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LITIGATION PUBLIC RELATIONS: THE PROVISIONAL REMEDY OF THE COMMUNICATIONS WORLD

DEBORAH A. LILIENTHAL

I. INTRODUCTION

The 1972 Ford Pinto: sport racing mirrors, bumper guards, and chrome lower molding. For you Pinto enthusiasts out there, note the original gas cap. Most were replaced by unpainted chrome caps during the Ford Motor Company gas cap upgrade. Under the hood, all original gaskets and radiator cap. Inside, complete deluxe interior, wood grain inserts in the door panels and dash, deluxe steering wheel, AM/FM radio, wood grain parking brake handle, and plush seats.

Sound familiar? You are probably less familiar with the Pinto's premier engineering and luxury and more familiar with its notoriety. In September, 1977, radical publication *Mother Jones* revealed internal Ford Motor Company documents alleging that Ford "deliberately and with shocking disregard for human life, produced the Pinto, an automobile it knew could turn into a burning deathtrap."[1] Ford's infamous "cost/benefit analysis" made its way on to the front pages.

The report: Ford's internal analysis weighed the cost of a human life, then estimated at $200,000 against the cost of fuel tank repair. The news: Ford executives were portrayed as killers who knew they could save lives for eleven dollars, the cost of a safe fuel tank.[2] The result: within one month, pressure from the media, Pinto owners, Ralph Nader, and the National Highway Traffic Safety Administration created the most expensive auto recall in history at the time.[3] And, of course, in the 1979 landmark case, Ford became the first American corporation—a truly dubious distinction—ever indicted or prosecuted on criminal homicide charges.

1. Suzie Larsen, *Safety Last*, MOTHER JONES INTERACTIVE, at http://www.motherjones.com/mother_jones/SO77/larsen.html (Feb. 17, 1998)

2. *See id.*

3. *See id.* On June 9, 1978, the Ford Motor Company recalled 1.5 million Pintos. *See id.*

The punch line: Ford was found not guilty.[4]

Despite the verdict, media coverage, class action suits, and Ford's handling of the crisis all helped make the Ford Motor Company the most guilty not-guilty[5] person, place, or thing in the world. The Pinto, of course, was no isolated incident. This exposé by a "radical" publication in the seventies lead the way to the expose-driven, scandal-obsessed media of the eighties and nineties, where news coverage is framed in stories of winners and losers, bad guys and good guys, David and Goliath.

Today I am here to talk about the role of public relations in the law. Spin doctoring. Litigation support. Public relations. Whatever you want to call it, it impacts you, your opponent, your client. First, I will give a brief overview: the populist culture that has melded PR and the law. Second, I will demonstrate how this culture has created a necessary corollary between PR and the law. Next, I will attempt to answer the pressing question: what is this amorphous "Litigation PR"? And last, a litigation landscape preview, from the communications perspective.

II. THE SURREAL FACT PATTERN: THE POPULARIZATION OF THE LAW

The popularization of the practice of law in American culture has made litigation PR a reality. More and more popular news programs—like *60 Minutes* and *Dateline*—feature segments about the law. Legal news programs spotlight legal controversies or issues that are news-driven or scandal-based, like CNN's *Burden of Proof*. The advent of legal commentators—a true apex in our culture's obsession with the law—has expanded the law from news subject to subject of discussion. These different characters with different faces with different points of view tour the circuit helping news cable channel programs fill twenty-four hours of legal programming. There is Dan Abrams, the young, sprite son of legendary Floyd Abrams. Nancy Grace, southern female prosecutor who has never lost a case. Marcia Clark, west coast prosecutor who lost the only case that could not be lost. Arthur Miller, constitutional sage cut from the Fred Friendly piece of cloth. Gerry Spence—the cowboy. Even prime time has gone penal with hits including *Ally McBeal* and *The Practice*.

Suddenly, law is interesting. Over the past thirty years a populist

4. *See id.*

5. Despite its legal victory, Ford discontinued production of the Ford Pinto five months after trial. *See id.*

phenomenon emerged that changed the perception of law—and of lawyers—and it has evolved in three tiers: the '70s, a profession for stodgy old white men; the '80s, corporate monsters motivated by greed; to now, the '90s, the every man and woman—a populist phenomenon. Today, people can see "real" law on *Court TV*, hear about law on the news and prime time dramas, and read about it in the papers.

Increased media coverage and public discussion, however, have not brought greater clarity about the law. As news and tabloid converge, the coverage of celebrity scandals—most of which are pending before a court of law—are open game for news and tabloid media alike.

