804:Effectively Managing Public Relations for High-Profile Litigation

Sara Church Dinkler
Associate Counsel
Federated Department Stores, Inc.

Richard S. Levick
President
Levick Strategic Communications, LLC

William A. Von Hoene, Jr.
Vice President & Deputy General Counsel, Litigation
Exelon Corporation

Faculty Biographies

Sara Church Dinkler

Sara Church Dinkler is in-house counsel to Federated Department Stores, which owns Macy's, Bloomingdale's, and other leading retail name plates. She is responsible for employment law and litigation in the company's Western Region, which extends from the Mississippi River to Guam. Ms. Dinkler was formerly a litigator with Gibson, Dunn & Crutcher, where she handled complex business litigation, including class actions and multiparty representative actions.

As both inside and outside counsel, Ms. Dinkler has worked with clients and media professionals in matters involving constitutional issues, disputed union elections, intellectual property, wage & hour laws, and agricultural laborers, as well as complaints of securities fraud, employment discrimination, and unfair business practices.

Ms. Dinkler received a BA with highest honors from the University of California at Davis, where she was elected to *Phi Beta Kappa.* Her law degree is from Boalt Hall School of Law.

Richard S. Levick

Richard S. Levick is president of Levick Strategic Communications, the global leader in law firm media relations, representing the most prominent law firms worldwide. He has directed media on the highest profile litigation, from the Catholic Church controversy to the national Florida election recount.

Mr. Levick is a contributing author to four books including, *Inside/Outside: How Businesses Buy Legal Services, Litigation Public Relations, Values-Driven Public Relations,* and the forthcoming *Stop the Presses: A Litigation PR Desk Reference.* He is also a coauthor of the 2004 calendar, *365 Marketing Meditations for Daily Life in a Professional Services Organization.* He is currently contributing to two additional books, including one sponsored by the International Bar Association called *The Impact of Technology on the Practice of Law.*

Mr. Levick is one of the world's most sought-after speakers on strategic media and marketing for the legal industry. He has just been named by *PR News* as the 2002 Public Relations Professional of the Year for U.S. Agencies. He is the cochair of the only U.S. conferences on litigation media relations in 2003. Mr. Levick writes frequently for numerous publications, such as the *Legal Times, Chief Legal Executive, Marketing for Lawyers, California Daily Journals, Legal Week (UK), European Lawyer,* and *Asian Financial Legal Briefing.* Mr. Levick is the former director of American University's School of Public Affairs Leadership Program.

He holds a BA from the University of Maryland, a MS in environmental advocacy (communications) from the University of Michigan, and a JD from American University's Washington College of Law.

William A. Von Hoene, Jr.
Vice President & Deputy General Counsel, Litigation
Exelon Corporation

Practical Considerations For In-House Counsel For Managing High-Profile Litigation

This checklist is designed to help in-house counsel consider steps to improve management of media-involved legal matters. It can also be used as talking points to discuss these issues with clients. Even obvious points are included, in the interest of completeness.

As in all litigation management, in-house counsel have a critical role to play. While outside counsel may be focused more narrowly on the discrete litigation matter at issue, in-house counsel have deeper knowledge of client personnel and culture, and are skilled at keeping in view the longer-term interests of the client.

1. Think Ahead

- Don't wait for crisis mode. Build relationships with clients long before reporters are swarming at the gates.

- Have a crisis plan and crisis committee in place. For quick and effective response, consider a dedicated web site, e-mail, cell phones, text messaging, dedicated 1-800 numbers, and secure password-protected access so internal people can communicate securely and quickly. These tools can be dormant, ready to activate at a moment's notice.

- If you have certain kinds of repeat litigation -- such as employment or product liability disputes -- work with the company's media professionals and public relations staff to consider how nonlitigation communications and advertising disseminated in the ordinary may also affect perceptions during litigation matters. What is the baseline perception which serves as a starting point when a crisis arises?

- Do you know who in your in-house legal department has worked with the media before? Has had media training? Is a particularly skilled writer?

2. Manage the Message

- Understand your clients' key business themes and brand imagery. You don't want litigation communications to undermine the overall message of the entity.

- Identify and manage intracompany constituencies which may have differing interests. A middle manager whose action is challenged may wish to stress that what he did was entirely in accord with company policy, practice & culture. Senior management may prefer to characterize the action as a departure or misinterpretation.

