

# CHICAGO LAWYER®

VOLUME 30

A PUBLICATION OF THE LAW BULLETIN

NUMBER 12

## Lawyers learn how to cross the communication divide

by Olivia Clarke

**M**any high-profile cases get tried not only in a courtroom, but also in the court of public opinion.

Lawyers and public relations experts say responding with “no comment” isn’t always the best solution when the opposing side talks to the press or when incorrect information reaches the public.

“Companies really realize that you can win in the court of law, but if you lose in the court of public opinion it can affect your company even more than losing a legal outcome,” said Amy Greenfield, managing partner of Van Prooyen Greenfield, a New York City and San Francisco-based law firm that specializes in providing strategic communications counsel.

Communication consultants say they get invited more often to the legal strategy table to help develop good litigation communications practices. Today’s 24-hour news cycle often means a public response needs to occur more quickly.

“‘No comment’ can look awfully defensive,” said Tom Frederick, partner and chair of the litigation department at Winston & Strawn. “In

dealing with the media, the biggest challenge is just making sure you send a clear message that is consistent with the message the client wants to send, and also not offensive to the court, or doesn’t raise collateral issues about the litigation itself.”

### Defining a need

The public’s interest in litigation has increased because so many different avenues exist today to learn about these cases — from mainstream media outlets to investigation shows, specialized Internet sites and television stations, said Lori Teranishi, chief operating officer and practice leader at Van Prooyen Greenfield.

---

**Keegan: “[Plaintiffs] recognized that they could immediately impact the court of public opinion by serving up the juiciest allegations to the media.”**

---

The firm participated in the 2007 Legal Marketing Association Midwest Conference in Chicago, where two members of the firm discussed litigation communications, which is



Tom Frederick



Sheila Finnegan

defined as managing the court of public opinion in high-profile or high-stakes litigation, protecting the client’s image, and providing counsel on the public implications of legal decisions.

The Internet disseminates information about litigation more rapidly than traditional media, which means a legal team must have a strategy in place immediately so they can be proactive, Teranishi said.

It can be difficult to correct a misstep later on because of how fast information can spread, she said.

“One trend we have noticed recently is that general counsels and their outside counsels have become more aware of the need for communication counsel in matters likely to

attract media attention,” said David Saltz, senior vice president and partner of Fleishman-Hillard, Inc.

“In a sense, the general counsel and corporate counsel are responding to a plaintiff’s bar that is increasingly aggressive and sophisticated in their use of traditional and digital media,” he said.

Litigation matters used to be handled outside the glare of the media, and lawyers would say they could not comment on ongoing litigation, said Charlie Stewart, Chevron Corp.’s manager of issues and litigation communications.

That mindset changed when anyone could publish his or her opinions on the web, Stewart said. Many companies eventually learned the importance of being proactive in

communicating their message to the public, Ohlemeyer said.

The public began showing interest in high-profile litigation, in part, when the O.J. Simpson trial was televised, said Bill Ohlemeyer, vice president and associate general counsel at Altria Group, Inc., parent company of Philip Morris. People saw the

---

**Bisceglia: "I think a lawyer has to judge each case on its individual merits and based upon the facts and circumstances."**

---

litigation process in real time, and the challenges, drama, and money associated with these types of cases.

#### **Sending a message**

Fears sometimes exist that talking to the media will anger the judge, or raise the public profile of the litigation, Ohlemeyer said.

But the wrong message can reach the public if no one comments on a case.

There are many examples where the legal team performed well in the courtroom, but the publicity received during the process still put the clients' future in jeopardy, or put the company out of business, said Michael Poulos, a senior litigation partner and member of DLA Piper's executive committee.

A prime example is Arthur Andersen. The accounting giant ultimately prevailed against its criminal allegations, but the publicity surrounding its situation drove nearly all its clients away, Poulos said.

Some lawyers do not want

to comment about litigation, but that response can be counter-productive, said Nick Kalm, president of Chicago-based Reputation Partners, a public relations agency that handles litigation-related matters.

Even if the legal team decides to not comment, the group should consult with communication experts and prepare statements that may be used if that decision changes, Kalm said.

An ill-timed or ill-said comment can prompt other people to file their own lawsuits, he said. Good lawyers will not let their clients give depositions without preparing them, and the same preparation should be done for those who will talk with the media.

Stakeholders and audiences important to a client may be getting information about the case from the media. Talking to the media can be an opportunity to reinforce what was said in court or to modify that message, Kalm said.

