# Article Reprint

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## *CEO Advisory:*
## Protecting Corporate Reputation in Mass Litigation·

By
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When corporations become involved in mass litigation – shareholder, products liability, securities and other lawsuits with a large number of plaintiffs, including class actions – they must be prepared to defend against threats to their reputation that could harm their brand and their strategy. While relatively few lawsuits become material financial events for most corporations, mass litigation has the potential to damage the image customers

have of a company, often with calamitous consequences for its strategy. Even a company with a strong brand, clear strategy, and respected leadership team may suffer significant reputational harm if it mishandles mass litigation. Such risks increase when the plaintiff is represented by some of the more aggressive and sophisticated members of the plaintiffs' bar. Often these lawyers use all of the instruments of influence to embarrass and persuade large corporations to settle large lawsuits before they ever reach a courtroom.

Companies that cede the litigation communication advantage to their adversaries commit a fundamental mistake. They fail to understand -- and therefore to protect, their business against -- the threat they face. CEOs, general counsel, and senior management can minimize this risk by better understanding the strategies and tactics of their adversaries.

Corporations facing mass litigation need to understand two fundamental principles in order to protect themselves from such aggressive and determined adversaries:

1) It's more than a legal fight.
2) Plaintiffs' lawyers count on corporate defendants to act (and communicate) in predictable and often counterproductive ways.

**1) It's more than a legal fight.** Plaintiffs' lawyers approach litigation much differently than most corporate attorneys, who often consider litigation in purely legal terms. Corporate counsel have been trained for negotiation and for litigation. They are most comfortable employing fact-based analysis, considering arguments on their merits, and outmaneuvering adversaries in a courtroom or across a negotiating table. Even corporate counsel who understand their adversaries' communication strategies are often reluctant to break out of the legal frame of reference. Many corporate counsel's first instinct is to advise corporate spokespeople to respond with no more than "no comment" when managing communications involving litigation.

Success for the plaintiffs' bar, on the other hand, is a lucrative settlement; most never expect to go to trial. While the best plaintiffs' lawyers are smart negotiators and excellent trial lawyers, they also understand that litigation, and all supporting communication, is at its core a battle for the hearts and minds of stakeholders.

A prominent trial lawyer, who made his name suing tobacco and insurance companies, shared his strategy with *The New York Times*: "These are not just legal wars. They are public relations

and political wars."[i] And as any student of warfare knows, ""the first, the supreme, the most far-reaching act of judgment that the statesman and commander have to make is to establish ... the kind of war on which they are embarking; neither mistaking it for, nor trying to turn it into, something that is alien to its true nature. This is the first of all strategic questions and the most comprehensive."[ii]

When companies define litigation narrowly as a legal battle, they ignore the fact that public relations and political battles are being waged against them simultaneously. What happens in the courtroom is only part of the struggle. Plaintiffs' lawyers are also doing battle in the courts of public opinion and public policy, whether or not their target, the corporation, shows up to defend itself on all fronts. And the tactics for each kind of battle are different.

**Public opinion.** The plaintiffs' bar intends to leverage media coverage to reach various audiences. They want the attention of the press, which sells more newspapers and TV ads when it stirs hearts and minds. Public awareness and sympathy in turn draw the attention of politicians, who may decide to take sides or even promote legislation.

When journalists cover litigation, their purpose is not to seek justice but to tell a story that their audience will want to read or watch. *The Wall Street Journal* editorial board lamented this phenomenon, in an editorial it titled, "Tort Lawyer Journalism": "Journalists often find themselves in alliance with the plaintiffs' bar because both are propelled by the evidence of dramatic anecdotes."[iii]

Successful reporters use time-tested, powerful narrative devices to craft an interesting story. One of these devices – a compelling cast of characters, especially heroes, villains, victims, and experts – is a constant in litigation coverage. Effective plaintiffs' lawyers ensure that their version of events includes these clearly defined characters, increasing the likelihood that reporters cover the story through the plaintiffs' frame of reference.

