegretti asked whether one can be both a good Christian and a good lawyer He posed four models for dealing with the apparent discrepancy between these roles, the final model suggesting that a Christian life can not only coexist with the practice of law but can make it a powerful vehicle for the service of others.

The article caused me to reflect on conduct I often witness as a commercial litigator, conduct engaged in by lawyers who profess Christianity. I do not purport to have answers to the difficult moral questions to which Professor Allegretti alluded, but I do believe one common kind of lawyerly conduct can be characterized as both un-Christian and unprofessional. Let me begin by describing the conduct I see it in two forms: the mad dog lawyer and the hardball litigator

Mad dog lawyers are best described by a witness who was unfortunate enough to have been deposed by one On the day of his deposition, the witness was calm and good natured as he entered the deposition room. He assumed that the event about to occur would be a reasonable, businesslike inquiry into the truth. He was prepared to tell what he knew, and to tell it honestly

ILLUSTRATION BY BRANT DAY

What followed can best be described as a mental and emotional mugging. In the words of the witness, the deposing lawyer was "alternately—but consistently—rude, coercive, threatening, abusive, and insulting His approach was to bait, belittle, [and] ridicule," even to the extent of mimicking the speech pattern of the witness. His venom was spewed at witness and counsel alike, and led to "bitter and vicious exchanges" between all involved in this supposed search for the facts Forty years in the business world had not prepared the witness for such treatment. Never had he, in his words, "come away from an experience with the disillusionment and revulsion that followed this exposure to the legal profession." The witness aptly described his questioner as "The Junkyard Dog."[1]

Such conduct shocks a person of ordinary sensibilities It rarely occurs in offices, at restaurants, or over backyard fences. Unfortunately, it is all too familiar in litigation Some lawyers and law firms apparently believe that zealous representation of one's client requires unmitigated hostility toward one's opponent.

A second breed of litigator appears outwardly to comply with the norms of civilized behavior, but is nearly as abusive as the first. This lawyer generally reserves his venom for opposing counsel, releasing it in measured doses through seemingly legitimate litigation procedures Commonly called "hardball litigator" (I have never understood this analogy to the honorable sport of baseball), this lawyer views the rules of civil procedure as tools of obstruction He may not yell during a deposition, but his relentless and long-winded objections will just as effectively prevent examination by opposing counsel When asking questions himself, he will stretch a 30-minute deposition into two days if he thinks some advantage might be gained by the delay Don't bother asking him for an extension or seeking to work out a discovery schedule; "real lawyers don't cooperate" Everything must be done the hard way

The hardball litigator seems primarily intent on making opposing counsel's life as miserable as possible His standard interrogatories include 800 questions, not counting definitions or subparts. If he detects the slightest defect in his opponent's response, a motion to compel will be filed immediately, requesting Rule 11 sanctions for good measure. This litigator files expedited motions on the eve of his opponent's long-planned vacation, moves to disqualify opposing counsel at the drop of a hat, and serves motion papers by placing them at the bottom of document production boxes, where, he hopes, they won't be discovered by his opponent until after the period for responding to the motion has expired.

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In short, the hardball litigator treats opposing counsel with the same contempt as the mad dog lawyer, but apparently with more concern about outward appearances. Both display utter disrespect for those with whom they deal daily, and both would tell us that such conduct is required by their profession.

It is this justification of the conduct that bothers me most. Shortly after reading Professor Allegretti's article, I was approached by a first-year law student who was very concerned about the profession he had chosen. While working as a legal assistant in a law firm last summer, he saw otherwise normal people behaving like ill-tempered children in their litigation practice Belligerence and acrimony infected almost every case in the office and was practiced zealously by young and old lawyers The exception was a new associate who had joined the firm only a few months earlier. He was pleasant to all, and particularly kind to my student friend When my friend mentioned this associate's pleasant manner to a secretary in the office, she replied that all the lawyers had been that way when they joined the firm "Just you wait," she said, "he'll become a jerk like the others If he doesn't, he'll never make it here"

So I found this student in my office asking some troubling questions Did he really have to become a jerk to succeed as a litigator? Are there law firms where lawyers behave normally? Is there any place in the practice of law for someone who treats other people with respect?

I believe the answers to these questions are easy. They do not fall in a gray area of uncertainty, nor do they implicate deep, moral questions. Abusive behavior toward opposing parties and counsel, far from being required by the profession, is expressly disapproved by the rules of professional conduct and leaders of the bar Acrimony rarely serves the client's best interests, and always costs the client money To those of us who profess to be Christians or to follow a comparable moral code, such conduct conflicts directly with fundamental tenets of our belief

THE PROFESSION'S ETHIC

Talk to any mad dog lawyer or hardball litigator and you will be told that litigation requires aggressive tactics. Truly zealous representation of a client's interests, he will claim, demands a scorched-earth, take-no-prisoners approach. After all, litigation is civilized warfare and lawyers are the combatants

To be sure, this view is fostered by some clients What litigator has not been asked by a prospective client if he or she is mean enough to

handle the client's case? Mad dog clients often insist on being represented by their own kind.