Such details as what happened, and what the next step will be are areas that can be discussed without revealing litigation strategy, Ohlemeyer said.

Historically, communication experts were an afterthought in legal disputes, said Bill Keegan, Chicago-based executive vice president and director of Edelman's U.S. Crisis and Issues Management Practice. But that changed dramatically because of class-action lawsuits involving areas like tobacco, food, and asbestos.

"[Plaintiffs] recognized that they could immediately impact the court of public opinion by serving up the



Joseph Bisceglia



Sheldon Zenner

juiciest allegations to the media and putting pressure on the defense, the companies being attacked or charged, and kind of force their hand," Keegan said.

#### **Taking steps**

Lawyers who choose to comment publicly about litigation should remain consistent in their message, keep that comment short, and not cross any lines set by the judge or local rules, said John T. Hickey, Jr., a litigation partner and executive committee member at Kirkland & Ellis.

"I'm a courtroom lawyer who has got to stay out of trouble with the judge," Hickey said. "What you can do properly varies from venue to venue, and within that venue, from judge to judge. Some judges say, 'I can't tell you to not talk to the press, but let me tell you what will make me pretty unhappy.' Know that line."

Hiring a public relations firm can be money well spent, said Michael Philippi, an executive committee member and chairman of Ungaretti & Harris' litigation department. Lawyers need to participate in communication strategy, but communications experts have special training that can help

when dealing with the media, he said.

"The last thing you want is an angry or contrite CEO to start going out there and saying whatever he or she thinks ought to be said," he said. "It has to be controlled."

Greenfield, from Van Prooyen Greenfield, said the first steps should be to hire a public relations firm, and develop communications protocol to protect the attorney-client privilege. Media training, and enlisting the help of quotable third parties can also be helpful, she said.

Prepare communication materials in advance, and tweak the information as the case goes on, she said. Her firm often prepares a question-and-answer document that will help the spokesperson talk about the case.

Lawyers and company representatives should meet with media consultants to frame a simple message that remains consistent with the case's position, said Sheila Finnegan, partner and co-leader of the Chicago litigation practice at Mayer Brown. Having one person who speaks to the media usually works best, Finnegan said. Speaking with the media can be a risky proposition because

---

a lawyer can be unsure of the reporter's agenda or how the information will be used, said Joseph Bisceglia, a Jenner & Block partner and president of the Illinois State Bar Association.

"I think a lawyer has to judge each case on its individual merits and based upon the facts and circumstances," he said. "If a lawyer does decide that it is necessary to communicate to the press, they should make sure that the statement is short and concise. They should choose their words very carefully."

Lawyers must determine what their clients want, and whether they want their legal teams talking to the media, said Frederick, from Winston & Strawn. Many clients have goals that are broader than the case being handled, he said.

Ohlemeyer, with Altria Group, said his company has done regular briefings when major litigation went to trial. It can help inform the media about the details, and encourage an accurate story, he said.

"I try to be very careful about being quoted on behalf of a client, and recognize that my ethical duties are to advance the position or cause of my client, while remaining true to the facts and the law," said Sheldon Zenner, national chair of the white-collar practice group at Katten Muchin Rosenman.

"Sometimes that allows me to speak in detail about the case and my client's perspective on the case, but in other instances it may be in my client's best interest to simply say nothing."

A lawyer must particularly watch what he or she says to the media when representing a

---

**Finnegan: "You never know in advance what the courts are going to decide. When you are talking to media consultants you do have to be careful."**

---

publicly traded company.

A lawyer could publicly describe a client as innocent, but then the Securities and Exchange Commission could say that the company must provide all the facts and documents that support those public statements, Zenner said.

A public relations expert must act as the "accuracy police" and not let inaccuracies go unanswered, said Keegan, from Edelman. A rapid response in the first 24 hours of a crisis is important, he said.

"If you aren't out in front with your side, you run the risk of losing control, and that information vacuum is filled with something [else]," he said.

Clients sometimes create web sites that allow them to talk directly about the case without the media filter. There are benefits to working with reporters, on the record or on background, so they understand the case, Keegan said.

Lawyers should advise their clients upfront about a litigation and communication plan, said Poulos, from DLA Piper.

Media comments can sometimes turn into leads, ideas, or potential witnesses that the other side had not considered, he said. The legal

team must recognize that a public statement can backfire or be misconstrued, and assume everything said in the media will reach the other side.

