



Bankruptcy

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Expert Analysis

Litigation Communications In Times of Crisis

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2008 was a stunning year for the world economy and the financial marketplace, as international powerhouses such as Lehman Bros., Washington Mutual and Bear Stearns filed for bankruptcy or were subsumed by larger companies at a fraction of the cost. September saw Lehman and WaMu file the two largest Chapter 11 bankruptcies in American history within 10 days of each other.

This year is shaping up to be no better, especially for stalwarts of the American auto industry, as Chrysler has filed for bankruptcy and experts fear that General Motors is also on the brink of doing so.

In these unprecedented and often confusing times, it is as important for companies dealing with a crippling financial crisis to make a case in the court of public opinion as it is for them to protect themselves in a court of law. Managing communications in a timely and efficient manner can play a vital role in the mitigation of a crisis, and an effective litigation communications strategy can make an important difference.

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Bankruptcy is the ultimate corporate crisis. The futures of the company and its employees, as well as potentially billions of dollars in shareholder and creditor funds, are all at stake. Personal and business reputations are on the line as the media dissect failures, assign blame and try to predict the outcome.

As participants hammer out and deploy the best legal strategy to handle bankruptcy, too often they overlook the world outside the courtroom and ignore the crucial step of developing a compelling media relations and litigation communications strategy.

This failure to communicate, however, can have very real, negative consequences, as a successful legal or congressional outcome may depend in part on how the handling of the crisis is perceived in business circles and by the general public.

An effective communications strategy provides crucial information to all stakeholders in a bankruptcy and ensures that the party's actions are clearly explained to creditors, financial analysts, the media, potential acquirers and employees.

Litigation communications experts understand the interplay between the law and legal processes on one side and the media and public opinion on the other. They know how best to articulate a client's position to win support in the public eye without compromising legal arguments. In a time of crisis, providing clear information to all stakeholders may be the key to a successful reorganization or settlement.

Heightened Media Scrutiny

While big bankruptcies are always newsworthy stories, now more than ever the media is paying closer attention to corporate failures amid the fallout of the current credit crisis and the attendant rise in bankruptcies.

In fact, business bankruptcy filings rose 42 percent in 2008 to 33,822 from 23,889 the prior year, the Administrative Office of the U.S. Courts reported, and bankruptcy lawyers are expecting that trend to continue. Niraj Chokshi, *Courts Post Sharp Rise in Bankruptcies*, THE RECORDER, Apr. 17, 2008.

Moody's has reported that the number of companies with the weakest of liquidity levels had more than doubled from June 2007 through March 2008 to 47, with a total rated debt of \$34.7 billion. Jeffrey McCracken, *Most Firms' Liquidity Levels Fall*, WALL ST. J., Apr. 17, 2008, at C2

Print, online and broadcast news outlets are all acutely aware of how the collapse of companies such as Washington Mutual and AIG turned into top news stories. Such stories are no longer relegated to the business or finance sections but have become front-page, leadoff stories for publications around the world. As more and more companies move into bankruptcy, media scrutiny intensifies.

One major factor in the heightened media coverage is the growth of around-the-clock and around-the-

world business news outlets always eager for the next big story. Business news has moved from the back sections of local newspapers to global prominence and flows around the world in seconds via television and the Internet, 24 hours a day, seven days a week.

Companies that fail to respond adequately to breaking news or public sentiment can face a Herculean task in repairing the damage cause by an ill-timed "no comment."

A well-managed litigation communications strategy can help companies frame their stories to the media truthfully without alienating the public or influential shareholders.

In November, for example, executives in the auto industry were pilloried in the media for appealing to Congress for billions in financial support, after having traveled to Washington in private jets and staying in luxury hotels. The disconnect between the two images is jarring.

A similar media backlash severely hurt the public reputation of AIG, after it was discovered that agents from the company's life insurance subsidiary, AIG General, attended a lavish luxury retreat mere days after AIG received an unprecedented \$85 billion government bailout.

Despite the fact that the retreat was planned months in advance of the bailout and rewarded insurance sales agents, not corporate executives; headlines such as "AIG executive retreat irks lawmakers" and "AIG's posh retreat offends taxpayers" spread throughout the world and framed the troubled conglomerate as greedy, selfish, insensitive and out of touch.

By the time AIG released statements that the company regretted the unfortunate timing of the event and promised "to take all measures necessary to ensure that these activities cease immediately," it was seen as too little, too late.

