

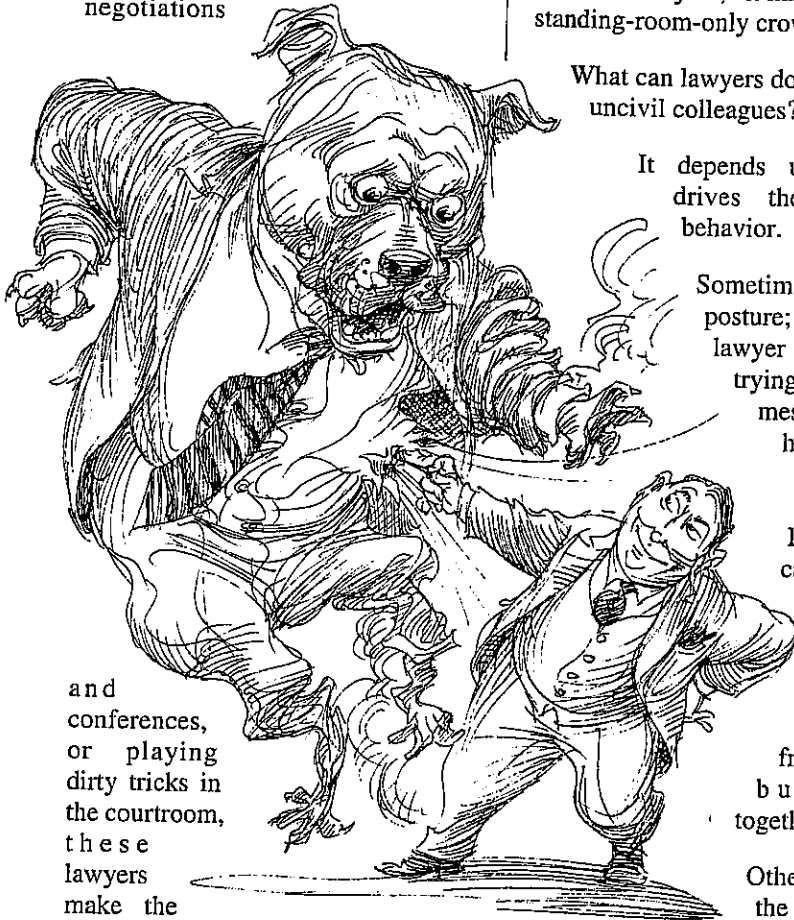
Taming the "Pit-Bull Lawyer"—

How Lawyers Can Neutralize Their Uncivil Colleagues

By Michael M. Bowden

Let's face it: Lawyers are paid to be intimidating, not ingratiating. But there comes a point when aggressive representation crosses the line to become just plain nasty.

Whether it's mailing documents later than the certification date, filing "ambush" motions on super-short notice, conveniently "reinterpreting" the content of negotiations



and conferences, or playing dirty tricks in the courtroom, these lawyers make the legal process miserable for attorneys and clients alike.

And the situation is only getting worse, according to U.S. District Court Judge Paul Friedman.

In recent years, the legal profession has "opened its doors to the 'Rambo litigator,' which has spawned a

generation of lawyers, too many of whom think they are more effective when they are more abrasive," Freidman said during a recent ABA section meeting. "I am here to tell you that neither my colleagues on the Bench nor I agree with that view."

Nor do many lawyers.

Consider this: Each time the Missouri State Bar has run its discussion program entitled, "Dealing With the Pit Bull Lawyers," it has attracted a standing-room-only crowd.

What can lawyers do about their uncivil colleagues?

It depends upon what drives the Pit-Bull behavior.

Sometimes it's just a posture; the other lawyer is simply trying to send a message that he or she means business. In these cases, you can usually get past the uncivil front and do business together.

Other times, the opposing attorney is unpleasant to the core—a person who derives his or her identity—and a great deal of pleasure—from producing rage in others. With these lawyers, the most essential response is to keep your cool so that you continue to litigate according to your own game plan rather than being drawn into your opponent's.

