



Core Competencies

Trial by Newswire

When a lawsuit turns into a media circus, success is measured in inches and seconds vs. verdicts.

By Steven B. Hantler



DOONNA TEREBEK

Hantler: Litigation managers must develop some of the skills inherent in public relations or communications positions.

All the world's a jury. Lawsuits are no longer tried exclusively in the courtroom. They are also tried in the court of public opinion, where customers, shareholders, and potential jurors sit in judgment. As my first article in this four-part series (see *Litigation Management*, Spring 2003, p. 19) noted, the trial bar has long recognized the courtroom benefits it obtains from driving public opinion against business. This issue's column will outline the steps to developing an effective litigation communications program to preempt false claims. The two to follow will outline the other core competencies—issues management and relationship management—essential in today's litigation environment.

The trial lawyer industry wages public opinion campaigns to discredit business defendants and their products or services before, during, and after trials. In an interview that appeared in the May 17, 1999, issue of *The New Yorker*, a lawyer recounted the

strategy meetings of the Castano Group—a cabal of trial lawyers that led the assault against the tobacco industry and specializes in class actions: "A lot of what we discussed was how to talk about the [issue] to the general public. This is a war that has a lot of fronts. One of the fronts is the battle for the hearts and minds of the American people."

In the Driver's Seat

Shaping the climate of public opinion serves a dual purpose for trial lawyers. First, it raises the stakes so high that business defendants will seek to settle

lawsuits for a premium rather than risk further damage to the company, product, or service image. Second, for those cases that do not settle, it prepares the battlefield in the courtroom so that when trial lawyers make their arguments before juries, heads nod in recognition of what was said during the media campaign and large damage verdicts follow.

The trial lawyers' primary campaign messages are that corporations put profits ahead of safety and fair dealing and that large damage awards are the only way to get business to act responsibly.

With these and other messages reverberating in the media and our popular culture—think of *Erin Brockovich*, *A Civil Action*, *The Rainmaker*, and *The Practice*—trial lawyers have succeeded in creating a climate of opinion predisposed to question the motives and actions of corporations. Trial lawyers latch onto the distrust they have seeded, portraying their clients as

IN BRIEF

Effective litigation communications requires competency in:

- Anticipating which cases will generate media coverage
- Assembling a strong communications team
- Responding effectively to media inquiries
- Ensuring balanced coverage by developing media allies



© MUG SHOTS/CORBIS

To win in the court of public opinion, defense attorneys will have to fight for equal time—and objective coverage—from the media.

unwitting victims of corporate greed who deserve the sympathy and help of jurors. This is why a great deal of jury deliberation revolves around what seems intuitively right and fair. Jurors are primed to ask, "Why should I follow the law to the letter when helping the little guy will cost no one but the big, rich corporation?"

Unfortunately, these false messages work all too well. They mislead juries, generate judgments of millions (and now billions) of dollars, and undermine share value as well as company and product reputation. In short, the trial lawyers have blurred, to the point of elimination, the lines that traditionally separated the courtroom, product and service marketing, and customer, public, and shareholder relations.

Sharing the Road

Until recently, most companies have allowed the trial lawyers' false messages to go unrefuted. Too often, we let

the trial bar dictate the terms of the public debate by failing to respond to direct attacks and refusing to aggressively advance our messages. But conceding all the inches in print media and all the minutes in electronic media to the trial lawyers has its consequences—consequences that can encumber companies in the courtroom and undermine corporate reputations built up over decades. Already, vilifying corporations in the media has played a role in influencing public perception of a lack of corporate malfeasance. According to a 1998 public opinion survey, 62 percent of Americans believe a corporation's "no comment" about a lawsuit means that company is covering up wrongdoing. In addition, 48 percent of Americans are less likely to buy a company's products when that company is *accused* of wrongdoing in a lawsuit.

Faced with this reality, an increasing number of companies are developing litigation com-

munications programs. While programs need to be tailored to a company's current and anticipated needs, the following is a simplified outline of the key steps needed to develop an effective litigation communications program.