This view has also had its champions at the bar. Lord Brougham taught that

an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. . . . He must go on reckless of consequences [2]

Adopting this view of the profession, a lawyer might rely on the twin principles of amoral lawyering identified in Professor Allegretti's article: zealousness and nonaccountability The lawyer must be zealous in his client's cause, and, being required by the profession to use every means available to further his client's interests, will not be held accountable for the damage he inflicts on others

I don't buy it At least when it comes to personal relations with others in the litigation process, there is nothing in the profession that requires a lawyer to act like a jerk On the contrary, the profession's ethical standards call for respectful and courteous behavior

Canon 7 of the Model Code of Professional Responsibility, the very canon that requires lawyers to "represent a client zealously within the bounds of law," states that a lawyer does *not* fail in his duty "by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, . . by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process" (DR 7–101[A][1]) The canon similarly provides that, "in his representation of a client, a lawyer shall not file 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" (DR 7–102[A][1])

The newer Model Rules of Professional Conduct continue these themes The rules prohibit lawyers from asserting frivolous claims or defenses (Rule 3 1), making a frivolous discovery request or refusing to comply with discovery requests from opposing counsel (Rule 3.4[d]), obstructing another party's access to evidence (Rule 3 4[a]), or engaging in conduct intended to embarrass, delay, or burden another person (Rule 4 4)

The Federal Rules of Civil Procedure expressly disapprove discovery or other written materials that are "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" (F.R.C.P 11 and 26[g]). The Advisory Committee Notes to Rule 26(g) expressly state that "the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues "

In its Code of Trial Conduct, the American College of Trial Lawyers confirms that a lawyer owes his client "undivided allegiance," but instructs that "[a] lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants" and "should avoid disparaging personal remarks or acrimony toward opposing counsel " The college admonishes lawyers to maintain "professional dignity," and teaches that a lawyer "should abide by these tenets and conform to the highest principles of professional rectitude irrespective of the desires of his client or others "[3] Even the Supreme Court of the United States has stated that lawyers "owe a duty of courtesy to all other participants" in the litigation process (*In re Snyder,* 472 U.S. 634, 647 [1985])

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The ethic is thus well established Courtesy and respect for others are fundamental requirements of good lawyering The mad dogs and hardball litigators simply cannot claim that their profession requires them to act as they do Those who routinely sow acrimony in their practice act unethically. The profession provides no justification for their behavior.[4]

Judge Noel Fidel, currently a member of the Arizona Court of Appeals, summed it up well:

So a word to the Junkyard Dogs : 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 [5]

THE CLIENT'S INTEREST

Some litigators might argue, ethical rules aside, that they best serve their clients by ferociously attacking their opponents I side with Judge Fidel: "That's baloney You owe your client the best of yourself, not the worst of yourself"[6] I further believe that acrimonious litigation tactics disserve clients

I do not profess to be an expert on the subject, but in nine years of litigation practice I have seen my share of abusive tactics These include all the examples given at the outset of this article. Yet I cannot think of a single instance where the tactic produced a benefit for the client On the contrary,

in almost every instance the acrimonious behavior of the attorney resulted in wasted time, wasted motions, or wasted depositions, all billed to the client by the hour.

A lawyer who spends three hours of a day-long deposition arguing with the witness or opposing counsel charges his client for three hours of entirely unproductive time. And because he offends everyone within hearing, the lawyer most likely obtains far less relevant information during the remaining four hours than he would in a civilized and courteous two.

A lawyer who refuses to respond with candor to his opponent's discovery requests, argues over the phone about the adequacy of his responses, exchanges accusatory letters, and finally surrenders the information only after motions have been filed, obtains absolutely no advantage for his client. Furthermore, he most likely charges several thousand dollars for the service. I have often wondered how clients would react if they really knew what they were getting for their money.

Judge Fidel, then a trial judge in the Arizona Superior Court, described the effectiveness of abusive tactics in this way:

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.[7]

The most productive cases of my experience are those where lawyers cooperate Each side knows what the other must do and makes no effort to obstruct. Depositions are scheduled well in advance to ensure that witnesses and counsel are available Questioning proceeds without unnecessary interruption. Written discovery requests are fairly framed and fairly answered Little or no time is wasted in disputes Though the litigation is hard fought, with both sides vigorously preparing and presenting their cases, the focus is on the case itself, not on the personal battles that characterize so much of modern litigation

In short, rancor is not required to serve one's client well. The most effective service is rendered by the lawyer who applies his skill and energy to the merits of the case, rather than dissipating them in side skirmishes with his opponent.