Remaining calm also allows you to use the Pit Bull's own aggressiveness against him. Like a martial arts expert who uses the brute strength and physical momentum of his opponent to his own advantage, lawyers can maneuver the litigation process so that the Pit Bull shows his true colors before the judge and/or jury.

In most cases, this can provide a subtle—and sometimes significant—advantage to the lawyer who remains civil. In extreme cases, the Pit Bull will go far enough to earn disciplinary action, judicial displeasure or to be generally shunned by peers.

SIZING UP THE OPPOSITION

The first step in dealing with the pit-bull lawyer is to determine what motivates the uncivil behavior. Is this a reasonable person trying to appear tough; a lawyer with a weak case resorting to the only tactics he believes can work; or a lawyer who firmly believes that the nastiest lawyer is the lawyer who wins?

Lawyers advise keeping an open mind.

"Sometimes things aren't what they seem," says Jo Annette Jacobs, a rural domestic lawyer in Marshall, Mo. "So as soon as there's a problem, just ask. Sometimes a two-minute phone call can help you avoid a snowball of escalating back-and-forth fighting throughout the course of the case."

University of Missouri law professor Mike Middleton agrees.

"At least in the beginning, assume that the Pit-Bull behavior is not intentional," he says. "Assume that the other lawyer doesn't realize what he or she is doing. Try to convince them to act properly."

Even when the nasty behavior is

intentional, it may still be workable. This is particularly true when the behavior is intended to mask professional insecurity or a weak case.

"I think most routine incivility—such as Friday orders to show cause, etc.—is fear-based," says Philip Schatz, a small-firm attorney in New York City.

He believes many lawyers fear other attorneys may take friendliness as a sign of weakness, and abrupt surliness as a sign of strength. By acting "tough," they're trying to convince their opponent, their client, and even themselves that they are taking a case seriously and fighting hard.

After all, some clients equate an aggressive demeanor with good lawyering.

"When people get in trouble, they want a Pit Bull, not a poodle, to represent them in court,"

notes Robert Clifford, a Chicago personal injury litigator.

Occasionally, that even includes fellow lawyers who are looking to refer work.

"I always hear lawyers saying things like, 'I need an attorney in Dallas for this, and I want the meanest son of a bitch you can find,'" says one Louisiana lawyer who asks not to be identified. "Well, if that's what we want, then who are we to turn around and say 'We've got to be nicer?'"

But there are options between

"nice" and "nasty"—and lawyers say there are ways to appeal to the professionalism of some Pit-Bull lawyers that can, in some cases, transform litigation from a bloodbath of dirty tricks into tough representation based on mutual respect.

One way to do this, according to Schatz, is to warn adversaries about letters, pleadings and other papers that will cause them or their clients distress. The message you are sending is that you're going to do everything in your power to advocate for your client, but you are not going to pull any cheap shots in the process. This can go a long way toward fostering an atmosphere of professional respect.

There have also already been some "official" efforts in this direction. Many state and regional bar associations have voluntary civility codes. Although these rules are essentially useless