Take, for example, a class action suit brought by Ecuadorian nationals against Chevron for environmental damage in the Amazon basin. The plaintiffs' lawyers ensured prominent news coverage by having Amazon tribesman in traditional clothing attend a preliminary hearing in a Manhattan courtroom and meet with reporters. A resulting headline in *The New York Times*: "Just Tourists on Broadway, but Barefoot and Craving Roast Monkey." Several color and black-and white photographs accompanied the

article, which barely mentioned the underlying substantive claims against the company.[iv]

This technique works particularly well against corporate defendants, who are easily painted as impersonal, uncaring, and large. In contrast, those suing are painted as "the little guy," otherwise powerless to prevent abuses by those with power and privilege. As Jonathan Harr notes in *A Civil Action,* the best-selling novel about class action litigation, "a forceful accusation by an injured party has more rhetorical power than a denial."[v]

A recent trend in corporate media coverage that the plaintiffs' bar also uses to its advantage is the broad public acceptance of "expert" opinion even from individuals with dubious credentials. Given the competing and contradictory expert testimony featured in civil litigation, the side able to communicate more quickly and broadly its "expert" positions, is likely to gain advantage in the public relations battle.

**Public policy.** Plaintiffs' lawyers also understand the symbiotic relationship they can forge with government policymakers. In a typical scenario, lawyers representing plaintiffs contact sympathetic journalists, leaking documents, and/or making available to them the stories of compelling victims of alleged

corporate malfeasance. Once reporters are covering the story, plaintiffs' lawyers may prompt the journalists to question government officials with jurisdictional responsibility for the corporate activities at issue. Even if the allegations are unfounded, when confronted by a reporter's question, elected or appointed officials are under great pressure publicly to respond or express outrage over the alleged conduct, scoring more points among stakeholders for plaintiffs and further damaging corporate reputation.

**Internet.** Plaintiffs' lawyers not only enlist the media and policymakers for their cause, but they also quickly identify and adopt new points of leverage. Internet communications, for example, including blogs, search engines, social networking sites, and mass e-mails have become a powerful tool, both for attracting clients[vi] and waging communication campaigns. Corporate adversaries recognize that damaging information disseminated through the Internet cannot be contained. And if a company tries to limit Internet speech, even false or inaccurate speech, it risks damaging its reputation among stakeholders even further.

For example, when a secret anti-piracy code used to protect high-definition movie discs was published on the Internet, a group of

companies that use the copy protection system sent cease-and-desist letters to the websites and individuals posting the code. The legalistic corporate response triggered a net-roots effort to widely publicize the code. According to the Electronic Frontier Foundation: "It's a perfect example of how a lawyer's involvement can turn a little story into a huge story… Now that they started sending threatening letters, the Internet has turned the number into the latest celebrity. It is now guaranteed eternal fame."[vii]

**2) Plaintiffs' lawyers count on corporate defendants to act (and communicate) in predictable and often counterproductive ways.** Speaking to a trade magazine about class action litigation, leading trial lawyer Richard Scruggs asserted that he employs a "sniper strategy" against corporate defendants.[viii] Guerilla warfare, often a battle for hearts and minds, is an apt metaphor for mass litigation. Guerilla tactics include: 1) striking at the point of least expectation and least resistance; 2) keeping the enemy off balance; 3) seizing, retaining and exploiting the initiative; and 4) using the enemy's strength against him.

Plaintiffs' lawyers expect companies to be slow, plodding, and inefficient, to remain silent and not to fight back on all fronts.

Trial lawyers are delighted when corporate defendants are lured into self-destructive confrontations.

**Defending reputation in litigation**

Given the sophisticated communications employed by the plaintiffs' bar, how can companies defend themselves?

**1)Understand the context of the fight.**

Leaders of companies should not view litigation narrowly as only a legal problem. Invariably, litigation is a business problem with many elements – legal, reputational, financial and operational. When considering litigation communication strategy and tactics, leaders should weigh all factors and keep in mind that the most prudent communication from a legal perspective may have a negative reputational impact. How will the communication strategy affect public opinion? How will policymakers react? How will other stakeholders react?