Form an effective partnership between the litigation manager and the company's communications counterpart. Each must know the other's goals, risk tolerance, and constraints to optimize the trial and public relations result for their company. For example, the communications professional must understand that more, rather than less, comment may cause a particular trial judge to view the company with jaundiced eyes. And the litigation manager must understand that the "no comment" approach is *not* risk free in either the legal or communications context.

Consult with and retain a public affairs/issue management firm that specializes in litigation communications. Organizations may need to look beyond their existing public relations support as most traditional public relations agencies do not have expertise in the relatively new discipline of litigation communications.

Understand the goals and constraints of the media environment. Factors to consider include:

- Victims make good news stories.
- Reporters act as "problem solvers" on behalf of victims.
- Corporate greed and indifference make good news stories.
- The time pressures of deadlines and the fact that many

Forty-eight percent of Americans are less likely to buy a company's product when that company is accused of wrongdoing in a lawsuit.

newsrooms are understaffed do not allow journalists to track down all the facts.

- Self-appointed “consumer advocates” are fully briefed with catchy sound bites by the trial lawyers and made accessible to the media.
- Not all reporters are trained to discern facts from allegations.
- Reporters often have their stories written or produced before contacting a defendant for comments.

Develop a media plan for a specific case or issue. This includes taking into account the media environment and:

- Developing and testing key messages that clearly articulate your position and resonate with the public.
- Creating media products that reinforce those messages, including fact sheets, question-and-answer sheets, press statements and releases, expert referral lists, opinion and editorial pieces, and video footage of company spokespeople and outside experts addressing the topic.
- Identifying spokespeople—both internal and outside third parties—and, if necessary, providing them with media training.
- Researching and identifying the media that may cover the lawsuit.
- Conducting “soft soundings,” which means calling reporters without fanfare to determine if they intend to report on the lawsuit.
- Briefing the media before, during, and after the trial to ensure, to the extent possi-

Too often, we let the trial bar dictate the terms of the public debate by failing to respond to direct attacks and refusing to aggressively advance our messages.

ble, that reporters do not enter a case having heard only the arguments of the plaintiff’s lawyers.

- Being prepared, if necessary, to deploy your messages—reactively in many cases, but also proactively if circumstances demand it.

Coping With Media Scrutiny

When a lawsuit or issue sparks a media frenzy, there are two fundamental goals litigation managers should aim to achieve. First, to have the entire story told—not just the trial lawyers’ version—and second, to shape the terms of the public debate so that the trial lawyers are responding to them, not the other way around. While these goals are not reachable in every instance, expanding the inches and minutes devoted to our messages increases the balance of the coverage.

Effective litigation communications, in turn, requires the litigation manager to develop some of the skills inherent in public relations or communications positions. These required competencies include being able to:

- Anticipate which cases will generate media coverage. Key factors include the potential size of the verdict, the trial lawyer’s history of dealing with the media, prior media interest in the case, and prior interest in the case by surrogates of the trial bar.
- Assemble a litigation communications team well in advance of the trial to help shape the trajectory of the media coverage.

- Ensure (with the communications specialists) that media products are prepared and approved before the trial, not after the verdict. Preparation is the key to a successful litigation communications program.
- Become a spokesperson and respond, in real time, to media inquiries in plain and compelling words. This requires developing a clear understanding of the differences between your responsibilities as a spokesperson (delivering key messages) and those of legal counsel (making legal arguments).
- Develop relationships with the media and allies—relationships that can help ensure more balanced coverage and create support for your key messages.
- Preserve the lawyer-client privilege or work product protection that may attach to certain documents and ideas.

Litigation communications is a required core competency of litigation managers in today’s litigation environment. The litigation manager must anticipate and shape the trajectory of emerging issues or face being overwhelmed by a perfect storm of key stakeholders—trial lawyers, media, regulators, shareholders, and customers whipped up into a frenzy by misinformation.

Steven B. Hantler is assistant general counsel for government and regulation at DaimlerChrysler Corporation. E-mail him at sbh2@daimlerchrysler.com.