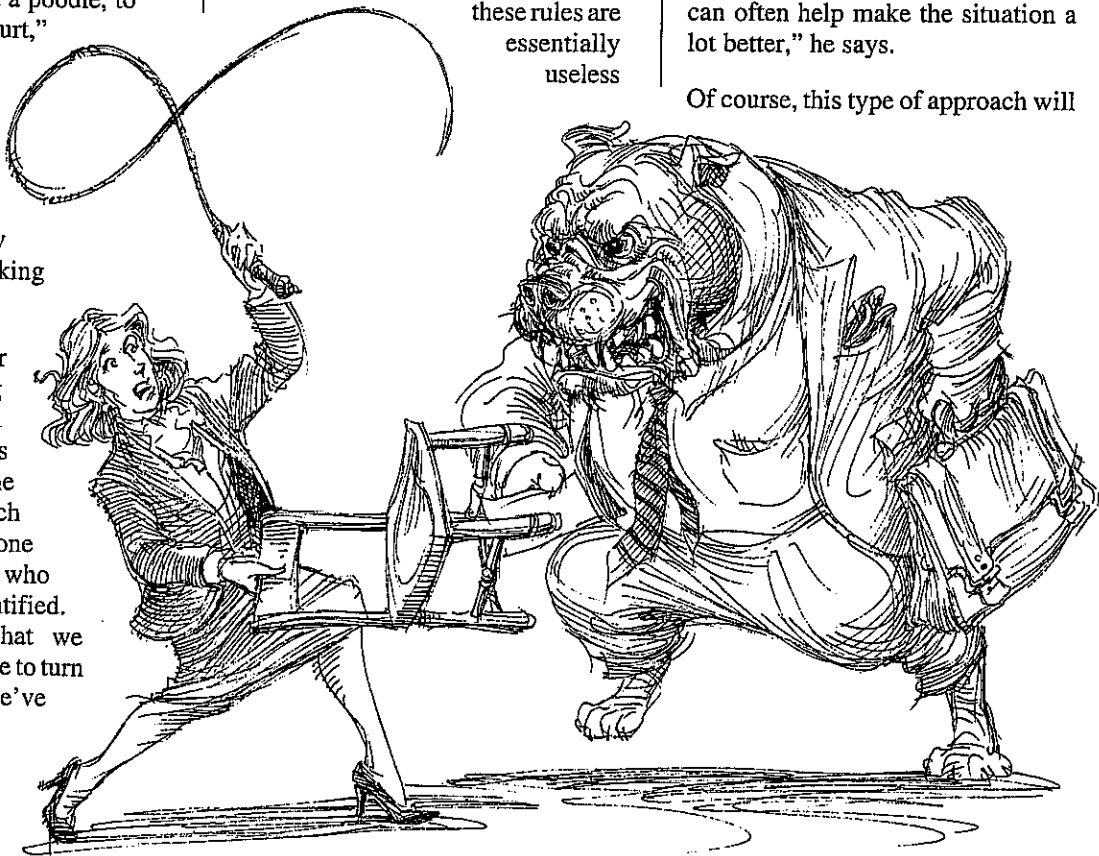
as a means of dealing with truly nasty lawyers, they can help two reasonable attorneys escape their "Pit-Bull" posturing and move to a more productive plane of discourse, Schatz believes.

"I have found that encouraging discussion of objective standards of conduct, such as the ABA Standards of Litigation Conduct and the New York State Standards of Civility, can go a long way toward minimizing future problems and allowing a fearful lawyer—including me—to realize that acting one way or not acting another is not a sign of weakness, but merely a reasonable courtesy," he says.

Such civility tactics work surprisingly well, says Maurice Graham, a veteran litigator in St. Louis.

"In my 36 years of practice, I've become convinced that this approach can often help make the situation a lot better," he says.

Of course, this type of approach will



only work when there is a reasonable lawyer behind the Pit-Bull behavior. When your opponent is a Pit Bull to the core or truly believes that it's the nastiest lawyer who prevails, your appeals to civility codes, professionalism, goodwill and reason will produce little more than a predatory chuckle.

So what can you do when the reasonable approach fails?

KEEP YOUR COOL

The most important thing to do when dealing with a relentless Pit Bull is to resist the urge to respond out of vengeance. You may still want to give him a bit of his own medicine, but make sure you do that because it makes sense strategically, not because it feels good.

It's like playing against a trash-talking athlete who tries to bait you into making mistakes—the Pit-Bull lawyer's infuriating behavior can draw you into playing his or her game instead of your own. If the Pit Bull can make you respond emotionally, you might say or do something that's not in the best interest of your client.

So the basic rule of dealing with the Pit-Bull lawyer is: Regardless of your opponent's conduct, do not give up control of the situation. Play your own game. Don't let frustration or anger bleed into your courtroom performance because if you do, you may be the one who comes out looking like a Pit Bull to the judge and/or jury. After all, they haven't seen the weeks of provocation that justifies your response, so in their eyes, the Pit Bull may appear calm while you seethe.

"The number-one rule is to keep your cool," says Jacobs. "I have broken that rule on more than one occasion, to my client's detriment. I'm immediately in their face, and at that point I have lost the battle."

