

Managing Publicity

Litigation Communications in the Age of Trial by Media

by Phil S. Goldberg

Courts and legal commentators are increasingly recognizing that the media, through the way it covers litigation, can have a tremendous impact on how individual lawsuits are resolved. First, the media can unduly influence defenses, motions, and settlement options that a defendant might consider. This is particularly true if the coverage has a negative crossover effect on a defendant's business, livelihood or other important outside interest. Second, media coverage can change the dynamics in the courtroom, so that when trial lawyers make their arguments before juries, the members of the juries recognize the themes from what was said during the pre-trial media campaign. Because media can affect the litigation, it is incumbent upon defense counsel to acknowledge, and deal with, this potential factor in the litigation.

To assist defense counsel in deciding how to engage the media to defend a client's litigation interests, this article provides an analysis of the rules and beliefs that have developed in this area of the law. In doing so, this article addresses the common misconception that defense attorneys should



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not publicly respond to negative publicity or outright attacks on their clients in the media. Such an attitude is akin to an ostrich burying its head in the sand, as it could harm a client's litigation position. Finally, this article addresses recent opinions concerning the hiring of "litigation communications specialists," who are public relations personnel dedicated to assisting lawyers perform their media-related responsibilities.

The Challenge of Litigation Publicity for Defendants The Inherent Plaintiff Bias in Media Coverage

The media filter can create a clear plaintiff bias in civil cases. When charges are made public, the media automatically reverts to the basic elements of storytelling and casts the lawsuit in traditional protagonist-antagonist terms. The defendant, simply by being on the wrong side of the "v," becomes the "villain" to the plaintiff's "victim," whether or not the actual charges have any factual basis or legal merit.

As part of the storytelling mode, reporters frequently lead with the plaintiff's injury or allegations and go into detail about the emotional and lifestyle impact the alleged injuries have on the plaintiff. The corporate position is usually given much less space and included only as a response. In this light, the company's position can readily come across

as defensive; by their very nature, corporate defendants can be placed in the position of having to prove the "non-negative" in an effort to exculpate themselves. As the *New York Times* asked, "how, without appearing callous, can a company argue in the court of public opinion that a plaintiff's child died because he misused the product, not because the product was defective?" For unpopular defendants with science-based defenses, this can be particularly challenging, regardless of actual fault. Moreover, these stories are rarely counterbalanced with positive information about the defending company.

The Impact of the Media Bias on Litigation

While most Americans, and most lawyers, probably would agree that it is best to have a judicial system insulated from outside influence, it is impossible to remove the court system from our larger society. In 1991, the *Journal of Applied Social Psychology* studied the impact of pre-trial publicity, and the results showed that even modest pre-trial publicity can prejudice potential jurors against a defendant. In another analysis, the authors of the book *The Jury System: A Critical Analysis* concluded that, in fact, pre-trial knowledge was the best predictor of pre-judgment. This study said that 80 percent of jurors exposed to prejudicial articles before trial found against the defendant, compared with only 39 percent of those who were not. Not surprisingly, judicial instructions to disregard media coverage did not reduce the impact of such pre-trial publicity.

Judges also do not appear to be immune from outside influences. As is evidenced by polling data and other studies, the judges can be, and sometimes are, influenced by public opinion and the media. The U.S. Supreme Court identified this problem in *Estes v. Texas*, 381 U.S. 532, 549 (1965), when it observed that judges are "subject to the same psychological reactions as laymen.... [I]t is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion." The American Bar Association's Reardon Committee, which was formed in the 1960s to review the potential effect of media bias on the judicial system, reached a similar conclusion when it reviewed the potential effect of media bias on the judges in the 1960s: "It is

essential that the public official... maintain his objectivity and impartiality. Under sustained pressure from the news media... this may prove impossible."

Further, the media coverage of the litigation can have a direct impact on the public's perception of corporate lawsuits—a difficult situation that is exacerbated by the reluctance of some corporate defendants, in particular, to speak with the media. According to a 2002 public opinion survey conducted by Hill & Knowlton, 62 percent of Americans believe that a corporation's "no comment" about a lawsuit means that the company is covering up wrongdoing. It is more likely, however, that defense lawyers simply are adhering to the antiquated notion that lawyers do not try their cases in the media. These lawyers may fear that setting the record straight could be misconstrued by a judge as improperly trying to influence the lawsuit, or worse, they could lose their attorney-client privilege for documents shared with litigation communications experts.