THE MORALITY OF ACRIMONY

Once it is clear that the profession and the practice provide no justification for assaulting one's business associates, can there be any doubt about the morality of abusive behavior? Professor Allegretti's moral dilemma arises when the lawyer's profession requires him to act in a seemingly immoral manner. But when the lawyer is free to choose moral behavior without disserving his client or his profession, the dilemma never arises. The lawyer who professes to be a Christian, or who follows any other moral code that values respect and kindness in human relationships, thus should recognize that his hostile conduct might be costing far more than his client's money

The immorality of abusive behavior would appear to be well settled under the Christian code. Christ taught: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets."[8] The Apostle Paul expanded on the Golden Rule:

Let no corrupt communication proceed out of your mouth, but that which is good. .

Let all bitterness, and wrath, and anger, and clamour, and evil speaking, be put away from you, with all malice.

And be ye kind one to another.[9]

I suspect that some lawyers attempt to "compartmentalize" their lives, acting one way with family and friends and another in the office. Such lawyers might believe that their behavior in the deposition room does not reflect or affect their true character. This seems like dangerous rationalization. As Mark Green observes, "Psychologists note that it is difficult for people to act one way and believe another Ultimately, either action conforms to belief, or belief to action."[10]

Christ made the point in more direct terms:

For every tree is known by his own fruit For of thorns men do not gather figs, nor of a bramble bush gather they grapes.

A good man out of the good treasure of his heart bringeth forth that which is good; and an evil man out of the evil treasure of his heart bringeth forth that which is evil: for of the abundance of the heart his mouth speaketh [11]

Those who espouse the LDS faith have additional reasons to view their lawyerly conduct as directly related to their moral character Individual agency and personal accountability are central doctrines in Mormon theology. Mormon scripture teaches that "every man may act . . . according to the moral agency which I have given unto him, that every man may be accountable for his own sins in the day of judgment"[12] Whatever difficult moral questions might arise in Professor Allegretti's dilemma, where seemingly immoral conduct is required by one's profession, they do not arise where the profession requires conduct consistent with one's moral beliefs. The strongest imperative seems to arise when one's moral beliefs and professional ethics coincide, both requiring respect and courtesy for others In such a situation, where the lawyer is free to choose how he or she will act, the doctrines of agency and accountability seem to hold the lawyer responsible for his knowing mistreatment of others. This principle can be found in another passage of Mormon scripture:

And now remember, remember . . . that whosoever perisheth, perisheth unto himself; and whosoever doeth iniquity, doeth it unto himself; for behold, ye are free; ye are permitted to act for yourselves; for behold, God hath given unto you a knowledge and he hath made you free.

He hath given unto you that you might know good from evil, and he hath given unto you that ye might choose life or death; and ye can do good and . have that which is good restored unto you; or ye can do evil, and have that which is evil restored unto you.[13]

The lawyer who professes to be a Christian, or who follows any other moral code that values respect and kindness in human relationships, should recognize that his hostile conduct might be costing far more than his client's money.

TO THE YOUNG LAWYERS IN ALL OF US

I told my young student friend that he need not sacrifice his character to succeed at litigation. If that is the price his law firm demands of him, it is too dear. He should practice elsewhere There are many fine litigators who act like Christians

To those of us who are a bit farther down the road and might have developed some sharp edges in the rough-and-tumble of litigation, the same notion applies. It is not too late to choose an alternate course. Reducing the acrimony in our practice will save clients money, increase our effectiveness, and probably lengthen our lives (see any recent medical study on the effects of stress) It will benefit the profession as well Most importantly, it will bring our professional lives more closely into conformity with our moral beliefs.

Again, Judge Fidel captured the basic truth:

As for . 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 combative energy for those fine tests of wit and planning that are litigation at its best. You can be successful without relinquishing those qualities that make your efforts worthy in your eyes.[14]

Notes

1 M Van Derveer, "Face to Face with an Abusive Attorney," *National Law Journal,* (14 May 1984), 13

2 Trial of Queen Caroline 8 (J Nightingale ed 1821), *quoted in* Frankel, "The Search for Truth: An Umpireal View," 123 *U Pa L Rev.* 1031, 1036 (1975)

3 *The American College of Trial Lawyers, Roster, Bylaws, Code of Conduct,* 294, 298 (1990)

4 *See* Allegretti, "Christ and the Code," *Clark Memorandum* (Fall 1990), 22

5 Fidel, "Reflections on Discovery Practice, Sharp Elbows, Junkyard Dogs, and the Elusive Spirit of Cooperation," *Arizona Bar Journal,* (October–November 1984), 18

6 Ibid , 17

7 Ibid , 18

8 Matthew 7:12

9 Ephesians 4:29, 31–32 *See also* 1 Peter 3:8–10

10 G Hazard and D Rhode, *The Legal Profession: Responsibility and Regulation* (2d ed 1988) 181, *quoting* Chemerinsky, "Protecting Lawyers from Their Profession: Redefining the Lawyer's Role," 5 *Journal of the Legal Profession* 31, 34 (1980)

11 Luke 6:44–45

12 D&C 101:78

13 Helaman 14:30–31

14 Fidel, 18.