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Navigating the media in high-profile cases

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Throughout history, high-profile court cases have captivated the public. Historians still discuss the significance of the trials of Socrates and Galileo that occurred over 2,000 and 1,000 years ago, respectively. And it seems that every few years the news hits for the next “trial of the century.” When a company or individual is faced with a case that is likely to generate significant media attention, it is absolutely critical to engage counsel who is both a skilled litigator and adept at recognizing the significance that public opinion will play on his or her clients. As Supreme Court Justice Felix Frankfurter recognized in 1954, “[c]ases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer

its distorted consequences.” *Pennekamp v. State of Fla.*, 328 U.S. 331, 362-63 (1946).

Today, these same concerns identified by Justice Frankfurter have intensified. With a 24 hour news cycle, the ubiquity of social media, and the immediate access to lawsuits as soon as they are filed, there are no longer any truly “local” stories. While a lawyer’s goal in dealing with the media will depend on whether the lawyer is trying to utilize the media to garner attention or, alternatively, to manage any negative consequences from a lawsuit, a lawyer who handles high-profile cases must always keep the public relations issue in mind in order to fully represent his or her client’s best interest in a high-profile case.

A Lawyer Must Be Prepared for the Media Attention

The moment a complaint is filed, it becomes fodder for the consuming public. Therefore, anticipating the public relations issues prior to the filing of a complaint is critical. In many

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Media trucks in Los Angeles during the O.J. Simpson trial, circa, 1995.

cases, a dispute has been brewing and the parties can have a public relations plan in place prior to any public filing. A lawyer should anticipate that the media will have the story as soon as the complaint is filed, whether through a reporter’s own channels or by receiving a copy of the complaint directly from plaintiff’s counsel. Further, many high-profile cases are initiated by the state and local government. Accordingly, these cases will receive media attention because the government will often put out a press release at the same time the complaint is filed.

Often, the opening paragraphs of a complaint will summarize the case, and will include sensationalized allegations in order to generate the most media interest. With this in mind, a defendant’s attorney must immediately develop a comprehensive media plan to manage negative publicity after a lawsuit is filed. An attorney should keep in mind that, while there have been recognized circumstances in which an attorney’s communications with

a public relations firm engaged as a litigation consultant are covered by the attorney-client privilege, not all communication with public relations consultants are protected. See, e.g., *Behunin v. Superior Court* (Charles R. Schwab), 9 Cal. App. 5th 833, 853 (Ct. App. 2017).

Manage the Message

To the extent possible, the attorney should review every public statement made in connection with the lawsuit. Cases that command significant media coverage often involve multiple public statements about the pending litigation. Often a client will react to inflammatory statements by the opposing party and want to make a public response. The lawyer is in the best position to determine the legal ramifications that a public statement will have on the case, and the lawyer must often remind the client that there are legal consequences to any statements. Indeed, a rogue public statement made by the client may be admissible as a party admission in the pending litigation, which



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could have a significant impact on the outcome of the case.

Moreover, the legal team needs to remind its clients of the importance of managing its social media accounts. Reporters, opposing lawyers, and other interested parties will closely monitor your client's social media accounts during highly publicized legal disputes as they search for the next soundbite or competitive advantage. Therefore, it is crucial that your client manage its social media with a critical eye on the impacts it will have on the pending litigation, and work closely with the legal team in doing so. The client should not delete or alter any social media accounts without speaking with counsel to avoid any issues with evidence spoliation.

Balance the Interests

A lawyer needs to understand how the pending litigation is affecting the client in areas beyond the lawsuit. While many lawsuits are based on solid legal grounds, some are opportunistic or tag-along cases with little legal merit, but still garner public attention because they involve a celebrity and/or address an important social issue. In these situations, the lawsuit can have immediate financial or personal ramifications for the client if the public determines to boycott a company or individual, or take

on a negative media campaign against the defendant. Therefore, it is necessary to work closely with your client to balance the potential legal exposure of making a public statement versus the potential fallout from bad publicity by repeatedly stating "no comment." It is important to remember that not all public statements are harmful. In fact, there are times where your client's interests will be better served by engaging with the media regarding the pending litigation.

Another question is whether the media should be permitted to use recording equipment or broadcast a court proceeding or trial. Under the Rule 1.150(e) of the California Rules of Court, the media may only do so upon a written order from the judge based on a multi-factored test. In deciding whether to support or oppose a request by the media to broadcast the proceeding, a critical component of the analysis should be that the public's image of the client will be shaped by what they see on television. Therefore, the lawyer should carefully consider whether it will benefit the client's public image for the proceedings to be on display for everyone to see.

Remain Vigilant

Given the ubiquity of social media, anyone can capture anything and share it with the

public at any time. During trials and court appearances that garner significant media attention, reporters are typically filling the gallery. Moreover, now everyone with a phone can post something seen or heard in the courtroom. Although the court may go off the record, the reporters do not. It is crucial to be cognizant of your surroundings when talking with your client during breaks. A lawyer does not want an outburst or unintentional soundbite to appear as a headline of next day's news.

Understand the Optics of Any Resolution

In high-stakes litigation and trials, it is important that the press understand the nuances of a verdict. Of course, a complete defense verdict in a civil trial or an acquittal in a criminal cases is not complicated to message. But sometimes there may a verdict that, while technically in one-side's favor, is actually a victory for the other side. For example, if a plaintiff seeks \$100 million dollars in damages in a lawsuit, a verdict in the plaintiff's favor that guts the damages claim may be a victory for the defense. Therefore, a lawyer working on a high-profile case should try to ensure that the media receives the complete story of any result.

In connection with settlements, attorneys and sophisticated clients understand that settlements of

non-meritorious lawsuits are, at times, a sound business decision. In the world of public opinion, however, there can be a tendency for the public to believe that if the client did nothing wrong, the client should not have paid any money for settlement. Under these circumstances, the client is left with a difficult decision of spending the money and resources to litigate the case until victory is determined, or to settle and deal with any potential innuendo that the client did something wrong. Another benefit of a settlement, however, is that the case is then taken out of the news cycle, and the public's attention will shift to the next big story.

Conclusion

In handling high-profile, crisis-related litigation, an attorney must recognize the holistic nature of the representation. A successful litigation result and managing the public relations components must be considered as important factors. Litigating a case that has significant media attention creates a number of unique challenges, but pitfalls can be avoided by implementing a strategy to address the media issues from the outset.

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