In some litigation, such as with breast implants, it can take the facts and the law several years to catch up to sensational headlines.

Plaintiffs' Lawyers Use This Media Bias to Their Advantage

Good plaintiffs' lawyers understand their media advantage and have adopted litigation techniques to maximize their leverage. In the game of high-profile corporate litigation, plaintiffs' lawyers will use the media as a vehicle through which they run their triple pressure point play of driving up the costs of the litigation, driving down stock prices, and vilifying the company among consumers and potential juries.

Certain personal injury lawyers, for example, have admitted that they purposefully and systematically set out to discredit businesses and their products before, during and after trials in order to raise the stakes for the litigation. For example, John Coale, a plaintiffs' lawyer who was part of the tobacco industry litigation, admitted in a 1999 seminar that the trial bar "put together a three-pronged attack, legal, media, and political. We attacked on these three fronts for five years until [the tobacco companies] folded and settled." In some instances, the plaintiffs' lawyers will only file a lawsuit after the target defendant is made unpopular—through

massive public relations efforts and, sometimes, political hearings. The plaintiffs' lawyers know that because many companies have low thresholds for negative publicity and its effect on consumers, employees and investors, they often will settle claims if the pressure gets too high.

For cases that do not settle, the media can have an impact on the way judges and juries perceive the litigants as well as the underlying issues, such as science, class certifications, protective orders, and the right of companies to assert their privileges in discovery proceedings. Some plaintiffs' firms have been known to hire in-house public relations staff, while others use plaintiff-oriented litigation communications consultants. Observers of this kind of high-stakes, high-profile litigation have noted that, as a result of the widespread use of public relations by plaintiffs' firms, litigation "blackmail" is being committed in the United States every day to generate public sympathy and apply pressure on civil defendants.

For example, when the trial bar brought a series of litigation against the HMO industry, well-known Mississippi trial lawyer Dickie Scruggs explained his strategy: "In the past, nobody has communicated directly with investors about the vulnerability of their money.... If HMO investors are smart, they'll

lean on their companies to see if we can work something out." During the time Scruggs was meeting with Wall Street analysts in the autumn of 1999, Aetna's stock fell by 30 percent. As Aetna Chief Executive Officer Richard L. Huber observed, "In one day, more than 10 billion dollars in American savings was vaporized just by the bark of the wolf."

Defense Lawyers and the Ethics of Responding in the Media

The question for the legal community then becomes, "What is the best way to reduce the effects of the media bias on individual suits?" A core tenet of the American legal system always has been that the parties have the greatest stake in ensuring that justice is achieved in the courts. It follows, then, that countering pro-plaintiff bias in the media is the obligation of the defendants. Should defense attorneys remain silent, the plaintiffs' attorneys and pro-plaintiff groups that regularly engage the media could have an undue and disproportionate influence on the litigation. Karen Doyme, head of crisis and litigation for the international public relations firm Burson-Marsteller, has observed that the Internet's "unprecedented speed and reach created a powerful platform for plaintiff law firms, activist groups, and others to recruit plaintiffs and influence



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opinion at the grassroots level." Therefore, only through engaging the media to protect their business interests with respect to the litigation can companies free up their lawyers to focus on making the right legal decisions, such as which motions to file, which defenses to assert, and whether to take the case to trial.

Defendants and their lawyers, therefore, should be permitted to help the media develop more complete stories about legal matters of public interest. Unfortunately, those who favor defending clients in the media are engaged in a fierce tug-of-war with those who adhere to the notion that lawyers do not "try their cases in the media." The latter group is most influenced by the traditional notion of the "gentlemanly" practice of law, as defined by the ABA guidelines in 1908. They may argue that extrajudicial speech can prejudice a judicial proceeding and, therefore, trumps a lawyer's or corporation's First Amendment right to free speech. Therefore, they will either say "no comment," or something akin to "the lawsuit is without merit and the company is going to fight it vigorously." The hesitation to say something substantive to the media, though, is misplaced, and the rationale is inverted. In many high-profile civil cases, the only way some lawyers can offer clients a fair trial is to set the record straight in the media in hopes that accurate reporting will create a neutral litigation environment.