- Help your clients draft the substantive messages. Lawyers can be very good at this kind of advocacy. Litigators write compelling and persuasive briefs. Trial lawyers excel at crafting simple and effective themes of the case to persuade a jury. In-house counsel create record-making letters or future exhibits when giving advice. Lawyers are often skilled negotiators or mediation advocates, even when dealing with contentious opponents. Attorneys of all kinds tend to be good with words, building imagery to persuade whoever needs to be persuaded, be it judge, client, jury, etc. Build on these strengths in partnership with your clients. This is particularly important if the public relations people at your company are inexperienced in high-profile, sensitive, fast-paced media relations.

- Don't use legalese. Always use plain English.

- Don't be defensive. As in most forms of advocacy, you want to tell the story from your point of view. Weave in the points which rebut the assertions of the other side.

- Most modern media professionals advise against a "no comment" response. If a client has historically used such an approach, consider this option: Refrain from comment on the particular case or dispute, but articulate positive general themes. For example, in a rare discrimination lawsuit, don't say "No comment" or "It is our policy not to comment on pending litigation." Consider instead: "Because we protect the privacy of our employees, we don't comment publicly on why a particular employee is no longer with us. I can tell you that XYZ has a richly diverse work force, a long tradition of equal employment, many senior mangers of the same race as Mr. Plaintiff, a mentoring program available to all employees and a confidential open door policy to resolve any employee concerns [insert other positive general information.]" Give out copies of helpful policy documents, or direct reporters to websites.

- In preparing a message for one audience, such as the popular press, be mindful of other audiences, including the financial press and courts.

- Don't forget communications to employees. If the media is likely to try to interview employees – whether management or rank-and-file – think about preparing them. Your goals are to enhance the likelihood of their giving positive messages to the media and to avoid employees becoming disenchanted. If the press is already publishing stories about the company, you don't want the media to become the sole source of information for your employees.

- Be mindful of ethical rules. See ABA Rule of Professional Conduct 3.6 and California Rule of Professional Conduct 5-120 (copies attached), as well as

rules governing client confidences, information covered by protective order, filed under seal, etc.

3. Manage the Process

- Avoid surprises. Involve senior management and the Board early on. This is true when a high-profile matter begins to surface. Is also true at the advice stage.

- Be proactive in considering who the company representative should be. In-house counsel is a key resource here. You know the cast of characters, who will make the right appearance, who may or may not be able to accept preparation from experts, who may be involved in another case, etc. In general, avoid having a lawyer be the spokesperson.

- Have potential spokespersons been deposed before? How did they do? If video tape is available, view it.

- Consider third parties as possible deliverers of the message. For example: trade groups or expert witnesses.

- Good lawyers are skilled at looking at a problem from many points of view and from the opponent's point of view. In crafting messages and preparing company representatives, prepare as you would for an important oral argument. What are the hardest questions you would ask if you were on the other side? Prepare effective responses to those questions.

- In prelitigation matters, such as agency charges, attorney letters, web site complaints etc., discern the facts early. Evaluate both the merits of the claim and its potential to generate adverse publicity. Sometimes a quick settlement may be in a company's interests.

- If mock trials or rehearsals are being done in litigation, consider involving the corporate communications team.

- Train everyone involved about privilege protection and document control.

- Consider Sarbanes – Oxley implications: Who will be involved in assessing issues or managing a crisis? Entire board? Executive committee? Audit committee? Nominating committee? Compensation committee? Finance committee? Specially-appointed committee? Special counsel? Consider using a subgroup of the Board, existing committee, or specially appointed committee to monitor the crisis. This subgroup should be independent directors and not have oversight of the area involved for example in a class

action alleging accounting fraud, the audit committee should not be handling the matter.

4. After the Dust Settles

- Conduct an effective lessons learned analysis. Try to create an open dialog free of blame. Questions to discuss include: Were staff appropriate and empowered to manage the situation? Could we have nipped this in the bud? Do our underlying procedures require tweaking to prevent this from happening in the future or surface an issue earlier? Did the communication efforts have the results intended?

- Should training be arranged either on substantive issues or on handling the media?

- Is there lingering public relations or employee relations damage that requires further work?

- If relations with legal regulators or shareholders have been damaged, what steps are called for?

Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP
RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Rule 5-110. Performing the Duty of Member in Government Service

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

Rule 5-120. Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Discussion:

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Paragraph (A) is intended to apply to statements made by or on behalf of the member.

Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets. (Added by order of the Supreme Court, operative October 1, 1995.)

Rule 5-200. Trial Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

Rule 5-210. Member as Witness

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

(A) The testimony relates to an uncontested matter; or

(B) The testimony relates to the nature and value of legal services rendered in the case; or

(C) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

Discussion:

Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding

Litigation and Crisis Media

LEVICK
STRATEGIC COMMUNICATIONS

For certain people after fifty, litigation takes the place of sex.

-Gore Vidal

"The saga says much about the dangers of exposing Gallic national ambition to US litigiousness."

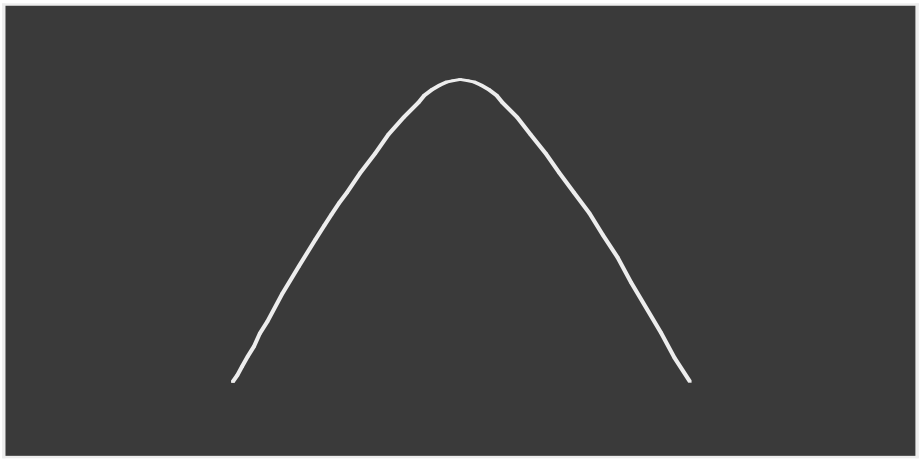
1. Perception Rules

Tylenol v. Exxon Valdez

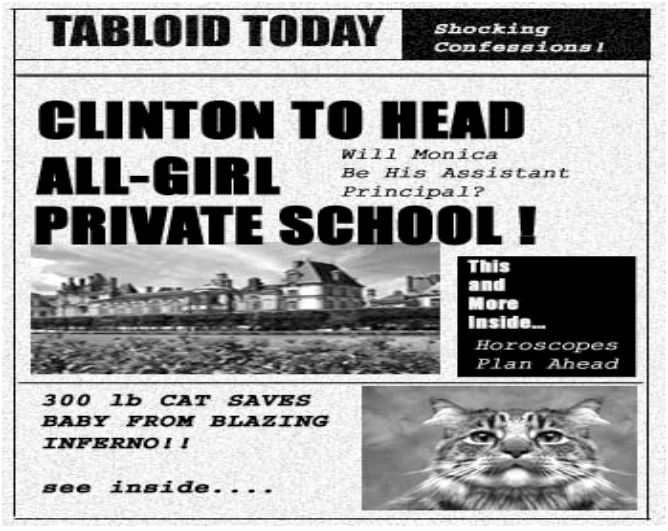
Plan for the Worst
Early Admission
Take Responsibility
(empathy/responsibility/action)
Messages from the Top
Delay Blame
Create the Picture
Make a Sacrifice
Hold Hands

2. Recognize the Problem

3. Understand the News Curve



Consider All Sources



4. Gather Intelligence

- Opposing voices?
- What will make them go away?
- What is your picture (vulnerability)?
- What is their picture (vulnerability)?

5. Plan for the Worst Case

6. Understand What You Are Selling

7. The Brand Rules

8. The Rule of Marketing

9. Choose a Spokesperson Wisely

10. The Rule of Message Points

The Big Three

- We're Sorry (empathy)
- We're responsible (even if not at fault)
- We'll fix it (action)

