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Courting Public Opinion

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A lot of what happens before the bench depends on what has appeared on television and in the newspapers. To avoid being indicted early by the "public jury," you need to consider how the press can help, and hurt, your case.

ROSS SANDLER

ENVIRONMENTAL LITIGATION has as much to do with the media as it does with the law. Public health and ecology issues arise in even the smallest environmental controversy, making litigation of even modest consequences newsworthy. And when the press gets interested in a case, strange things happen. A lawyer's careful briefs and oral arguments may be completely undone by a client's media moves. Or vice versa. A case with little chance of success on the merits may become threatening and powerful simply because of press interest.

The power of the media has not gone unnoticed by environmental litigants. Plaintiffs in environmental cases use pleadings like press releases. They play to a higher court—the court of public opinion—while defendants, often mistakenly advised by their attorneys to be mum, hope the bad news will only be a one-day story. But that rarely happens. As a result, press strategy inevitably becomes an integral part of litigation strategy.

The simple act of filing a complaint in an environmental lawsuit is a newsworthy event. It is the opening shot, the starting gun, the kickoff. Consequently, the plaintiff controls press timing and content. It is the plain-
Although filing a complaint often creates news, the dismissal of a complaint is almost never newsworthy. Vindication is a lonely business; there is little chance that anyone will hear about a complaint being thrown out of court. Moreover, all intermediate discovery, brief writing, and motion practice might as well happen on another planet. Unless a lawyer commands attention in the manner of Alan Dershowitz, his or her intricate arguments and briefs will never rise to public notice.

If the defendant wants to get its side before the public, it needs to be in the first article that reports the complaint. There are rarely follow-up stories. If the defendant announces "no comment" or "we're studying the complaint," it will probably never get a second chance. People believe the worst, and limp responses confirm guilt. Typically, defendants will be relegated to the last paragraphs while the plaintiff's story will be repeated in detail. But two years later when the victory is the defendant's, no one will know.

Most environmental defendants do not win dismissals, especially against governmental plaintiffs. But, since the defendant is generally aware of an investigation before the complaint is filed, it has a number of options in dealing with the press in order to make the best of a poor hand.

For example, on July 11, 1991, Alcoa agreed to pay $3.75 million in criminal fines and $3.75 million in civil penalties for hazardous waste violations at its Massena, New York, facility. The criminal fine was the largest ever paid for a hazardous waste violation. New York Attorney General Robert Abrams, the New York Department of Environmental Conservation, and Alcoa each issued separate press releases.

Abrams, pursuing a tough law enforcement image, detailed the violations and emphasized the record size of the penalty. The attorney general stated that "Alcoa illegally kept quantities of hazardous waste at the site, prepared false documents to conceal what it was transporting, failed to obtain required state permits, and dumped hazardous solutions into the environment." In fact, Alcoa shipped 33 railroad cars of PCB-contaminated soil to Alabama, and admitted to dumping hazardous wastes down a manhole approximately 2,000 times since 1985. Moreover, two Alcoa employees pleaded guilty to criminal charges and paid fines.

The same day, Alcoa issued its own statement, which is a model of how a corporation can take charge of a disastrous situation. The statement, which Alcoa attributed to its chairman, Paul H. O'Neill, read: "Alcoa has a clear environmental policy which was not followed in this instance. The manager of the Alcoa plant at Massena first identified the violations that formed the basis for this settlement and brought them to the attention of New York State officials. Since the problems were identified, Alcoa has fully cooperated with the Department of Environmental Conservation and the attorney general and has entered into this agreement because it was clear that employees of the company had, in fact, violated the law and company policy. Under the law, the company is responsible for wrongful acts by its employees. Alcoa has accepted this responsibility. With this unfortunate episode behind us, we can now turn our full attention to meeting our environmental obligations."

The Department of Environmental Conservation issued its separate press release which read as if Alcoa had won its Environmentalist of the Year Award. The initial quote in the DEC press release, attributed to Commissioner Thomas Jorling, read, "Alcoa's forthrightness and commitment to bring the Massena plant into full compliance with New York's environmental laws underscores our belief that environmental protection and manufacturing activity are fully compatible." Emphasizing Alcoa's agree-
The power of the media has not gone unnoticed by environmental litigants. Press strategy inevitably becomes an integral part of litigation strategy.

ONTROVERSY OVER DEVELOPMENT projects usually begins with an administrative action, not court action. The battle lines form early, often during a public debate before a local zoning board, the EPA, the Army Corps of Engineers, or a similar agency, or in hearings or written comments that may themselves attract media attention. The winner is the one who succeeds in tacking a pejorative label on the other: NIMBYs on one side, rapacious developer on the other. Even if the opponents can simply cause the project to be judged “controversial,” they are well on their way to success.

