

Talking Head

Foresight and preparation can help attorneys use the media during litigation to provide a platform for protecting clients, reassuring shareholders and defending against attacks.

BY JULIE CAMPANINI

Talking to the media during litigation is a delicate balancing act that requires foresight and preparation.

Although defense counsel usually hopes to avoid this kind of scrutiny during trial, the media can provide a terrific platform for protecting the client, reassuring shareholders and defending against attacks by opposing counsel or consumer groups.

The proliferation of 24/7 news cycles, such as the Internet and 24-hour cable news programs, quickly have converted a dearth of previously uncovered stories into major headlines.

Complex corporate and litigation issues receive increasingly unprecedented media attention as editors try to satisfy the never-ending news appetites of savvy consumers.

Popular television legal dramas, large damage awards and recent high-profile cases lend fuel to the exploding consumer interest in litigation. Add to it competition among news wire services to "break" a story, and potential jurors often can learn about product recalls, trial outcomes and high damage awards almost as fast as the corporations themselves.

In other words, the media play a key role in shaping the public's perception about a company, an industry or a pending litigation.

When developing litigation strategies, counsel should give as much attention to influencing the jury pool before voir dire as after the jury is impaneled.

Proper use of the media during litigation can help influence the jury pool to embrace a particular set of facts, manage perceptions about the corporation generally and, in some cases, force settlement. This article provides practical insight and methods for defense counsel to manage the media in the context of litigation.

Plaintiffs' Media Tactics

It is important to know how plaintiffs use the media and why they are successful. Plaintiffs use the media to generate sympathy for their cause or move a company into disfavor with the public or potential jury pool. These tactics can be employed by the plaintiffs themselves or the plaintiffs' counsel.

For example, plaintiffs' counsel might try to increase the class by publicizing the issues through conventional media or on a dedicated Web site. A plaintiff or consumer might use the media to disparage a corporation with which he or she had a particularly bad experience.

When a defendant, or possible defendant, refuses to comment on a problem with a product or recent case fil-

ing, potential jurors hear avoidance.

Jurors interpret silence as admissions of guilt or wrongdoing. Jurors believe that, if someone were accused of something he or she did not do, that person would not idly stand by and say nothing.

Often, cases are lost before they get to the courthouse. When a corporation fails to respond to media inquiries or responds with "no comment," the consequences, while seemingly subtle, can have far-reaching implications.

Aside from losing a case in the court of public opinion and being forced to try the case in front of a "tainted" jury, bad publicity can be a successful attack against a com-

Protection Strategies

There are several things corporations and their counsel can do to protect the brand and reputation of a company, as well as influence consumers and potential jurors about a particular case.

First, know what is being said in the media. Conduct basic media research for any media or press releases, and review them to identify opposing counsel's (or corporation's) themes.

Second, acknowledge that a first impression is a lasting impression. Any allegations that initially go undefended or, sometimes worse, are poorly defended in the media will make a lasting impression and cause distraction.

A classic example is when President Clinton vehemently denied any relations with Monica Lewinsky. His lie ultimately was more of a problem than the affair, something he failed to consider.

Third, establish messages primarily to protect the overall corporate reputation, as well as to address matters specific to any particular litigation.

For example, if a company is sued for a defective product, counsel should spend the same amount of time defending the corporation's general business practices as addressing the specific product in the suit.

Every media opportunity is a chance to convey a message, so don't let opposing counsel drive media coverage.