Training

11. The Rule of Thinking Differently

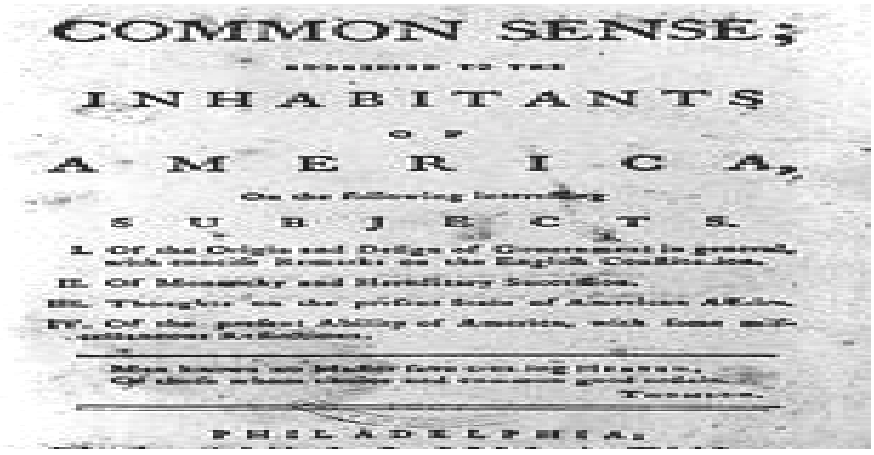
The Rule of News

NATIONAL NEWS

Plane Lands Safely!

12. The Rule of Blame

13. The Rule of Audiences


COMMON SENSE;
INHABITANTS
OF
AMERICA,
SUBJECTS.
PHILADELPHIA:

WIIFM

14. Speak in Pictures

15. Prepare Materials Ahead

16. The Rule of Reach & Repetition

Front Page

The Right Strategy, the Wrong Result

BY RICHARD S. LEVICK AND LARRY SMITH

Public relations management is the newest core competency for in-house counsel.

The collapse of Arthur Andersen LLP affected lives and destroyed reputations on a global scale. Today, no one is exempt from potential crisis in what's become an increasingly stringent compliance environment.

Now, in-house counsel, as much as any outside auditors, find themselves to be potential defendants in the court of public opinion—a court that demands altogether different survival skills from the ones learned in law school. The fact that you and your company might be innocent of any wrongdoing is wholly irrelevant.

DONNA TEREK

Richard S. Levick of Levick Strategic Communications

Lessons learned from the Andersen situation abound for any lawyer charged with ensuring a corporate bill of good health. There are the overt lessons about staying out of the quicksand in the first place, about dotting every *i* and crossing every *t* when reporting to the SEC, and about innovating new oversight procedures amid rapid global growth.

[IN BRIEF]

Lawyers charged with ensuring a corporate bill of good health can learn from the demise of Arthur Andersen. Among the lessons:

- Have media management know-how—or access to it.
- Devise a media crisis plan, and act on it early.
- Be prepared to admit fault and accept responsibility.

There are also lessons learned in crisis management—a daunting curriculum when you consider that Andersen actually had a sound approach to its crisis, at least from a media-management perspective. We know of few better models for how to set up and manage a crisis team. Yet a marketing budget of $100 million per year, an expert internal crisis team, and a preponderance of ethical, honest employees could not save Andersen. The inexorable caveat is that some crises are terminal, either because the company is guilty of unforgivable transgressions, or because no matter how well advised the media response, there are times when no one will believe anything the corporation says.

Best-Laid Plans

A shocking number of corporations do not have a crisis team or plan. Most litigators do not even know when to tell their clients that a case may become high profile and that media prophylaxis is required. For in-house counsel, one immediate lesson pertains directly to the retention of outside counsel. Insist that your lawyers, and especially your litigators, have some demonstrable talent in media management—or at least the sensitivity to know when to call for help.

Andersen was a cornucopia of best practices. The crisis team was nationally based in the firm's Chicago headquarters and its Washington, D.C., office. It had expertise in public relations, legal issues, and lobbying. It communicated around the clock with smaller Andersen teams in London and Hong Kong, who in turn communicated with the

media in their own time zones to ensure a consistent message.

When the Enron disaster struck, the Andersen pros immediately drew up a list of priority publications to which they would speak directly, and dedicated their website to provide information to others. Andersen was ready for the media deluge.

The team was able to respond directly to rampant speculation and send the message that the indictment was "a gross abuse of government power." It ran effective attack advertisements, built highly visible grassroots teams, and enlisted an unimpeachable spokesperson, former Federal Reserve Board Chairman Paul Volker. It would be hard to find a better example of the importance of starting early with a media crisis plan. Andersen fought its "holding action" well, and the media team leveraged every message.

The problem was that no one was listening.