In the 1960s, there was a distinct movement against allowing lawyers their right to extrajudicial speech. After President Kennedy's death, the Warren Report strongly denounced the wide availability in the media of significant details of President Kennedy's assassination, stating that had Lee Harvey Oswald survived, it would have been unlikely that he could have received a fair trial. At around the same time, the Supreme Court, in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), overturned the murder conviction of Dr. Sam Sheppard (who later became the basis for the television series, and later the movie, *The Fugitive*) because the media created significant public prejudice against the defendant: "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

In response to these opinions, in 1969,

the ABA's Advisory Committee on Fair Trial and Free Press promulgated a new ABA rule on trial publicity (ABA's Model Code of Professional Responsibility, Disciplinary Rule 7-107), which was adopted in most states. The rule said that, in civil actions, an attorney could not make extrajudicial statements, other than a quotation from public records, if it reflected on the character or credibility of a witness or party, expressed an opinion on the merits of the claims or defenses of a party, or on "any other matter reasonably likely to interfere with a fair trial of

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the action." Thus, lawyers were fairly tightly gagged in their interactions with the media.

Starting in the 1970s, the judiciary began invalidating these rules as too restrictive and violative of the First Amendment. In *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), for example, the United States Court of Appeals for the Seventh Circuit found that a district court's "no-comment" rules, which barred lawyers from making public comments about ongoing civil and criminal cases, deprived litigants of their free speech rights under the First Amendment. The district court rule at issue, like Disciplinary Rule 7-107, prohibited extrajudicial statements if there is a *reasonable likelihood* that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice. The appellate court, in striking the rule down, held that only comments that pose a "serious and imminent threat of interference with the fair administration of justice can be constitutionally proscribed." The court also recognized the importance of attorney speech: "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion."

In 1983, the ABA tried to accommodate *Bauer* by adopting Model Rule of Professional Conduct 3.6, which authorized sanc-

tions for attorney speech that produced a "substantial likelihood of materially prejudicing an adjudicative proceeding" and prohibited attorneys from discussing information likely to be inadmissible at trial. There remained, however, an overriding principle disfavoring extrajudicial speech, and it was still considered "unlawyerly" to advocate in the media.

The opposite view—that extrajudicial attorney statements could be proper, particularly when made by defense counsel—received a boost in the 1991 Supreme Court case *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The case involved Dominic Gentile, an attorney in Nevada, who held a press conference hours after his client was indicted on criminal charges. Gentile, who reviewed the applicable Nevada ethics code, which was substantively the same as ABA's Model Rule of Professional Conduct 3.6, determined that unless some of the weaknesses in the state's case were made public, "a potential jury venire would be poisoned by repetition in the press of information being released by the police and prosecutors." Even though he sought only to counter publicity already deemed prejudicial, the Nevada Bar found him in violation of the rule and reprimanded him.

In *Gentile*, the U.S. Supreme Court struck down the Nevada ethics rule for vagueness. In delivering a portion of the Court's opinion, Justice Kennedy laid a marker for the right of lawyers to use extrajudicial statements to seek a just legal result. Justice Kennedy stated:

An attorney's duties do not begin inside the courtroom door. . . . Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation. . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

501 U.S. at 1043.

In 1994, the ABA formalized this opinion by drafting ethics rules supporting the right of lawyers to defend their clients in public. It modified Rule 3.6 to add a "right of reply" so that lawyers would feel free to respond to particularly egregious publicity without fear of sanctions. Now, Rule 3.6(c) clearly recognizes that a lawyer acts within his or her

professional responsibility when making a statement that a reasonable attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. Rule 2.1 also acknowledges that representing a client may extend beyond legal issues "to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Defense Counsel Should Consider Litigation Public Relations

Working with the media to create more balanced, accurate, and less sensational coverage of a lawsuit may be a necessary element in defending high-profile defendants. The problem is that many lawyers are overly skeptical of the media and are not experienced with public relations. Skills in handling the media are not regularly taught in law school, are not generally considered in hiring corporate counsel, and are not relevant to many of the issues and cases that corporate law departments face. Further, the lawyers' attention generally is and should be focused on the more traditional aspects of lawyering, such as discovery, motion practice, and trial.