What does this mean to lawyers? Two things. First, a lot more people know the law. Second, a lot more people *think* they know the law. If I may take a Machiavellian moment, these "legal" programs are supplying viewers with just enough law to make them dangerous. They are developing a cocktail-party familiarity with theories of tort liability, the grand jury process, even the exclusionary rule. No one *knows* the exclusionary rule. No one *gets* transactional immunity. You get the gist, but lawyers know the outcome will always hinge upon the specific facts. As lawyers, that is what we are taught. In practice, it is how we are trained. To non-lawyers, that is completely foreign. Non-lawyers—for better or worse—are far less deliberative than lawyers. They are looking for and want to give an absolute answer. Their perceptions of law and those involved in a legal battle are shaped by different factors than lawyers. And these non-lawyers are your future jurors. For lawyers to ignore this truism is virtual malpractice.

So what's wrong with everyone knowing a little bit about law? If you are a corporate defendant, a lot. After all, it is the corporate defendant who is most greatly and adversely impacted by today's populist culture. News exposés by programs like *60 Minutes* appear and impact viewers days, months, maybe years before a legal document is filed. Jury pools are tainted by media coverage before viewers even know that there is a legal issue. Legal defense counsel must help their clients level the playing field before they even step into a court of law.

Many defendants recognize that they must be concerned with opinion outside the courtroom as well as inside.[6] In fact, negative public

6. *See* W. John Moore, *The Court of Public Opinion*, THE NATIONAL JOURNAL, May 23, 1998, at 1199.

opinion may impact a company more than an adverse legal decision.[7] After all, if a company cannot pay its judgment, it can seek bankruptcy protection. If, on the other hand, the public believes your product is unsafe, that you are dishonest, that your business practices are unjust, no code, case law or judge can protect your client's market share, brand name, reputation, or credibility in the court of public opinion.

Public communication—or "PR"—should be the foundation of any legal strategy. The court of the public can be an unjust place. There are no discovery rules. There are no Miranda rights. There are no pretrial motions to measure credibility, relevance or whether there is a triable issue of fact. The media—not the judge—determines what is fit to be admitted into the case (the public case). Unlike people, companies are guilty until proven innocent. Ignoring this fact does your client a complete disservice.

According to a recent poll, when a government agency announces an investigation of a company, more than half the American public believes the company is guilty.[8] This does not bode well for the Microsofts or Visas of the world.

When Americans hear of suit being filed against a large company, again more than half (56 percent) believe the company is guilty.[9] Even with routine litigation, a large company today is facing an uphill battle in trying to prove its innocence and in finding an objective forum to defend itself against charges of impropriety.

There is a fundamental distrust of large companies, and it illustrates the magnitude of the challenge for any company trying to defend its reputation in the public arena. What is clear from this ORC data is that a company must move vigorously and proactively to defend its good name early when charges are raised in a government investigation or lawsuit. A company cannot afford to believe that the potential for damages is only in a court of law. Litigation and legal issues can create serious collateral

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7. *See* Harold W. Suckenik, *Corporate PR Should Not Be Supervised by a Lawyer*, O'DWYER'S PR SERVICES REPORT, Aug. 1991, at 40, *available in* LEXIS, Market Library, Pres. File.

8. *See* Study by Opinion Research Corporation International on behalf of GCI Group, the worldwide public relations firm (on file with author). The study by ORC was conducted from August 20 to 23, 1998 with a telephone survey of 1,004 adults 18 years or older living in the continental United States. *See id.* The study projects national attitudes within a research margin of error of plus or minus three percent.

9. *See id.*

damage for a company and for the marketplace power of its corporate brand.

II. WHAT IS LITIGATION PR?

What is litigation PR? I like to think of it as a provisional remedy of the communications world. It's a non-judicial provisional remedy that a PR practitioner—like jury consultants working in conjunction with legal counsel—uses so as not to render the final legal decision a nullity in the public forum. While jury consultants focus specifically on twelve people inside the courtroom, PR counsel addresses a much larger audience: the court of public opinion. Sometimes wearing a sweater in court, being found not guilty, or helping a few dying animals is not enough. Litigation PR manages the battle outside the courtroom, allowing the legal counsel to address the battle in the courtroom.[10]

Public relations, generally, and litigation communications, in particular, provide clients with a range of services. Litigation communications is most often a subgroup of crisis management. Crisis communications offers communications support during a perceptual or actual crisis, like an oil spill or a guilty verdict. Issues management is a preventative measure, designed to support long-term management of a person, place, or thing in hopes that it never becomes a crisis, like brand management for leading companies like Dow Chemical or for products like Tylenol.

