

# Providing Context and Protecting Legal Privilege

By Amy V. Greenfield, Esq. and Lori Teranishi

With the media spotlight shining brighter than ever on the business world, companies involved in litigation need to worry not only about what happens in the court of law, but how it affects their reputation in the court of public opinion. The most compelling courtroom arguments may do very little to counteract a negative public image once a company becomes embroiled in a high-profile civil or criminal case. In some instances, the actual outcome of the case may be insignificant when compared to the damage inflicted upon the corporate reputation during a trial.

## LAW VERSUS MEDIA

The legal and media worlds operate by different rules. Lawyers focus on what happens inside the courtroom, where defendants are innocent until proven guilty. Outside the courtroom doors, however, the reverse is too often true in the media. As they aggressively argue their case in court, law firms, and their clients involved in newsworthy cases, should seek out litigation communications counsel to help ensure that they articulate their positions just as effectively to the public.

External litigation communications counsel helps protect a client's reputation during a high-profile trial by explaining legal arguments for the general public; by managing public perceptions; and by combating misinformation. This strategy is increasingly being used in legal proceedings, leaving counsel and their clients who skip this crucial defense at a serious disadvantage.

## WHY LITIGATION COMMUNICATIONS IS NOT PR

Litigation communications provides the context and clarity needed to give the general public a common sense understanding of the legal positions involved in the most complex cases. This is a very specific, targeted practice. It is neither spin control, nor is it, strictly speaking, public relations, which focuses on improving the client's general image. Litigation communications is designed to protect the image of corporations in litigation—or facing the prospect of litigation—whatever the outcome of the case.

Litigation communications experts understand the law and legal process as well as the media. They work with lawyers to ensure that their client's positions are articulated in a way that supports the client in the public eye without compromising legal arguments. They also understand how to make the company's position known to all its key audiences—media, shareholders, customers and business partners. While communicating with all of a company's stakeholders is always important, it becomes acutely critical during litigation.

Consumer and activist groups, along with many attorneys, have become very adept at managing stories. They plan news conferences and press releases to gain the maximum exposure and to inflict the maximum damage on their opponents. A company may not get a second chance to control the damage caused by these kinds of attacks.

## Litigation Communications: Essential Steps

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To manage the media response and prevent potentially lasting and costly damage to the corporate reputation, litigation communications should be an essential part of a company's approach to a high-profile legal case. In order to effectively deploy a litigation communications strategy, some key steps include:

- ✓ Retaining litigation communications counsel as early in the process as possible and creating the communications strategy so that the corporate position can be articulated from the very start of the case;
- ✓ Protecting attorney-client privilege;
- ✓ Constructing a separate engagement with a litigation communications firm that is separate from the client's normal public relations firm;
- ✓ Making sure that the litigation communications firm is hired by the law firm, and reports to the lead attorney;
- ✓ Making the litigation communications firm part and parcel of the litigation team;
- ✓ Developing a close working relationship with litigation communications counsel to craft the most effective arguments outside the courtroom;
- ✓ Understanding the milestones in the case in order to be prepared for media queries and news coverage; and
- ✓ Monitoring and reacting quickly to changes in the way the case is being reported or to shifting public sentiment.

### BLENDING TWO STRATEGIES

An effective approach to litigation communications encompasses strategic counsel regarding the public implications of legal decisions, as well as planning for communications before, during and after resolution of a legal case. It is essential that a litigation communications strategy work hand-in-hand with the overall legal strategy so that lawyers remain in charge of the case as effective communications outreach supports that effort.

The most important step is to develop sound communications protocols that best serve the client and protect confidential legal information through attorney-client privilege. For that reason, the attorney and not the client should directly retain the external litigation communications

counsel. Generally, attorney-client privilege will apply if a company provides strong proof that its public relations counsel, whether in-house or at an agency, enables counsel to provide legal advice.

### USING DUE DILIGENCE

The next step is to conduct due diligence, including research both inside and outside the case to review potential media issues. This can, for example, include a review of how media-savvy opposing counsel is. Even major lawsuits typically make news only a handful of times, and each opportunity should be used to the best advantage. Thus, it is crucial to benchmark a case and anticipate the major milestones that will be staffed by

media, such as opening statements and closing arguments, and also to be prepared for when the media highlights sensitive issues.

This does not mean aggressively pursuing the media at every turn. Litigation communications should help lead the legal team to the most effective proactive and reactive media responses, as appropriate. The organization must be ready to respond to inquiries from the media and other audiences immediately. Clients should not cede by default to the opposing counsel's media or third-party strategies.

Since much of the information to be communicated during litigation is general or factual, materials should be prepared in advance for each major litigation benchmark. Communications materials to develop include core messages, draft holding statements, draft press releases, corporate backgrounders and Q&A documents. Materials should be developed to reflect scenario planning to respond to whatever the outcome of the case may be. These materials should be honed to resonate most effectively with the public.

The next step is to work effectively with the media to ensure that the client's message gets out and that media coverage is balanced. It is essential to give the media and other critical constituencies accurate, honest and timely information about what is happening and what to expect. By providing information, you can establish credibility with media representatives and ensure the

accuracy of news reports.

### **"NO COMMENT" DOESN'T WORK ANYMORE**

Taking a "no comment" strategy is no longer realistic in a high-profile case. Misinformation, mischaracterizations and material misstatements, which are usually based on inaccurate and fragmentary information, must be countered. Companies that fail to respond adequately to breaking news, can face a Herculean task in repairing the damage caused by an ill-timed "no comment."

By developing and deploying an effective litigation communications strategy, however, counsel can manage media coverage during a high-profile case and minimize the potential damage caused by a failure to respond adequately to negative perceptions being generated by the opposing side. It is essential to keep in mind, that the company's good name is one of its most valuable assets. Litigation communications helps protect that very valuable reputation. **PRN**

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