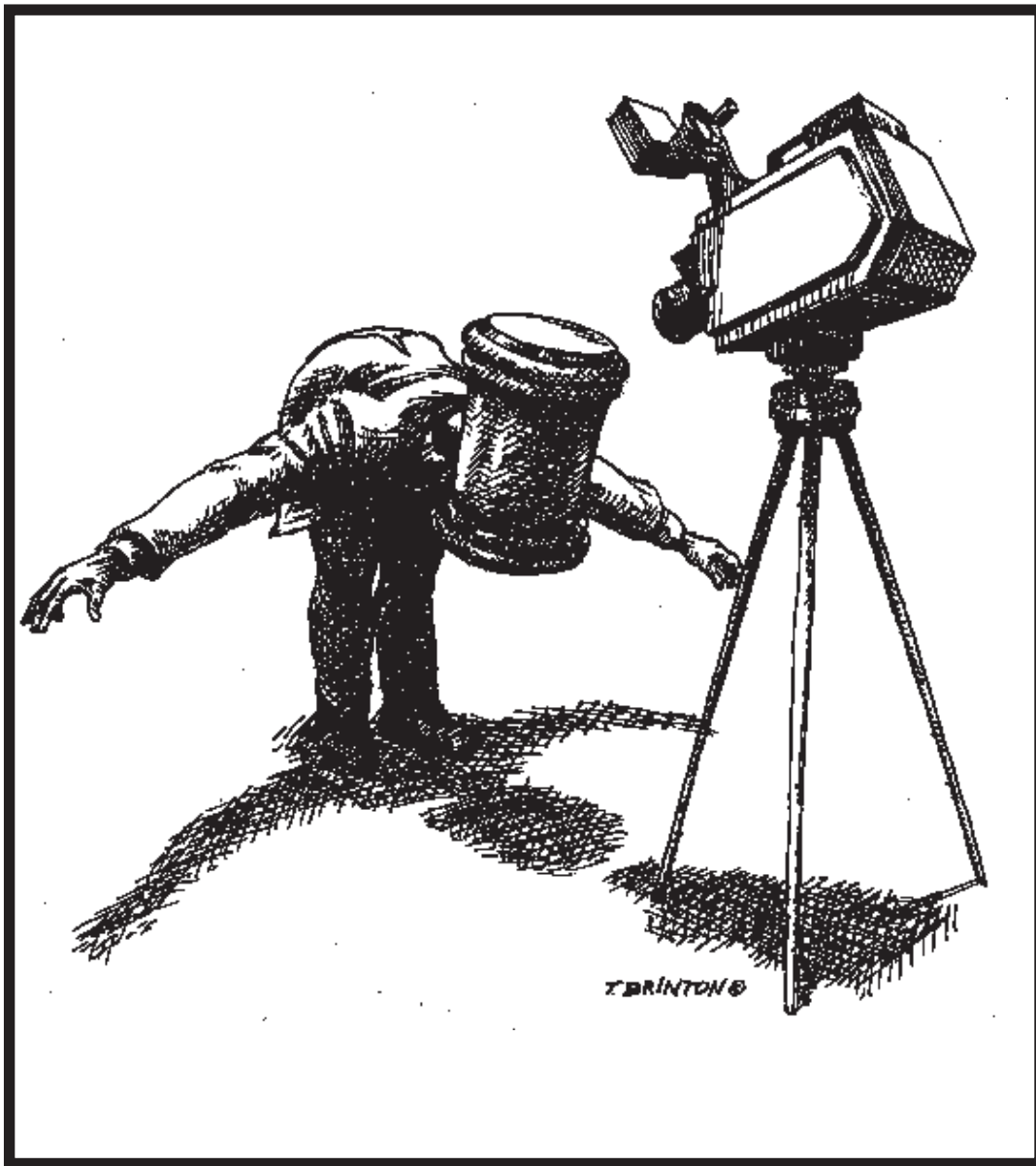
What to Say

Historically, counsel often took the position that absolutely nothing should be communicated publicly about a lawsuit. This was typically at odds with the corporate communications departments.

However, a compromise can be reached. When lawyers prepare to defend a case in the media, there should be no surprises.

A reporter always will seek comment from the defense, and these opportunities should be exploited.

An effective response to address opposing counsel's attacks directly would employ



pany's hard-earned reputation, community standing and financial bottom line.

It can spur more lawsuits, cause a consumer boycott, give a relatively benign story arms and legs that lead to lost consumer confidence and market share, and cause unquantifiable damage to long-term growth and acquisition strategies.

When developing media strategies, counsel and companies need to consider the reach and impact of working with the media. Companies should develop internal and external communications strategies that mirror the legal strategies in order to reach the media, shareholders, employees, the community, public officials and, in some cases, opposing counsel effectively.

the following strategy:

- Coordinate communication strategies with the client's corporate communications office to maintain message consistency.
- Identify and maintain a positive position.
- Deny untrue allegations or correct factual discrepancies.
- Assure consumers of the company's relevant policy changes.