As with any other area of practicing law requiring specialized skill, lawyers should be able to consult with those skilled in litigation communications to help them perform the media-related aspects of their jobs. These experts, and not the trial counsel themselves, are often the more appropriate personnel to analyze coverage, anticipate how legal defenses will come across in the media, and offer strategic advice about protecting the litigant's legal interests in the media coverage. Part of what makes litigation public communication different from regular public relations is that the litigation public relations practitioners generally are not charged with disseminating or "pitching" stories. Rather, they help manage the news, work with reporters to understand the litigation process and the significance of legal rulings and motions, and provide clients with strategic counsel as to how to respond to certain attacks. As one practitioner in corporate defense litigation communications observed, "Litigation PR is not for the kids. The hazards are too great. It can end a company."

What makes litigation communications specialists "experts" is that, in addition

to being well-versed in media relations, they need to understand the legal world. It requires the ability to understand and translate legalese into simple terms and concepts that segments of the public can comprehend. Talking in the midst of litigation also requires a comprehension of legal procedures and doctrines; with corporate litigation, it also takes familiarity with restrictions on corporate communications. For example, corporate lawyers, unlike plaintiffs' attorneys, are bound by securities law in how and when they discuss issues material to a company's financial standing. The new Sarbanes-Oxley rules subject those statements to even further scrutiny.

In addition, corporate lawyers, after *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), are bound by the rules of advertising, even in their statements made in crisis or litigation. Therefore, statements need to be clear and accurate when discussing corporate policies or products. Especially at the outset of a litigation issue, this can be difficult, as companies often have to gather information about the issue while simultaneously trying to give consumers and investors guidance. When plaintiffs' lawyers are not held to this same standard for accuracy, responding to their charges can be a particular challenge for companies because the first few news cycles can determine the way the public, and eventually the jurors and judges, view a company's culpability. Finally, many cases involving corporate defendants are governed by case-specific protective orders that prohibit certain types of communications. Litigation communication specialists need to understand the nuances of how protective orders work. In sum, lawyers need litigation communications experts who understand these rules and have experience operating within them so, given today's shortened news cycles, they can respond quickly, accurately and effectively when litigation developments occur.

Litigation PR and the Attorney-Client and Work Product Privileges

Given the reality of practicing law in corporate America, extending the attorney-client privilege and the work product doctrine to those who provide litigation communications services is both appropriate and necessary. At the conceptual level, it would institutionalize the right of companies to

respond to litigation issues, which could reduce the influence of extrajudicial statements on the courts and allow courts to be honest brokers in the pursuit of justice. That is because, at the technical level, it would remove one of the greatest obstacles corporate defendants face in deciding whether to use litigation communications experts: the fear of inadvertently waiving legal privileges over key client documents and of having the public relations and legal teams' thought processes and work product being read and used by opposing counsel.

Lawyers need to provide their public relations experts with confidential information so that they can provide advice in anticipation of potential media pitfalls, likely defenses, and settlement strategies. At the same time, public relations professionals need legal input so they do not unwittingly curtail legal options specific to the case or issue at hand. For example, the legal team must assess whether explanations included in press statements could be misconstrued as admissions or certain defenses could be precluded through poorly conceived press statements and explanations. Full disclosure and coordination are necessary for lawyers and their public relations counsel to perform effectively and have a positive impact on the administration of justice.

Only a handful of cases address the application of privilege to litigation communications specialists. Most recently, in *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F.Supp.2d 321 (S.D.N.Y. 2003), Judge Kaplan of the Southern District of New York extended privilege to litigation communication specialists under the non-testifying expert witness doctrine. In that high-profile litigation, the plaintiff was the target of a grand jury investigation initiated by the United States Attorney's Office. As the court noted, the target stated that she hired litigation communication counsel "out of concern that unbalanced and often inaccurate press reports about [her] created a clear risk that the prosecutors and regulators conducting various investigations would feel public pressure to bring some kind of charge against [her]." The public relations specialist was specifically hired to help restore balance and accuracy to the press coverage.

