

Staying cool under the media spotlight

By Carl Whitaker

It's no surprise that lawyers who have spent their careers calmly standing up in court arguing cases where lives and fortunes are at stake would have a sense of how to successfully manage press issues arising during the course of litigation. Media coverage goes with the territory in high-stakes litigation and experienced trial lawyers take it as a matter of course that they will need to craft a media strategy for the case.

So how does a media-savvy lawyer best represent a client's interest in the press during the course of litigation? In this article, Bay Area lawyers discuss how they view the media challenge and the steps that can be taken to effectively protect or advance their client's interests when news coverage is likely to be part of the equation. The answers may sometimes be simpler than you think.

BE PREPARED

Angela Padilla, a partner at Orrick, Herrington & Sutcliffe who has handled many high-profile commercial and whistleblower cases, focuses on being prepared well in advance of the first media call. "The first step is always to consult with the client about media strategy," she said. "You want to work together to develop basic themes to be communicated and agree about who will be speaking to the press over the course of the case."

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S.F. lawyers discuss best practices for working with the press



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TELL A SIMPLE STORY

Simplicity starts with telling a brief and compelling story. When a case hits the public eye the first battle is often for the news storyline.

Michael Li-Ming Wong, who joined Ropes & Gray in 2008 after heading the white-collar unit of the U.S. attorney's office for the Northern District of California, says that during his time as a prosecutor he tried to draft charging documents with multiple audiences in mind, including judge, grand jury, trial jury and press.

"In the government there are strict rules about speaking to the press and you aren't go-

ing to get many opportunities to convey your message," said Wong. "I've seen too many indictments that are incomprehensible to lawyers, not to mention members of the grand jury or reporters trying to write a story about the case. I've always believed that it's possible to meet statutory requirements and be user-friendly."

Edward Swanson of Swanson & McNamara, who has represented defendants in many high-profile criminal cases, says the starting point in the development of an effective media strategy is distilling the case: "For me, the first order of business is to figure out what your message is. It needs to be concise and compelling. What's the two or three-sentence nugget that you want to make sure

to get across?"

Michael Jacobs of Morrison & Foerster, who litigates patent and other intellectual property cases, says that he's learned to think about press statements from the client's point of view: "Craft a pithy statement. Lawyers often draft lawyerly statements for clients. Skip that step and avoid sending clients legalese. You need to boil it down and make it usable."

SLEEP ON IT

In this age of the 24-hour news cycle, with daily blogs and hourly "tweets" from the courtrooms of high-profile cases, must a lawyer be constantly responding to the latest assault on the client's reputation? Although there are undoubtedly cases where it is necessary to exchange tweet for tweet, the lawyers interviewed agreed that there are many more cases where it is probably in your client's best interest to let the latest barb go unanswered.

Farella Braun & Martel's Douglas Young, who handles complex white-collar and civil litigation matters, said, "It's critical to have measured judgment. Less can be more — I think you often need to resist the temptation to respond to every news development." Swanson agrees, saying that in the white-collar context deflecting press coverage is usually in the client's interest: "Every subsequent article that's printed reaches new people in the community and can poison the jury pool, so I think hard before responding too quickly to put out a fire."

Padilla notes that sometimes a lawyer will need to persuade an emotional client that it's simply not in their best interest to respond to a negative news story. Wong said, "I've learned to resist the temptation to rebut every shot across the bow. My advice is to sleep on it."

SET THE RECORD STRAIGHT

On the other hand, there are times when it's necessary to strongly counter a damaging allegation or dispel uncertainty. Young points out that if there is nothing but negative news about a client in circulation, it is sometimes necessary to find a way to get their story told: "There may be times when you have to educate a reporter off the record or get a statement out there so that the client's point of view is clearly represented."

DON'T LITIGATE IN THE PRESS

Now that he's on the criminal defense side of the aisle, Wong believes that it's a rare situation where a lawyer helps a client by being proactive with the press: "Anything you say can potentially limit your options later in the case; it's important to not get too factual." According to Young, "In criminal cases your goals are often modest ones: Preserve the client's dignity and be sure the jury pool isn't tainted. Trying the case in public isn't going to help."

Jacobs, who represents technology and life sciences companies said, "Sometimes a lawsuit has a built-in audience like a technology user group that feels passionately about an issue. It can be tempting to play to the gallery, but you have to remember that your principal audience is a judge who may be put off if she feels the case is being tried in the media."

CHANGE THE PUBLIC CONVERSATION

In criminal cases and commercial disputes, client interests often lead lawyers to try to minimize publicity. When public policy is involved it can be a different story.

Ernest Galvan and his colleagues at

Rosen, Bien & Galvan have faced a difficult communications challenge in bringing major class actions against the State of California on behalf of prisoners, including the highly publicized prison overcrowding case that has resulted in the state developing a plan to release 40,000 prisoners over the next two years.

According to Galvan, "The class actions about inadequate health and mental health care in California's prisons have raised questions about the criminal justice system that are politically sensitive and so part of our mission has been to help raise the level of the public dialogue on crime and punishment. We've tried to encourage the press to ask some tough questions about whether we are really getting a public safety benefit from throwing all these billions of dollars at prisons."

Galvan concludes, "The public dialogue has been stuck at the Willie Horton-level for 20 years. There is a huge amount of new information about what works in public safety, but it usually doesn't break through the iron curtain of fear that surrounds these issues."

BRING THE STORY TO THE LIGHT OF DAY

For Kathy Fisher of Calvo & Clark, who handles large cross-border commercial disputes, being able to create a compelling public narrative about a case can be the first step to a favorable resolution. "When up against a big institution, you often find that there has been an internal narrative and even public positions taken to rationalize some of the actions at issue in the lawsuit," said Fisher. "And this 'group think' may underlie a corporate decision to engage in a scorched-earth defense, rather than strategically defending or settling the lawsuit."

Fisher says that telling your own story early and often is important to counteract what may be a misleading public narrative created by the other side through press releases and public disclosure of their side of the story. "Facts come out piecemeal in

litigation and that means that your adversaries' side of the story is the 'truth' they are telling themselves and others for years," Fisher said. "The challenge is often to work through obstructionist tactics, restrictive protective orders and foreign rules preventing discovery to get to the real story. But once you are able to bring that story to the light of day it becomes all the more powerful for having been hidden or denied."

HELP REPORTERS DO THEIR JOB

Swanson notes that in a high-profile case the lawyer should recognize that the reporter has a job to do and find a way to give them what they need. He says that he has learned that it's most efficient to hold a press conference so that he can deliver the same message to all reporters covering the case.

Orrick's Padilla said that while being respectful of a reporter's deadline it's OK to say you can't answer a question or tell a reporter that you'll get back to them with an answer. "Be prepared and take your time during an interview," she said. "You shouldn't feel pressured to answer a question or go beyond what you've previously decided is acceptable to say."

Arthur Shartsis of Shartsis Friese, who handles high-stakes commercial disputes, says that he goes into all interviews with the idea that the reporter is a sophisticated professional who is doing an important job and his goal is to help her get it right. "As a lawyer receiving media calls on behalf of the client you need to be accessible and responsible," he said. "When speaking to reporters get to the point and assist them in doing their job accurately."

Shartsis added, "I've found that you have to be especially sensitive to explaining where the case stands procedurally because that's a place where they can easily get it wrong. And, as in the courtroom, you want to be totally truthful — the consequences of a lie or misleading statement could be severe." ■

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