As any lawyer knows, this is a rule that's not always easy to follow

"It is very, very difficult not to react, when the other lawyer does something that is absolutely wrong, that will create an advantage that he or she would not be entitled to had they played by the rules," says Graham. "The problem is, your [immediate] reaction may fall into the area of overreaction."

deposition, you might reschedule and obtain a court-approved list of questions that must be answered by the deponent. If you're at trial, ask the judge for help—but do it in private.

"I will rarely bring those issues to the attention of the court in front of the jury," Graham says. "If it's getting that bad, I will ask the court for a recess, and then take the matter up

If the Pit Bull can make you respond emotionally, you might say or do something that's not in the best interest of your client.

True to martial arts theory, your unflustered attitude will act as a fulcrum, highlighting the Pit Bull's boorish demeanor and catapulting him or her into a mire of their own making.

"Juries do a pretty good job of observing what goes on in the courtroom, and can generally tell when a lawyer's not doing what he or she should," notes Graham. "Don't squander that contrast advantage."

However, just because you keep your cool doesn't mean you can't respond to the uncivil behavior of your opponent. It simply means you do it on your own terms.

"Many times, the best time to react is later," says Graham. "I'm going to think about when I want to react to the improper conduct. And I'll pick a time to my advantage, not [to the advantage of] the Pit-Bull lawyer."

If your problem occurs during discovery, that may mean requesting a protective order. If it's during a

with the judge out of the hearing of the jury. Sometimes jurors can't tell an aggressive, effective attorney from one who goes beyond aggressiveness to bend or violate the rules. So settle the matter out of their hearing."

For all of these situations, Schatz offers a few guiding principles:

Take your time responding to offensive communications, and remove all adjectives and adverbs as part of the final edit.

Refuse to engage in, or respond to, arguments on unimportant issues.

Realize that you can't control other people's conduct, no matter how hard you try. Above all, trust the process to work.

SHUNNING THE PIT-BULL LAWYER

One way to deal with unrepentant Pit Bulls is to isolate them.

"Beyond our obligation to our clients, we have an obligation to

society and to the legal process," says Middleton. "Working that process properly will ostracize the true Pit Bull by the rest of the bar, and render them pretty much ineffective."

That's especially true of lawyers in small, close-knit communities.

"I usually just let them talk and do their thing, and trust that the judge and everyone else will know it," says Jacobs, who practices in a small town in Missouri. "With lawyers in the cities, there's always the anonymity factor. But here, we all know each other, and if you behave like a Pit Bull you're just not going to get very far."

For example, the anonymous Louisiana lawyer recounts the time he represented one plaintiff in a multi-plaintiff case that sprang from the collapse of the state's oil market.

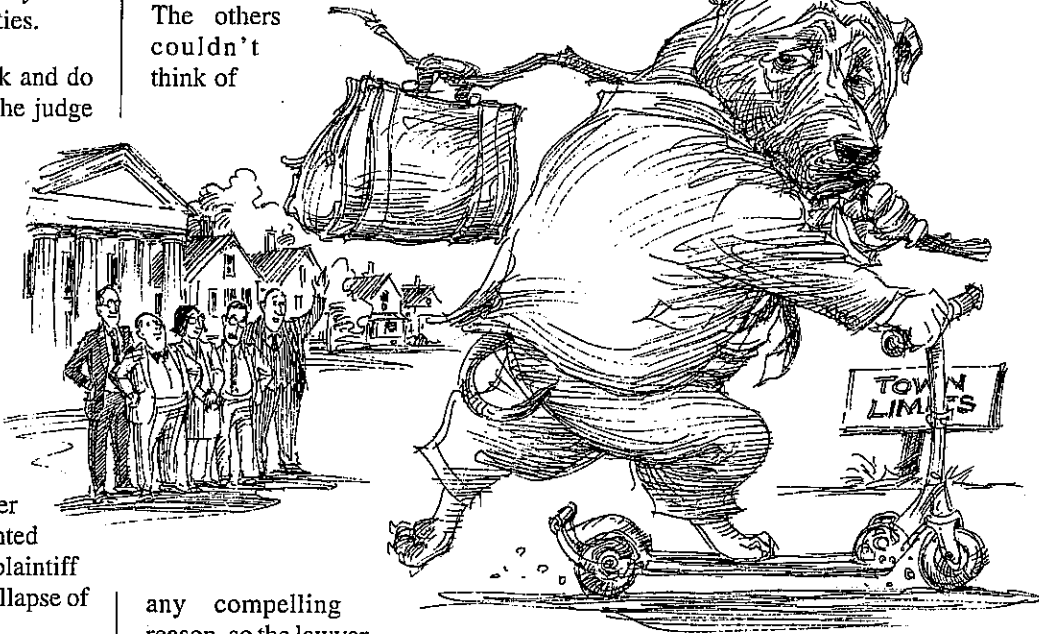
The plaintiffs' lawyers, a friendly bunch of mostly small-firm lawyers, often met over lunch to discuss common interests and strategies. But one of these lawyers was a classic Pit Bull who would invariably get into an argument of fact with someone at the table, or waste the lunch session pontificating on his client's superior claims to compensation.