**2)Identify the likely assault**.

To craft your defense, understand clearly the strongest case against you. Expect exaggeration, error, misstatement, and

misdirection from your opponent. Draft definitive, compelling refutation to the likely assault, and do it fast, before the media are invested in your opponent's side of the story. Anticipate attacks through all communication channels, including internet channels; and in the policy arena.

**3)Pre-empt your adversary**.

As in other realms, in litigation communication there is a significant first-mover advantage. Companies must quickly set the terms of debate by defining the litigation issue and the parties involved. Remember, this is insurgent warfare. To preempt your adversary, you should seize, retain, and exploit the initiative to define both the adversary and yourself before the adversary does.

**4)Act quickly.**

Timeliness in litigation communication is critical. In the current anti-business and instant-information environment, communication is most effective before a media feeding frenzy begins. It also allows you to control the terms of the discussion. If a media whirlwind does spring up, you'll need a combination of powerful facts and luck to turn it around.

**5)Communicate forcefully**.

There are legitimate legal reasons, of course, for exercising caution in promulgating corporate communications about litigation, but there is lots of room to maneuver between self-defeating silence and self-destructive bluster.

Remaining silent, or even worse, seeking to quash or hide information, presents plaintiffs' counsel with a huge opening to win hearts and minds. Many segments of the public will perceive a corporation's "No comment," as evidence of culpability and any account of its hiding information as a sign of guilt. In the court of public opinion, such initial perceptions raise the risk of long-term reputational damage.

Communicate forcefully with messages that are 100 percent accurate and able to withstand critical scrutiny. The most compelling message both refutes an expected attack and affirms positives.

Craft the most effective message in terms likely to be understood consistently by legal, public and policy audiences. Effective

messages are crafted using plain language, the active voice, short sentences and short words.

Give your side of the story quickly. By pre-emptively briefing reporters before your adversary gets to them, you are able to shape and frame the issue in question. You should also respond to reporters immediately when they contact you. The longer you wait the less effective you'll be because your adversary will have seized control of the initiative.

Other communications tactics include:

- Taking your story to a friendly medium, and using an ally to tell the story.
- Mobilizing allies: Rallying those with similar business or policy interests.
- Identifying those who are regularly sought for media comment; briefing them so that they give supportive quotes or become full allies.
- Reaching out to educate likely third-party experts who might give inadvertently negative quotes without complete information.
- Communicating directly with your stakeholders so that they don't rely only on what they hear from your adversary or through the news media.

By understanding yourself and your adversary, you will be better prepared for litigation communications that advance business strategy and protect corporate reputation.

Endnotes:

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[i] Richard "Dickie" Scruggs, *quoted in* Joseph B. Treaster, "A Lawyer Like a Hurricane: Facing Off Against Asbestos, Tobacco, and Now Home Insurers," *New York Times*, March 16, 2007.
[ii] Karl von Clausewitz, *On War*, edited and translated by Michael Howard and Peter Paret, Princeton University Press, 1976, pp. 88-89.
[iii] Editorial, "Tort-Lawyer Journalism", *The Wall Street Journal*, March 27, 2002.
[iv] Robert F. Worth, "Just Tourists on Broadway, but Barefoot and Craving Roast Monkey," *New York Times*, March 12, 2002, p. B1.
[v] Jonathan Harr, *A Civil Action*, Vintage Books, 1995, p. 295.
[vi] "Mesothelioma" – the cancer caused by asbestos exposure – is reportedly the most expensive paid advertising search term on Google. Adam Liptak, "Competing for Clients, and Paying by the Click," *New York Times*, Oct. 15, 2007.
[vii] Fred von Lohmann, staff lawyer, Electronic Frontier Foundation, *quoted in* Brad Stone, "In Web Uproar, Antipiracy Code Spreads Wildly," *New York Times*, May 3, 2007.
[viii] "Tobacco Trial Lawyer 'Poster Child' for Katrina Insurance," *Insurance Journal*, May 10, 2006.