The court concluded that advancing a client's legal positions in the media is part of a lawyer's legal services because it can be important to a defendant's ability to achieve "a fair and just result" of the legal matter. In fact, as the court noted, courts have long seen public relations efforts as a legitimate legal function and have reimbursed court-appointed counsel in a number of instances for time spent hosting press conferences and performing other public relations tasks in connection with their representation. It also noted that the common law recognizes that the attorney-client and work product privileges in appropriate circumstances extend to persons assisting the lawyer in the rendition of legal services.

The court recognized that if dealing with the media is part of lawyering in high-profile cases, two truths become evident. First, lawyers should be able to consult with public relations specialists to help them provide their clients media-savvy legal advice. Second, full and frank communication among clients, lawyers and litigation communications specialists enhances the administration of justice. Because litigation communications is a specialized discipline within public relations, it makes sense to classify these practitioners as expert consultants and worthy of privileged communications.

In 2001, in *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001), the Southern District of New York also extended privilege to a public relations firm, but under a different scenario. This case involved Sumitomo Corporation, a Japanese company not skilled in dealing with the American media. The company hired a crisis management public relations firm to handle media surrounding allegations that it conspired to manipulate global copper prices. The consultant was privy to advice from the company's counsel, and legal ramifications of that advice were material factors in the development of the communications materials. Because the foreign corporation hired the litigation public relations firm directly, the court found that it was the functional equivalent of an in-house department.

The United States Court of Appeals for the District of Columbia addressed a related issue in *Federal Trade Commission v. Glaxo-SmithKline*, 294 F.3d 141 (D.C. Cir. 2002). Unlike in the previous two cases, the court

was not presented with the question of whether to cover the work product of the public relations firm. Rather, it considered the more precise question of whether privilege would simply be lost because otherwise privileged documents were shared with a litigation public relations firm. In this case, GlaxoSmithKline had distributed otherwise privileged information to specifically named public relations employees and contractors on a need-to-know basis. The court did not distinguish between the company's public relations officials and those hired

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as outside contractors, and held that privilege was not surrendered because these professionals were under the company's confidentiality agreements and needed to provide input to the legal department and/or receive the advice and strategies formulated by counsel."

Finally, the Southern District of New York set the outer bounds for extending privilege in the trademark suit *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y.2000). In this case, defense counsel used the company's existing public relations firm and did not seek litigation communications experts or advice. They were simply strategizing about the effects of the litigation on the client's customers, the media, and on the public generally. Consequently, the Southern District of New York denied the extension of privilege because ordinary public relations does not satisfy the work product doctrine, which provides a zone of privacy for strategizing about the litigation itself.

A Practical Guide for Working with Litigation PR Professionals

As these cases indicate, litigation communication professionals who offer advice that helps lawyers give better legal representation should be able to operate within the attorney-client and work product privileges that non-testifying experts enjoy in most jurisdictions. The underlying rationale to these decisions is that in high-profile litigation:

- Legal representation includes media work;
- Lawyers are permitted to consult with outside experts in performing these legal functions; and
- Unfettered coordination between lawyers and their litigation communication experts is in the public interest.

As discussed earlier, the parameters of what is considered legal services should encompass all communications with the potential to influence judges and juries, as well as the litigants themselves. While no court has ruled on this point, privileges relating to litigation communications service should extend beyond individual cases and include larger litigation issues important to a defendant's docket. For example, companies frequently face a series of lawsuits on the same issue, such as exposure to a potential toxic substance or failure of a widely-disseminated product. Coverage of the larger issue or public crisis can define the way the public views the company and its culpability.

In addition, the argument should be made that privilege should cover communications efforts related to the interplay between business interests and litigation results, which is distinguished from media efforts directed at the effects of litigation on business interests. Business concerns often have a direct impact on whether and how companies decide to assert their judicial rights, such as taking a case to trial or settling out of court, regardless of whether they were legally or morally responsible for the injuries alleged by the plaintiffs.

Conclusion

Litigation journalism is a fact of life for the American judicial system. Ideally, justice would be served solely based on what is admitted and said in the courtroom. But, unlike in Great Britain where it is illegal for the media to print anything about a trial until it has been concluded, there is no way for American legislators or courts to regulate the media coverage of lawsuits. As long as the courts cannot control trial publicity, the litigants and their lawyers have a right, and even an obligation, to engage the media. Therefore, they should have the ability to hire litigation communication specialists, who provide the expertise for lawyers to perform this aspect of their jobs effectively. **FD**