Oftentimes the most effective litigation PR never sees the light of day. This, too, runs counter to many perceptions of what PR is. Many PR strategies and tactics are designed to contain, not promote, an event, decision, or crisis.[11]

I like to think of it as a corollary: PR is to law as *Emmanuel's* is to the law student, as Lexis-Nexis is to researchers, as legal forms are to sole practitioners. *Emmanuel's*, Lexis, and legal forms make easier, better, and smarter the tasks of the student, researcher, and practitioner. When the student, researcher, or practitioner uses these tools correctly, no one ever knows. They just look smart.

What are the objectives of litigation PR? There are two. Major com-

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10. *See* Kathy Fitzpatrick, *Practice Management: The Court of Public Opinion*, TEX. LAW., Sept. 30, 1996, at 30.

11. *See* Fredrick S. Newman, *Coordinating Legal, PR Aspects of a Product Liability Crisis*, PRODUCT LIABILITY L. & STRATEGY, Sept. 1996, at 1.

panies face two key threats in defending against a high-profile lawsuit. First, a company must manage the pre-trial information landscape to ensure a level playing field so that the company's attorneys can have their day in court.

The second problem for a company facing high-profile litigation is in the court of public opinion. The litigation process today can kill product lines and companies—even if the attorneys win in court. A leading company today can no longer afford the luxury of being myopic about litigation. Litigation has to be viewed in a larger marketplace context, as an important factor in its corporate reputation.

Strategies

How do you meet these two objectives? There are five core strategies.

1) *Tell your side through carefully crafted message points.*

Lawyers emerge from an "everything you say can and will be used against you" culture.[12] Litigation PR tempers that tendency. Saying "no comment" is not enough.[13] According to opinion research, fifty-nine percent of Americans believe a company is guilty if it responds, "no comment." While the words are concise, even accurate, from your client's perspective they are dangerous, even fatal.

Message points are the PR equivalent of the theory of the case. Message points communicate the facts and legal issues in a concise package suited both for jurors and for audiences outside the courtroom. They are the foundation of any external and internal communications regarding your side of the case. Whether this is media briefings, press statements, press releases, interviews, backgrounders—all should be consistent, accurate.

2) *Don't tell just anyone—tell who matters.*

Despite the images set forth in prime-time TV, litigation cannot be resolved in one hour. Therefore, for a company to emerge from the litigation process with its credibility intact, it must recognize and combat

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12. Fitzpatrick, *supra* note 10.

13. *See* Jim Cox, *The Strategist; Rikki Kleiman, Symposium: Courts and the Mass Media: The Ethical Issues*, 37 SANTA CLARA L. REV. 981, 995 (1997).

the impact of negative publicity on its key audiences.[14] The communications team supports legal counsel to help tailor key messages, and to amplify legal arguments.

While the litigation team focuses, obviously, on winning, your client has critical interests that extend beyond the litigation. The litigation will impact on shareholders, on the price of its stock, on its employees, recruitment efforts, business partners, suppliers, competitors.[15] How do you speak to these key audiences?

Why tell audiences? Two reasons: timing and business impact. First, while a complaint may not see the inside of a courtroom for years following its filing, it may make the front page the same day it is filed. Media routinely position representatives at courthouse drop boxes to monitor newsworthy filings. Other complaints make the front page without ever being filed.[16] The threat of lawsuit often makes better news than a filed lawsuit, as it has the benefit of both surprising the defendant and avoiding critical legal review of its merit.[17]

Second, for corporate defendants, the problems are business matters, not legal ones.[18] They are looking for the best way to solve a business problem. The potential or actual legal issue is a piece—albeit large—of the client's business concern. In order to provide your client comfort and in order to gain your client's trust in time of crisis, the legal team must recognize the legitimate reputational issues at stake. Upon the filing of a lawsuit, the lawyer must be prepared to file papers, consult the client, talk to the judge. In contrast, upon the filing of a lawsuit, the client must be prepared to answer inquiry from the media, business partners, customers, and most importantly, shareholders. Legal counsel must recognize all of these concerns.

3) *Use third-party experts.*

Sometimes the most powerful messages come from someone else.

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14. *See* Fitzpatrick, *supra* note 10.

15. *See id.*

16. *See id.*

17. Analogous to movies premiering without a prescreening for critics, a tactic employed by producers who fear their film would be doomed from the outset by bad reviews. This gamble allows public opinion—not expert opinion—to shape perception.

18. *See* Richard S. Levick, *Publicity as a Litigation Tactic*, LEGAL TIMES, Aug. 5, 1996, at 19.