Getting the press to treat a project as controversial is tantamount to overcoming the legal harmless error rule: only errors that significantly hurt the appellant’s case warrant reversal. Similarly, if the project is deemed controversial, then litigation about it becomes significant, and legal or procedural errors are no longer harmless. Judges pay closer attention and, right or wrong, plaintiffs become worthier of a remedy. Conversely, if a project is not controversial, the judge will care less about the plaintiff’s claims. Although plaintiffs do not always succeed in this strategy, their odds are improved if the media have already taken their cause seriously.

On the other hand, once a project gets labeled as controversial, there is almost no power on earth that can alter that image. The project passes into that special territory occupied by such favorites as the Cross Florida Barge Canal, the Alaska Pipeline, the Tellico Dam, Westway, Mono Lake, the North Slope, nuclear power, and hazardous waste disposal sites. The battle lines become fixed like ancient tribal boundaries, and it does not matter what particular issue establishes the project as controversial. Spotted owls, snail darters, striped bass, caribou, whales, rain forests, and redwoods all possess intrinsic ecological importance and are worth fighting for on the merits. But for litigation, their special importance lies in the power to convert an ordinary proposal into a controversial proposal.

The very first modern environmental lawsuit showed the way. Consolidated Edison, New York City’s electricity supplier, proposed in September 1962 to build a pumped storage hydroelectric plant at Storm King Mountain in the Hudson Highlands south of Newburgh. It would have been the third largest hydroelectric plant in the United States.

The opponents, mostly nearby homeowners, organized. Their first goal was to establish that they were not just against development, but were fighting for an equal and perhaps more important value. Calling themselves the Scenic Hudson Preservation Council, they emphasized the aesthetic splendor of the Hudson Highlands and their role as the inspiration for the Hudson River school of painting, America’s most important contribution to nineteenth century art. They dramatized the highlands’ unique history by organizing a water-borne protest in which small boats paraded as a regatta past Storm King Mountain. The fleet sailed through the historic and scenic water gap, and right into the New York Times and other national news magazines, which reported in picture and story the plucky fight to halt the loss of scenic beauty. In one stroke, the opponents raised the recreational and scenic resource issue to a level equal to that of the region’s need for electricity. Consolidated Edison’s proposal had become controversial.

In 1965, the Second Circuit Court reversed the Federal Power Commission’s grant of the license, opening its decision with a favorable nod to Scenic Hudson’s press campaign: “The Storm King project is to be located in an area of unique beauty and major historical significance. The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in the world. The great German traveler Baedeker called it ‘finer than the Rhine.’”

From that aesthetic foundation, the court held that “recreational purposes . . . undoubtedly encompass the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites.” Having made that leap, which here-tofore had not been at all obvious, the court chastised the FPC for not affirmatively protecting the recreational rights of the public.
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when it failed to analyze alternatives to the project, such as gas turbines and interconnections with other utilities. In short, the Scenic Hudson Preservation Council had played the press card exactly right.

The best press efforts persuade through a visually compelling dramatization. A stunning example of this strategy occurred in New York City in 1987, when the Municipal Art Society and others sued to stop construction of a city-sponsored three million square foot office and residential building at Columbus Circle, on the southwestern edge of Central Park. The developer planned two huge towers, one 925 feet high and the second 802 feet high. In addition to alleging technical violations in the request for proposals and in the contract, the plaintiffs objected primarily to the project’s overwhelming size, which would cause street congestion and block sunlight from reaching Central Park. At first, few observers gave them much of a chance for success. But then the opponents demonstrated.

The Municipal Art Society invited supporters to gather in Central Park one Sunday at noon to “Stand Against The Shadow.” The invitation said “Bring A Black Umbrella, Rain Or Shine.” After a rally, the opponents intended to form a line the length of the shadow cast by the building. “Starting at Columbus Circle,” the press release promised, “participants one after the other will open their umbrellas, causing a ‘wave’ of black umbrellas that will reach Fifth Avenue and 69th Street. Almost a mile long, the shadow that will be created is one that would be cast over the Park on March 21 (the last day of spring) at 5:00 p.m. The actual shadow will go far beyond the park to Second Avenue.”

That Sunday proved brilliantly sunny, and a thousand opponents of the project turned out. The umbrellas unfurled as planned and the press loved it. It didn’t hurt that Jackie Onassis and Bill Moyers assumed leadership of the protest. The Daily News headlined the next day “Shady Protest Held.” The Wall Street Journal printed a long analysis headed “Building That Would Shade Central Park Draws Quiet Civic Group Into The Light.” The West Side Spirit declared it was “Celebs Vs. The Shadow.” Kent Barwick, the president of the Municipal Art Society, summed up the case: “It was necessary to assemble today to protest man’s basic right to sunlight and air. When you attack Central Park, you do so at your own great peril.”