"You'd talk to him, and the next day in the mail, you'd get a full memo of what was discussed, and what was decided—the way he saw it!" the lawyer laughs. "And at the bottom, he'd put, 'If you don't agree that this is what we decided, write me back'—obviously hoping that you wouldn't read it, and he could use it against you in the future. So then you'd have to spend 30-40 minutes writing back to say, 'No, dummy! That's not what we decided!'"

As if that wasn't enough, this lawyer also refused to pick up the tab, even though the rest of the lawyers took turns treating their colleagues.

Finally one of the lunch team asked, "Why do we keep inviting him?"

The others couldn't think of



any compelling reason, so the lawyer was unceremoniously dumped from the circle. Shortly thereafter, the lunching lawyers hammered out an early settlement that removed their clients from the litigation with a sizeable payoff.

But the Pit Bull—and his clients—were out of luck because the settlement was complete before they knew about it. As a result, they remained a part of the slow, expensive litigation for years to come.

The incident got around the community, and basically destroyed the Pit Bull's reputation and practice. Unable to get any clients, he finally packed up and left town.

"These lawyers get to a point where nobody will deal with them," the Louisiana lawyer says. Or if colleagues have to deal with them, it's with a tone of wary distrust, with

no hallway negotiations or handshake settlements.

"As soon as you see that [kind of] person involved, you shift over to the straight-and-narrow and go right by the book,"

he says. "Every letter is certified mail, every notice is done, nothing is agreed by telephone, every time you talk to him, you confirm it."


That eventually makes life hard—and lonely—for the Pit Bull, especially in smaller jurisdictions with friendly relations among members of the bar. And the lawyer will sometimes return to the "civil" fold.

But not always.

The anonymous attorney, a fifth-generation lawyer, recalls a Cajun morality tale his grandfather taught him about the eternal human plague of dealing with unpleasant people. After coming away from an encounter with such an individual, the story's protagonist bemoans the

Continued on page 21

Walsh contends in the prologue that “no slightest fictional coloring has been added” and that “[e]verything said or suggested rests squarely on documented sources.” A careful examination of Walsh’s book, however, reveals otherwise.

Walsh began his prologue by criticizing other Lincoln historians because Walsh contends they totally overlooked or misunderstood the significance of the Almanac Trial. Walsh even smugly stated that one account by lawyer J. N. Gridley, who actually obtained the Brady letter upon which Walsh exclusively relied, “show[ed] the usual defects” because Gridley was a lawyer rather than a historian. In the end, the shortcomings of Walsh’s book may be due to the fact that Walsh is not a lawyer and therefore does not fully understand the ethical obligations of a criminal defense lawyer, or they could simply be due to Walsh’s willingness to make far-reaching conclusions without supporting evidence. 