Fatal Errors

Andersen also had terrible timing—in part its own doing, because it did not recognize the enormity of the problem soon enough—and the story hit the news during proxy season. When Delta and a few other corporate clients publicly fired Andersen, the press presented the defections as terminal symptoms of Andersen's problems. Only 5 percent of Andersen's client base bolted when those doomsday stories first appeared, but the bad press encouraged a further client exodus.

One weakness in Andersen's strategy is especially relevant to in-house counsel: Andersen relied too heavily on a presumption of legal innocence. A better strategy might be to rest your case on a simple admission of fault and an acceptance of responsibility.

While a public confession of any sort may well be legally untenable in the last analysis, the public will be waiting for just that. For lawyers, the art of crisis management is all about accepting responsibility without exposing the company to additional civil and criminal liability. Remember, the verdict in the media can affect the company's destiny as tangibly as a jury.

Andersen, convinced of its own innocence, failed to address the bigger picture. It did not develop that one great overarching message about itself and was forced into a defensive position. Even as the Enron scandal was unfolding, Andersen could have, and should have, created opportunities to portray itself as the protector of our financial reporting system, not its destroyer.

To be sure, Andersen had great odds against it—like that nasty bit about shredding. Shredding isn't just illegal. From a media standpoint, it's visual. Audiences judge news in pictures and put those pictures into simple, broad categories of right versus wrong. Andersen's shredding stories made us envision desperate accountants destroying documents in dimly lit offices.

The war was over when that word picture hit the newsstand and Andersen failed to counter with a positive image of equal force.

The Mop-Up Campaign

Once the war was effectively over, Andersen's media team fought its "rear action" well: It used targeted media placements to help preserve individual reputations and maximize the value of the remnant Andersen business units in order to fetch the best prices from buyers or to create merger opportunities with other firms. Andersen achieved an auction mentality for its business units and avoided a fire sale.

At the end of the day, many believe Andersen's first mistake was irreparable: It failed to take responsibility. It didn't cut its public relations losses and move on.

If you are going to fight back, at least maximize your chances. Make public perception your touchstone, not reality. •

Richard S. Levick is president of Levick Strategic Communications. E-mail him at rlevick@levick.com.

Larry Smith is director of strategy at Levick Strategic Communications and the author of Inside/Outside: How Businesses Buy Legal Services. *E-mail him at lsmith@levick.com.*

Andersen relied too heavily on a presumption of legal innocence. A better strategy might be to rest your case on a simple admission of fault and an acceptance of responsibility.

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Smile, You're on Television

When the cameras are rolling, it's usually because TV reporters smell blood. Be careful out there.

BY RICHARD S. LEVICK AND SCOTT SOBEL

Marketing

Most lawyers who seek media attention dream of being interviewed on television after a big win. Indeed, lawyers with an important courtroom victory may attract the attention of the press, but most often this will be the print media.

Television, while offering some opportunities for positive coverage, is unfortunately more likely to call a lawyer, or the client, when the story is unflattering, embarrassing, or scandalous.

None of us is a stranger to the broadcast media's propensity for negative coverage ("If it bleeds, it leads"). For example, during 10 of the past 11 years, murder rates in the United States have declined, yet television coverage of murders has gone up. As a result, the general impression is that we live in a more violent society now than we did a decade ago.

If your client has some bad news they do not yet want made public, if the outcome of a conflict is still in doubt, if another party stands to gain a crucial advantage, there is a greater likelihood that reporters are interested in the story right now, long before you have tied up all the client's loose ends. When you have finally gotten the job done to your client's satisfaction, the story immediately loses any real interest for TV reporters. The conflict, the life-blood of television, is over.

But when the television reporters do call, the stakes at that moment are probably much higher than what is at risk in the courtroom.

Alas, if you want to play their game, you have to play by their rules. And those rules are guided by fundamental objectives that have less to do with journalistic integrity or fair play—regardless of the reporter's intent—than with the simple dictates of the entertainment industry. Even programs with the word *news* in their title are largely about show biz.

Last month, for example, the Associated Press news wires ran a story for several days about allegations of Israeli atrocities against Palestinian civilians in Jenin. When the allegations proved to be untrue, the AP stopped reporting the story. A major television network, on the other hand, which got its story from the AP, ran the story for two more weeks before pulling it. Why? Because the TV industry is guided by the Napoleonic Code. Once a story has the appearance of authenticity, it may be necessary to prove that it is not true in order to win acquittal.