Two months later, the court ruled in favor of the opponents, finding that the request for proposal and contract had been defective, as the plaintiffs alleged. The Shadow was not mentioned. The city settled the case with the Municipal Art Society by lopping 175 feet off the building. But, proving again the rule that once a project is controversial, it is always controversial, another lawsuit surfaced charging the city with a violation of the New York City Clean Air Act plan. That case also proved successful. Together, the lawsuits, along with a general office glut, have kept the developer from breaking ground, and Central Park remains free of The Shadow.

F A PARTY TO AN ENVIRONMENTAL conflict has to buy an advertisement to sell its proposal, then it’s probably too late: the project has most likely already entered the pantheon of world-class controversial projects. One of the latest inductees is Hydro-Quebec’s proposal to spend $11.7 billion to build a series of hydroelectric dams and reservoirs on the Great Whale River, which flows into Hudson Bay. Because Hydro-Quebec intends to sell a portion of the power to users in New York and Vermont, the project has become international.

After a series of adverse news stories, the controversy erupted with full-page ads in the New York Times. On October 21, 1991, opponents of the project headed their ad “CATASTROPHE AT JAMES BAY: Destroying A Wilderness The Size Of France.” With pictures of drowned caribou and a young Cree Indian, the ad summarized its opposition by declaring the project an “ecological catastrophe on a scale with the devastation of the Amazon.”

Three days later, Hydro-Quebec responded with its own full-page ad, which it headed “Looking At Facts Rather Than Symbols.” Hydro-Quebec said, “Let’s Talk Sensibly.” pictured live caribou running across a frozen reservoir, and showed Cree apparently happily living side by side with “traditional and modern economics.”

But Hydro-Quebec has been on the run for some time, in large part because of the low cost of competing fuels, but also due to the articulate advocacy of Matthew Coon Come, the grand chief of the Quebec Cree, who has traveled extensively in the United States. Three weeks before the battle of the ads, Coon Come declared before a New York legislative hearing that hydroelectric projects already in operation were “eating away at the soul of my people . . . The Cree have constructed no great earth works and built no pyramids, but our grandfathers always managed to leave the land as it had been, a remarkable achievement.”

With the controversy established, the New York State Department of Environmental Conservation announced that for the first time it would require a full environmental impact statement on alternatives to
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the purchase of Hydro-Quebec's power. The press campaign therefore succeeded not only in labeling the project as controversial, but also in erecting an administrative and legal hurdle that previously had not existed.

Environmental law possesses a moral force which defendants defy at their peril. The Exxon Valdez oil spill in Prince William Sound in March 1989, and the subsequent litigation, has been a textbook of lessons in this regard. In April 1991, after months of negotiations, the federal government and Exxon announced a $1.1 billion settlement of all federal civil and criminal litigation. Unfortunately, the settlement—trumpeted as the biggest ever by Attorney General Richard Thornburgh and EPA Administrator William Reilly—was immediately undone.

The stories reporting the settlement quoted a pugnacious and impotent Lawrence Rawl, chairman of Exxon, saying that the penalties would have "no significant effect on our earnings," which he had announced on the same day to be $2.24 billion for the first quarter of 1991, a 75 percent increase over the prior year. From the timing, it appeared that the penalties were a mere slap on the wrist, while Exxon's profit bonanza in fact resulted from the price increase accompanying the Persian Gulf war.

Rawl's bravado exacerbated the unfavorable reaction among Alaskans and environmentalists who, even before reading Rawl's comments, had a larger view of what justice required in the way of both cleanup and contrition. This reaction ultimately led the Alaska state legislature and the federal judge to reject the agreement which had been so carefully crafted by the lawyers in the Justice Department.

Six months later, Exxon and the federal government reached a new settlement which turned out to be remarkably like the earlier one. This time the parties had apparently worked out a different role for Rawl. He showed up in the federal court in Alaska to plead Exxon guilty to a single misdemeanor for killing migratory waterfowl. Also present was the president of Exxon Shipping Company, a subsidiary, who pleaded guilty for his company to three misdemeanors: killing waterfowl, violations of the Clean Water Act, and violations of the Refuse Act. In return, the prosecution dropped four felony and two misdemeanor counts.

Demonstrating contrition by his court appearance, Rawl went further, saying, in effect, that the fines hurt. He stated that the oil market was too competitive to pass on the costs of the fines to consumers, and that Exxon's shareholders would be the ones to pay. Ironically, a later economic analysis of the monetary settlement by the New York Times reported that the second settlement was in fact $5.5 million cheaper for Exxon.