By asking for billions of dollars in taxpayer-funded support while promoting a public image of excess and expense, these companies, once considered

pillars of industry, are increasingly seen by the public as hypocritical and deserving of their fates.

A well-managed litigation communications strategy can help companies frame their stories to the media truthfully without alienating the public or influential shareholders.

As a first step, it is crucial to recognize that the legal and media worlds are driven by different demands. Lawyers operate according to established court procedures and build their cases with great care, while reporters must answer to the demands of the news cycle. Journalists may have only hours, if not minutes, to get a story out.

If only one of the parties to a bankruptcy is making its case to the media, the positions of the others are unlikely to be explained adequately in a short print story or a broadcast sound bite. Over the life of the case, a party who lacks working relationships with the reporters covering a high-profile bankruptcy can expect to see the opposing sides receive more in-depth (and possibly more favorable) coverage.

If a participant is not actively seeking to advance his case in this court of public opinion, even the most compelling courtroom arguments may not be sufficient to counter a negative public image built by default. Mishandling messages to the media can result in long-term damage to a client's corporate reputation that even a win in the courtroom cannot overcome.

A failure to deploy a positive media strategy can have real business impacts that play out in declining share prices, adverse customer buying decisions or even the outcome of the case itself.

With the intense media scrutiny given to high-profile bankruptcies, in some instances the actual outcome of the case may be insignificant when compared to the reputational damage suffered during the proceedings. Lawyers, by training and necessity, focus on what happens in the courtroom rather than on the courthouse steps. That means that while everything may be well in hand during the trial, the client could be subjected to a pummeling in the media.

During litigation lawyers are often so engrossed in the facts of the case that it is difficult to turn around and explain a client's position to the media and outside audiences, particularly in the context of a complex bankruptcy.

Litigation communications can mitigate this risk by providing the context that helps the wider public gain a commonsense understanding of the legal positions involved.

A failure to deploy a positive media strategy, however, can have real business impacts that play out in declining share prices, adverse customer buying decisions or even the outcome of the case itself. While attorneys focus on the most effective means of arguing a case within the courtroom, the media offers a very efficient way to disseminate information to key stakeholders outside the courthouse.

The Role of Litigation Communications In a Bankruptcy

Bankruptcies are highly complex matters that do not always lend themselves easily to explanation in short news stories. External litigation communications counsel adds value by helping to translate legal arguments and complex financial information into language that can be understood by the media and the general public.

Media-savvy attorneys already are deploying this strategy, leaving opposing counsel and their clients at a serious disadvantage. Companies often underestimate how public opinion can affect a case as events on the legal side unfold. This is particularly true in cases where developments are followed closely by the business media, and negative coverage can have a real impact in the markets and on investment decisions in the financial community.

Far too often, however, decisions on how to interact with the media are made purely on the basis of legal risk without taking into account the reputational dangers that can cause equal (if not greater) damage than an adverse verdict or judgment.

Litigation communications can mitigate this risk by providing the context that helps the wider public gain a commonsense understanding of the legal positions involved.

To improve a client's general public image, litigation communications professionals play a very targeted role that is neither spin control nor public relations. They bring an understanding of media, law and legal processes and work with lawyers to articulate their client's positions to the public without compromising legal arguments. The practice of litigation communications is designed to protect the image of corporations involved in litigation or facing a potential lawsuit, whatever the outcome of the case.

It is important to understand not only the media but also how other groups are using the media to promote their viewpoints. Consumer and activist groups have become very adept at managing stories. They plan news conferences and press releases to gain exposure and to inflict the maximum damage on their opponents. A company may have only a short window of opportunity to control the damage caused by these kinds of attacks, and they may not get a second chance.

A wide variety of media channels need to be taken into consideration, from trade publications, such as legal or

industry magazines and newsletters, to general business publications and newspapers, and even direct channels of communication, such as e-mails and phone calls.

Along with the established media, new forms of journalism and information sharing pose challenges for companies. As candidates for public office in state-wide and national races have learned, often the hard way, the information flowing across the Internet can have a powerful impact.

All forms of dialogue outside the courtroom may have a long-term impact on a company's reputation, whether they be blogs and the associated user comments, videos posted to online sites, or even podcasts and webcasts.

Unfortunately, the business and bankruptcy outlook for companies, both large and small, remains grim. It will take several months, if not years, before the economy begins to stabilize again and multimillion-dollar bankruptcies are no longer an everyday occurrence.

However, with strong litigation communications strategies, companies involved in bankruptcy and other high-stakes, bet-the-company litigation can better prepare themselves to weather the storm, both inside and outside the courtroom.



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