When Television Calls

Saying "no comment" to a television reporter is a fine strategy if you wish to concede the entire broadcast to your opponent. Once television has decided something is newsworthy, simply ignoring the media will not make the story disappear. The key is to learn well the tactics to minimize damage to your client and maximize your communications strategy.

1. Less is more. The first difference between electronic and print media interviews is the amount of information the reporter is willing to listen to and the amount of information that will get into the story. In most cases, print reporters have more time to put stories together, listen to interview subjects, and then incorporate what they learn and write suitably in-depth articles. Give these reporters all you've got.

By contrast, don't fill in too much detail for electronic journalists unless asked to do so. If you are giving an interview during a "live" report situation, be aware that you may have an opportunity to get out only three or four sentences before you are cut off. So make your primary message point first and quickly move to Point Two if you can. In any event, always be ready to repeat Point One, especially if the reporter asks, "What is the most important thing the public should know?"

2. Quick, call in the experts. Most businesses do not have litigation public relations specialists in-house. Nonprofit organizations are even less prepared. Don't wait until you are surrounded by camera crews to seek help.

Most in-house PR professionals are experts at positioning a product or idea, but they may be inexperienced in han-

dling a crisis. Lawyers too often assume that their clients (especially large corporations) are ready and able to manage the media aspects of any situation they're facing. More often than not, clients are caught flat-footed, at the most critical initial moments of a crisis. At that point, reporters have not yet formed their opinions and are still sorting out the good guys from the bad. The bad guys are usually perceived to be the ones who take longer to call the reporter back.

Before there's even a whiff of a crisis, have the prophylaxis in place. Know who your crisis specialists are, build a trusted ongoing relationship with those specialists, and keep their cell-phone numbers on hand, to call at any hour. The future of your client may depend on it.

3. Say something. In those first few hectic moments, have a spokesperson return the call from the producer or reporter. Tell them, "We want to respond to your request for an interview, but we want to make sure we get you the right answers from the right people. Please be patient, let me know your questions, give me a number where I can reach you, and we will call you back as soon as possible. What is your deadline?"

If a TV crew has already arrived, politely ask them to leave the property unless you think you will very soon have something prepared to say. Request that, if they do stay on the property, they don't talk to anyone until you come back out. Make it a win-win negotiation by promising more access to key people if they are cooperative.

4. You can negotiate. When negotiating with reporters for more time or to modify the story angle, understand that the vast majority of reporters want to report the facts accurately. Even cynical journalists chose their profession in part because they believe, and continue to believe, that the truth is sacred. However, their news judgment is sometimes influenced by deadlines or a competitive situation—or, in the case of broadcast media, the need to entertain.

Their instinct for the truth, even if it's buried, is still a tool in your arsenal. So let reporters know that they need your input because it will make the story balanced, truthful, and fair. Reporters will run afoul of their bosses, and perhaps even the law, if it turns out that they intentionally rejected an opportunity to balance their story.

5. Speak in pictures. Al Gore lost the presidency the moment that television news showed pictures of hanging chads. If, in fact, African-American voters were prevented from voting, the Gore campaign needed a picture of this injustice. Instead, they lost in the first few days by letting television run with absurd images of allegedly defective ballots. If you are going to go on television, you must have a better picture than the other guy. What is your picture?

6. Use one spokesperson. Always try to centralize your message, using one credible voice. If there must be multiple spokespersons, make sure everyone has internalized the same story, so the media can't pit one answer against another to compromise your position. The lawyer is the spokesperson of last resort, to be used only when fair treatment seems highly unlikely.

7. Play the "exclusive" card for leverage. The news business is one of the most competitive in the world. Reporters almost have to at least consider any opportunity to best the other networks.

If things aren't going your way, you can always bargain with exclusive information. Here, you provide the reporter more access or information than any other reporter, provided she demonstrates receptivity to working with you to balance the story. Conversely, you can negotiate by gently threatening to hold a news conference or to give away information to other networks.

8. Knowledge is power. Be aware of what kind of reporter you are dealing with. Learn when the reporter's deadlines are, what newscast he is trying to make, and what other news might upstage your angle. Find out whether you are dealing with a general assignment reporter, who may not know everything about your business, or a beat or investigative reporter, who may be tougher and more knowledgeable.