Rawl, when he appeared in the Alaskan federal court, was clearly uncomfortable in the role of defendant at the dock. The New York Times reported that "for the normally combative Mr. Rawl, his role as humbled oil company chief was unusual. Answering the kind of routine questions that judges normally direct at defendants to insure that they understand their rights, Mr. Rawl spoke in a barely audible voice."

The environmentalists remained unconvinced that the settlement fully compensated for the damage caused by the spill, and many continued to oppose the settlement. This time, however, the agreement held. But as one relentless environmentalist said at the time, "At least we got to see Rawl before the court pleading guilty, mumbling his answers."

MAJOR CRISIS FOCUSES MEDIA attention immediately, as the Exxon Valdez accident clearly shows. How the defendant handles the crisis directly affects subsequent litigation. As images of oil softly rolling over beach rocks and dying birds and sea otters filled the evening news reports, Rawl failed to issue a comment for a week, and when he did, he blamed the Coast Guard and Alaska officials for the slowness of the post-spill cleanup. During the week of Rawl's silence, the news media complained of difficulty in getting accurate information. Exxon's public relations team attempted to brief reporters from Valdez, which proved too remote and, coupled with the general difficulty in getting news from the area, caused Exxon to issue conflicting and late information to reporters. On the whole, Exxon appeared distant, disengaged, and unresponsive.

A month after the spill, pundits of crisis management were already publishing articles analyzing Exxon's performance, generally grading it as poor. The New York Times, in a critique of Exxon's actions in the days following the spill, reported that the company violated six "cardinal rules" of crisis management. The article singled out for particular criticism Rawl's decision not to go to Valdez immediately and his unavailability to the press for a week after the accident. One crisis management expert stated that, "As phony as it sounds, sending the chairman to the scene would have shown genuine concern for what happened there."

Rawl seemed to agree. In an interview in the Wall Street Journal three months after the spill, he admitted to waking up in the middle of the night questioning the decision to stay home. He stated that although his in-
HANDLING ENVIRONMENTAL matters requires a knowledge of how the media operate. It means understanding their deadlines (early in the day for television, later for print), their definition of news (the hook), their need for controversy, and their need to tell a story. Six basic rules constitute a primer for dealing with the media effectively.

First, use care in speaking with local television reporters. They are likely to know absolutely nothing about your issues. Unlike many print reporters, TV news reporters are not assigned beats and bring little history to the interview. They are generalists focusing mainly on crime, weather, traffic, sports, and politics. Television reporters almost never specialize in environment or law like those reporting on such matters in the New York Times or the Washington Post. TV reporters will know whatever appeared in recent press releases and what has been said that day. They are looking for good visuals, pithy statements, and controversy. For instance, if a television reporter had confronted Alcoa in the Massena case, the reporter’s lead question would be something like: “The attorney general says that Alcoa dumped hazardous wastes down a manhole at the plant more than 2,000 times since 1985. How could that happen?” And the Alcoa response would be edited down to about ten seconds in the report aired that evening.

Second, television likes pictures. Probably a key reason Exxon’s Rawl did not rush to Prince William Sound is that he did not wish to be interviewed by television reporters with dying sea otters and oil-soaked beaches in the background. But he might have agreed to meet reporters in New York City when the story broke, where he would still look chairman-like. And since the television reporter could not have ignored an opportunity to speak to the chairman of the board, the corporation would have been able to name the location, and therefore also the background.

Third, television coverage usually follows print coverage. If a story appears in print, there is the possibility that television news will pick it up, but newspapers almost never follow up on television stories. Television news managers read the morning papers, decide what fits, and assign reporters. Print editors either do not watch television or figure it is a dead story if it has already aired.

Fourth, the question reporters always ask is, “How much will this cost?” It is as mandatory as age at death in an obituary. Be prepared to answer.

Fifth, editorials constitute a second front. Contrary to what one would think, a newspaper’s editorial department is usually a completely separate division. These anonymous writers will often meet with you to hear your ideas for editorials and your views on the subject. It is possible to salvage a bad situation, or improve your position, by teasing the interest of a writer into writing a favorable editorial. But be prepared: editorial writers are by nature analytical, and good record-keepers. They will check facts with your adversaries, and they have the time to pull up all the clips of past articles. If you mislead them they do not forget, and they can repeatedly attack from the high ground of disinterested wisdom on which they sit.

Last, tell the truth. One is constantly surprised by how little truth ever gets told. Reporters will likely find it refreshing, think you are rare and special, and maybe even give you a break.