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PUNITIVE DAMAGE AWARDS

continued from page 8

The evidentiary standard before the 1995 legislation was a preponderance of the evidence with a finding of gross negligence. After the reforms, the evidentiary standard is that of clear and convincing evidence for the element of exemplary damages, and the plaintiff must prove fraud, malice, or a willful act or omission or gross neglect in wrongful death actions brought by or on behalf of a




surviving spouse or heirs of the decedent’s body.

Finally, the standard of judicial review also changed. Before the 1995 enactments, there was no statutory requirement for review. After 1995, the law requires that the appellate court state, in a written opinion, the court’s reasons for upholding or disturbing the finding or award. The written opinion must address the evidence or lack of evidence with specificity, as it relates to the liability for, or amount of, exemplary damages.

WHAT DOES THE FUTURE HOLD?

The immediate presidential agenda has not publicly provided for tort reform legislation. There has been no mention of pending concrete federal reform from either the White House or Congress. But based on the president’s long-established pro-reform position coupled with control of Congress and unpredictability on tort reform from the Democratic side, it would appear the most

logical question is, how long before legislation is proposed and passed? It may not be a matter of “if”, but rather a matter of “when.” 

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PIT-BULL LAWYER *continued from page 12*

fact that, “Not all of the [expletives] are dead yet.” And a friend replies, “And not all of them have been born yet either.”

GETTING THE JUDGE TO STEP IN

When the informal methods fail, an attorney who maintains professional detachment can often use an opponent’s own provocative behavior against him. Let the SOB dig his or her own grave in front of the judge or jury. While it’s not likely to win a case outright, it can

certainly gain an advantage for the lawyer who maintains civility.

"These pit-bull lawyers think it's an effective strategy, but sometimes it has the reverse effect," says Linda Oligschlaeger, a practice management consultant with the Missouri Bar Association.

LETTING THE FACTS SPEAK FOR THEMSELVES

Jim MacGowan, a solo practitioner in Providence, Rhode Island, recalls the time he was representing a man who entered into an onerous franchise agreement with one of the area's largest oil companies.

"The oil company basically decided to spend him into submission," says MacGowan (not his real name; the solo requested anonymity, noting, "It's a small state!").

The oil company's lead attorney was a young, hotshot associate who made it clear he considered both the franchisee and MacGowan himself to be beneath contempt. Things came to a head on the day after Thanksgiving, when MacGowan stopped by his office briefly to check the mail—and discovered the lawyer had filed a massive motion to dismiss his client's counterclaim. Accompanied by a thick, detailed memorandum, the motion was mailed on Thanksgiving Eve and set down for hearing the following Monday—just barely within the jurisdiction's minimum notice requirements.

MacGowan was angry. His staff was already gone for the holiday and his first instinct was to spend the weekend crafting a response. But after cooling himself down, he decided to ignore the motion, and return home for a pleasant holiday weekend with his family.

On Monday morning, he walked into court to see the Pit-Bull associate

standing at the counsel table, flanked by two other attorneys ready to aggressively argue their motion. They had an array of paperwork fanned across the counsel table.

When the judge noted that she had no response on file, MacGowan stepped forward and simply stated the facts, with as much "simple charm" as he could muster.

"Your Honor, I'm sure this was a mistake or oversight of some sort, but according to the postmark, my brother's pleading didn't even get into the mail until late afternoon the night before Thanksgiving," he said. "I'd given the girls Friday off, so we couldn't even address this thing until this morning. I think, to be fair, I'd like to ask for a little extension on this."

The judge immediately recognized what was going on, glared at the young Pit Bull, and asked MacGowan how much time he needed.

"Perhaps 30 days, Your Honor."

"I object to that much time," the young hotshot interrupted.

"You've got 60 days," the judge told MacGowan, and then turned to the Pit Bull. "And I'd strongly suggest that you be a little more careful about timing in your future filing practices, Mr. ____."

The extra time enabled MacGowan to prepare a response that persuaded the other side to reach a fair settlement.

MacGowan believes that if more judges would simply use their discretion to discourage uncivil behavior, civility codes wouldn't be necessary.