By enlisting third-party experts you can broaden the issue by reaching beyond the facts of the case and instead discuss the larger, legal issue and validate your legal theory. Strategic communications further the client's message by leveraging news to further your message.

Carefully and selectively leverage the publicity and news interest surrounding other high-profile, similar cases to generate visibility and support for your case. Other tactics include placement of by-lined articles, op/eds, how-to pieces, letters to the editor, and editorials in key publications. These tactics further every litigators' overarching strategy: tell your side of the story.[19]

As famous in Southern Florida as Donald Trump is in New York and Ted Turner is in Atlanta, Wayne Huizenga wants to fix the used-car business just like he fixed the trash collection business (WMX) and the video rental business (Blockbuster). Huizenga wants to create a national chain called Auto Nation but, like Trump and Turner, he creates controversy and regularly faces opposition from smaller communities and businesses. As Huizenga moves into neighborhoods to purchase dealership clusters and to open his Auto nation mega-store, companies like Honda and Toyota fight for their lives. Experts predict that within a decade it is possible that only 250 to 500 dealers will sell vehicles in this country.

As part of its two-pronged legal strategy, Republic Industries sought to secure its financial and reputational threats in the court of public opinion. In its efforts to avoid the financial and reputational costs of facing unmeritorious litigation, legal counsel for Republic Industries consulted a PR firm. The firm, on behalf of Republic Industries, asked twenty-three former attorneys general to review the complaint. They all agreed. Within days, the former attorneys general held a press conference to decry the merit of this lawsuit. Within days the suit was dropped.

4) *Legal and PR must work as a team.*

Legal must ensure that statements released by PR are consistent with legal strategy, are argued in court, and are ethically and factually correct. After all, just as a PR disaster may result when lawyers ignore reputational issues, public relations professionals must understand legal issues

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19. *See* Edward J. Burke, *How to Stop Worrying & Learn to Love the Press*, AM. LAW., Dec. 1990, at 32, *available in* LEXIS, Gen Library, Amlaw File. Burke discusses the especially important trade press. "These publications remain an untapped gold mine of incredibly well-targeted exposure." *Id.*

in a crisis, or put their client at considerable risk.[20] Open communications with PR counsel allows legal counsel to minimize potential liability that may result if a PR team communicates without complete authority of the legal team. Consult with PR counsel that understands the primacy of the legal team

5) *Monitor misinformation.*

Litigation PR strategies can help provide the public support that may lead to a quicker resolution of the suit. Businesses facing public criticism and loss of sales may seek swift resolution. In the event the suit advances to trial, the communications strategies will ensure that the issues—and the client's position—are understood.[21]

III. LITIGATION LANDSCAPE

The litigation landscape for the next few years guarantees we (PR and the law) will be seeing a lot more of each other. And this is not such a bad thing. We often hear of the dissimilarities between legal and PR counsel.[22] Culturally, there are differences. The legal culture, driven by the underlying principle of client confidentiality, is a deliberative, control-oriented culture.[23] It has to be. In contrast, the PR culture is based upon openness and collaboration. Lawyers know and expect resolution of a dispute to take years; PR professionals want prompt, open dialogue and quick *perceived* justice.[24] Lawyers are concerned with the liability exposure; PR professionals with the public perception.[25] Although the two professions have great culture dissimilarities,[26] they share a common

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20. Creighton R. Madrid, attorney, Dorsey & Whitney P.L.L.P.

21. Fitzpatrick, *supra* note 10.

22. Linda Tsang, *PR: The Key for Firms in a Royal Mess*, THE LAWYER, Sept. 22, 1998, at 17.

23. *See id.*; *see also* Suckenik, *supra* note 7. Suckenik suggests that the two professions mix as well as oil and water.

24. *See* Newman, *supra* note 11.

25. *See id.*

26. *See* Suckenik, *supra* note 7. Suckenik discusses how culturally divergent the two professions are, notably, that lawyers are confrontational by nature, PR practitioners, collaborative. *See id.*

professional goal: to communicate a story.[27]

So, what's a lawyer to do? Potentially cloaked within the requirement to be a zealous advocate is the responsibility to consult with PR counsel. Just as inside the courtroom lawyers employ communications tactics to explain complex legal issues and convoluted facts to the jury, it is common to hire communications consultants to explain outside the courtroom. And given the media-driven climate—where preliminary injunction hearings and depositions are becoming front page news—it is virtual malpractice not to.

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27. *See* Harold W. Suckenik, *M&A Attorneys Need PR to Win Against Media*, O'DWYER'S PR SERVS. REP., Dec. 1989, at 37, *available in* LEXIS, Market Library, Prsrvs File.