The advantage in dealing with the general assignment reporters is that they are usually easier to negotiate with. The disadvantage is that they might not care about alienating you, since they don't cover your industry and don't need you as an ongoing source. The advantages in dealing with a beat or investigative reporter are that they want more information that you may be able to provide, they need you as an ongoing source, and they want to establish themselves as the

brand name journalist in your field. They need to be credible in your eyes, as you do in theirs.

9. Call the boss. If you feel you are not being treated fairly, or if you are being harassed, you can call an assignment editor or someone else further up the network's food chain. But this is a last resort. Use all of these negotiating techniques before you go over the reporter's head and possibly make that person an enemy for life. Be frank with the newsperson looming in front of you: Tell him that you are going to call the boss. But make sure the warning is off the record, or you'll hear yourself making it on the evening news.

When negotiating with reporters for more time or to modify the story angle, understand that the vast majority want to report the facts accurately.

10. There can be a silver lining. Even the most threatening ambush or sudden crisis confrontation can be transformed into a positive experience for your firm or your client. If you are straightforward with news people, appreciate their job, and can establish a good relationship with them, you've maximized the possibility of balance or at least garnered yourself the benefit of the doubt.

In fact, it is not unreasonable to expect that, if you treat journalists fairly, the day may come—sooner rather than later—when they will be receptive to positive stories involving you or your clients. That will be an earned media opportunity worth its weight in gold.

Richard S. Levick is president of Levick Strategic Communications and can be reached at rlevick@levick.com. Scott Sobel is director of communications. The firm has handled public relations for many high-profile cases, including the Florida election recount, the tobacco wars, and the Roman Catholic Church crisis.

Reputation or Litigation: Weighing Opposing Risks

The CEO wants to see you in 15 minutes about a legal matter that may be in the *Wall Street Journal* tomorrow. You, the Chief Legal Officer of Hartwell Department Stores – a publicly traded retail giant with 1,000 stores in North America – walk into a large conference room to find the CEO with a tense look in his eyes. Beside him sits the public relations director and the heads of marketing and product lines, all with nervous expressions on their faces.

The CEO reminds everyone that, not too long ago, the company entered into an exclusive agreement with Benicia, an upscale design company, to supply goods. Everyone at Hartwell considered the deal a great coup and expected increased sales from the arrangement. A multi-million dollar contract was signed, the initial shipments of the goods were delivered, and, indeed, Hartwell happily watched its sales dramatically increase.

This deal is only the latest in a series of shrewd moves by Hartwell involving Benicia. In fact, just five years ago, Hartwell was a largely blue-collar based business. As Hartwell picked up Benicia lines, it successfully changed its image to reach middle-class and upscale customers as well. The recent agreement on exclusive distributorship caps this strategy.

Hartwell's customer base now cuts across class lines. It's an important business relationship, to be sure.

But in the past several weeks, Benicia has received negative press over a number of its ads that are offensive to Hartwell's essentially conservative core customer base. Some of the ads are overtly sexual. Others are insensitive to handicapped people. By association, the public outcry has spilled over to Hartwell. The head of PR tried to dissociate the company from the bad press by issuing press releases, but, so far, the effort has failed.

Hartwell had warned Benicia about the ads before the bad press began. In fact, there's a paper trail, including letters to Benicia from Hartwell executives, as well as memoranda summarizing meetings in which those warnings were repeated.

The CEO looks around the table. "Any ideas what to do?" he asks.

There's no easy answer: If you terminate the contract, you'll violate the agreement, and open up the company to a lawsuit. But if you honor the contract, the company's reputation will continue to be attacked. Meanwhile, sales of Benicia products by Hartwell have dropped 40% since the bad press began.

Essentially, the task is to evaluate two different types of risk…

Is there a middle ground that the company can find, where it can quell the public disapproval and still honor its contract?

If so, what is the message? How is the message to be delivered?

If not, which alternative risk is worth taking? What is the worst-case scenario in taking the reputational risk? What are the advantages in doing so?

What is the worst-case scenario in taking the legal risk? What are the advantages in doing so?

What information does the company need, and what information do you need, to render an informed judgment?

Can the letters and memoranda expressing Hartwell's past concerns about the ads be used now to help Hartwell, either legally or in the press?

How fast can a decision be made? Fast enough for tomorrow's *Wall Street Journal*? If not, is there a "holding statement" you can issue that will satisfy the reporter for now, without undermining the further statement you will make once a decision is made?

The CEO needs to leave this meeting armed with both a general strategic plan as to what kind of risk Hartwell will run, as well as specific action points to implement the strategy.