"You've got to hit them where it hurts," MacGowan says. "That Thanksgiving motion cost his firm's client a lot of money. It turned out to

be a debacle, and they've got to explain that away when they bill. If that were to happen a few more times, this kid might get the message, 'Hey, maybe it doesn't pay to be a jerk!'"

CAUGHT IN HIS OWN BEAR TRAP

Frequent users of "ambush" scheduling may eventually fall prey to their own Pit-Bull tactics. For instance, solo practitioner Tom Crane tells of one lawyer who repeatedly sent him hearing motions after 5 p.m.

"The rule here is you have to give three days' notice when you set a matter for hearing," says Crane, who hails from San Antonio. "So, the horse's rear would fax it to me after 5 p.m. to give me the least amount of notice possible; the notice really amounted to only two days."

In addition to eleventh-hour filings, this Pit Bull would also send his most inflammatory communications after 4 p.m. on Fridays.

"So, after a few of these, I started turning off my fax machine after 3 p.m. on Fridays," he says.

Crane did that for months until the lawyer complained to Crane that he was purposely trying to close the lines of communication, making it impossible for him to give notice of hearings—and filed a motion for sanctions against Crane.

That's when the tables turned.

Crane had filed for a hearing for sanctions against the Pit Bull for failure to produce documents which was, coincidentally, scheduled for the same day and the lawyer's secretary signed the notification receipt without telling her boss.

At the hearing, Crane convinced the judge that the complaint against him was unfounded and, as the Pit Bull

packed up his papers, Crane asked the judge about his own motion.

The pit bull immediately flew into a rage, saying Crane had failed to provide timely notice.

"I waited calmly as he vented and fumed," and then presented the proof of receipt to the judge, who then turned to the other lawyer.

"Well, what about it, ____?" the judge asked.

"The horse's rear starts gasping," Crane says, savoring the memory. "Finally he asked for more time to respond, [knowing that] my motion had real substance. The judge gave him until the following Monday to respond."

Later that same day, the lawyer called to accept mediation, something he'd been refusing to do for months.

"What a change!" says Crane.

The pit bull was brought down by his own medicine and the case came to a swift and peaceful resolution. 🐾

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JUROR ANONYMITY *continued* from page 15

In light of this, are reforms imposing juror anonymity in all criminal cases, or, as once proposed in Wisconsin, in all criminal and civil cases, desirable? Of course, a potential juror is fully assured of

anonymity only if a blanket rule or law exists. That level of assurance could be what is needed to raise public confidence in the court system and reduce the dodge of jury service. Obviously, that was the opinion of the California legislature with the adoption of their blanket seal of the names and addresses of jurors serving on criminal cases. But such reforms do take the uncomfortable position of presuming the need for anonymity and make a closed court system the norm rather than the exception.

A final consideration in the juror privacy area is the possibility of awarding privacy rights to other participants in the trial process. In particular, commentators often legitimately cite witnesses as having similar privacy and safety concerns to those of jurors. The thought of conducting trials with anonymous witnesses brings into sharp focus the First and Sixth Amendment issues at risk when granting privacy rights. Despite the distinct differences between a juror and a witness, it does not seem such a large step from granting privacy rights for one to granting privacy rights for both. Perhaps it is safer all around to avoid the venture down the potential slippery slope presented by the jury anonymity reforms.

The consensus holds that some type of reform of the current jury system is needed. As state courts rise to this challenge and decide what exact changes should be made, many are considering

the possible role of jury anonymity in providing protection of juror privacy, safety, and free speech. A complete review of this issue balances two factors: the damage to the common good in the form of a more closed court system with less accountability, reduced appearance of impartiality, and less understanding of the jury's process, with the individual jurors' need for safety, privacy, and confidence in the judicial system, and the attendant rise in juror yield.

For many states, jury anonymity will be rejected as too radical, relegated alongside the abolition of the jury process altogether or the employ of professional juries. But for others, such as California, these reforms may be perceived as necessary for the continued viability of the jury system and could validly form a compelling reason for the rule. However, unless and until truly drastic measures are called for, the cost of jury anonymity to achieve individual privacy is too steep a price for society to pay. 🐾

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