Some clients may want their lawyers to "chase down all the loose chickens" and fight every public battle that surfaces, Poulos said.

That attitude can attract unnecessary attention. The legal team should focus on the real hits that need to be contained, he said.

"The inconsistency of your message can be just as catastrophic as anything you deal with," Poulos said. "You don't want to be out in the marketplace communicating a story that is ultimately inconsistent with what you say or do in the courtroom."

#### **Following the rules**

When the legal team talks to media consultants or public relations firms, lawyers must research if those conversations are privileged or if they could be disclosed, said Finnegan, from Mayer Brown.

During Martha Stewart's proceedings for insider trading, the judge ruled that because her lawyers hired communications consultants for the purpose of giving legal advice, that information was protected by the attorney-client privilege, she said.

But the courts will sometimes find that the PR firm was hired for ordinary PR advice, and will say that communications with the PR firm are not attorney-client privileged and must be disclosed, she said.

"Every time you do a media campaign, it is not privileged," Finnegan said. "Sometimes clients talk directly to a PR firm and that

makes it a little bit more likely that it is not privileged. You never know in advance what the courts are going to decide. When you are talking to media consultants you do have to be careful because it might be discoverable."

Attorney-client privilege is generally protected when there are confidential communications between attorneys and public relations consultants, and when attorneys hire these public relations consultants to provide counsel about the media for a particular case, according to information Van Prooyen Greenfield provided at the LMA conference.

Public relations experts must do more than "provide spin" on an issue for it to be privileged, Greenfield said.

Attorney-work product privilege is not absolute, and privilege has been waived if the PR adviser works outside the scope or is not working at the direction of counsel, Greenfield said.

Steps to protect these privileges include using an appropriate engagement letter that notes that the advice is for the legal team, and not for general PR; and has been retained to provide counsel for the specific case, she said.

Several rules in the Illinois Rules of Professional Conduct address what might or might not be appropriate for lawyers to say with respect to pending litigation, Bisceglia said.

For example, Rule 3.6(a) says, "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public

---

communication if the lawyer knows or reasonably should know that it would pose a serious and imminent threat to the fairness of an adjudicative proceeding.”

And Rule 8.2 (a) says, “A lawyer shall not make a statement the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicative officer, public legal officer, or of a candidate for election or appointment to judicial or legal office.”

Additional and more specific rules exist when handling criminal cases, he said.

“The bottom line is, it is important for lawyers to start with the proposition that they should remind themselves what is appropriate and what isn’t,” Bisceglia said.

“One of the big exceptions in [Rule 3.6(d)] is that a

lawyer can make a statement that might otherwise be prohibited under the rule to protect the client from the substantial undue prejudicial effect of recent publicity that was not initiated by the lawyer or client.”

#### **A few examples**

Public relations experts and local lawyers offered examples of companies that demonstrated good communications practices with the media and the public.

Frederick, from Winston & Strawn, said Mattel has responded well in the media to the lead paint controversy involving the recalls of certain toys. The company apologized not only to its consumers, but also to its Chinese suppliers, saying the recalls were related to a design flaw and not necessarily mistakes made by these manufacturers.

Although litigation may follow, Mattel’s apology may

help take the sting out, he said.

“They decided that they had to make a very open and complete apology early on,” he said. “Preserving their reputation was more important than the impact on their litigation position.”

Keegan, from Edelman, said the communication specialists working with Martha Stewart during her trial effectively advanced her position each day. She countered the media’s response and spoke directly to the public through her own web site and advertisements.

KPMG effectively controlled its publicity and communicated its message well in connection with its tax-shelter litigation, said Poulos, from DLA Piper. The company recognized its responsibility, he said, and suggested in the marketplace that it plans to move forward.

Chevron is currently

involved in a lawsuit where 47 plaintiffs allege that the company didn’t clean up billions of gallons of toxic wastewater in Ecuador’s jungles.

Stewart, from Chevron, said he believes his company has done a good job working with the media.

“Because we are starting to become a lot more proactive in the United States and because we are bringing our story and evidence to a whole variety of groups, they are starting to say, ‘let’s take a look at this,’” he said. “And they are starting to say, ‘Chevron did the right thing.’”

“We take great pains in making sure our positions are crystal-clear,” he said. “We back them up with factual information, and reference particular scientists or third parties. We have proof points that prove our case.”★