In doing this, counsel should develop no more than four main talking points that will become the key messages to convey, and they should rehearse the delivery.

Be prepared to convey the messages in hard-hitting responses and speak in sound bites, condensed sentences

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that clearly and concisely convey the message in 15- to 20-second increments.

Even when a reporter generously offers counsel the floor during an interview, stick to the top three or four message points.

Give the reporter the tools (sound bites) to tell the story. If a reporter has not asked a question that lends itself to an answer with a prepared message, tell the reporter that there are a few more points to address. Usually, he or she will listen.

Just the Facts

Another step in the strategic defense of a case in the media is countering the opposing side's spin on the issue with facts.

If the defendant has been sued before and was victorious, that fact should be mentioned. For example, "We have tried these issues in front of a jury before and have won. We believe this case is equally baseless."

This kind of comment puts potential jurors on notice that other jurors found the same claims to be without merit while at the same time planting the seed in jurors' minds that they somehow would be remiss in a converse finding.

Psychologically, it often is difficult for jurors to go against conventional wisdom and find something different from their peers. In high-profile cases against big corporations, most juries want to be perceived as doing the right thing.

If the public sees high punitive damage awards as acceptable against a corporation that has behaved badly, another jury will be reluctant to send a conflicting message. The public then may think that the second jury did the wrong thing by sending the wrong message to society. These subtle pressures do influence jurors in this age of social consciousness.

Do Your Homework

Finally, and perhaps most important, counsel should know a lot about both the case at hand and the company in general.

When the media question counsel about litigation, they are searching for information on the corporation's general business practices.

During an interview, counsel for a corporation is both answering questions about a case and publicly perpetuating an image about that corporation. Counsel should work closely with the client's corporate communications department to impart a positive and consistent theme to bolster the com-

pany's image and protect the brand and reputation.

Negative press causes an entire corporation to come under scrutiny. Persistent negative press can neutralize years of work on public image and set a corporation back years in its branding and its quest for a positive reputation with the coveted consumer.

In light of that, counsel should not stop at defending the client but rather should extend the range of counsel to go further, with an affirmative stance on the corporation's business practices.

Instead of only defending a company's overtime policies and practices, point out positive things the corporation has done in the community or for its employees. In an infringement case, point out everything the defendant corporation has done to make advances within the relevant industry. It is more difficult for negative information to tarnish an existing good reputation.

Big Payoff

Although "giving good media" is often low on counsel's priority list in preparing for trial, solid upfront work with the media can have dramatic effects on a case.

Advanced communications strategies include the development of sophisticated "win-lose-draw" strategies to help position a company positively to its audiences.

Companies use targeted research and audience-specific approaches, including the use of third-party allies, to support a message or litigation position.

In many cases, corporate backgrounders, press releases and other fact sheets also may be developed for use with media and other important audiences surrounding the litigation.

The public is eager for information, and that information influences people, however subtly. Counsel no longer can bank on the ignorance of the jury.

It used to be that no lawsuit or scandal could cast a shadow on large corporations that gave people jobs, contributed to a community and put widely used, popular products on the market.

Today, that is no longer true. Even the bastions of good corporate reputations have taken hits. Nothing travels faster than bad news, and corporations defending themselves in the courtroom also are defending themselves with the public.

Employing these strategies can help ward off the one-sided, negative messaging that occurs without the active involvement of the defense.

Getting 'Psyched'

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They get along better nowadays, he says.

Wright came away impressed with Seplow's zealous advocacy, calling him a "dedicated true believer."

"He's not daunted by the odds," Wright says.

Suing government entities requires overcoming special legal protections that shields them from liability, Seplow says.

He faced many roadblocks after taking on the case of a mentally ill man from Los Angeles who spent two years in a New York prison because authorities mixed him up with a fugitive who shared his last name and birth date.

The state of New York settled for \$3.25 million; Los Angeles County paid out \$290,000; and the city of Los Angeles agreed to hand over \$225,000. *Sanders Lee v. County of Los Angeles*, CV96-7268 (C.D. Cal., settled May 17, 2002).

Deputy City Attorney Cory M. Brente says he let Seplow sign joint status reports on his behalf during the *Sanders Lee* litigation.

"I trusted the guy," Brente says.