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Litigation PR: The Eliot Spitzer syndrome

Craig McGuire - 21 Mar 2005 00:00

The spitfire attorney general has made many companies aware of the need for good litigation PR.

PR has become crucial to a successful litigation strategy. Not only is "no comment" no longer an acceptable answer to most media inquiries, but chances are, when your clients come up for trial, they better get their sides of the story out or risk being run over by those more savvy.

"Litigation-related communication services are an emerging art," says Harlan Loeb, who recently left Hill & Knowlton to head up a Chicago-based litigation practice for Financial Dynamics. "During the past two years, we have seen the dramatic - and often zealous - joining of legal representation with communications strategy. The fact of the matter is, today there exists a nascent cottage industry for creating litigation that has nothing to do with the legal genesis of the cases."

In other words, publicity has the potential to have such a potent effect on the outcome of litigious proceedings that people are making money by engineering situations where suits are brought, communications strategies applied, and share prices subsequently driven down to produce back-door profits.

Though an extreme example of the misuse of litigation PR, this nefarious practice shows how integral promotion has become to the legal process. "Mega-matters like Enron, WorldCom, and Martha [Stewart] have raised awareness about corporate malfeasance to such high levels that even small matters receive an undue amount of attention," says John Hellerman, CEO of Hellerman Baretz Communications, a firm with a litigation communications practice. "The increased media attention means more ink and TV time for ambitious AGs. It also means that companies, and whole industries, are at even greater risk. And that's good for business."

Spitzer's impact

Perhaps more than anything, New York Attorney General Eliot Spitzer's very public crusades against improprieties in many industries - from investment advisories and mutual-fund companies to insurance corporations - has struck a resounding chord in our culture.

"Spitzer has drastically changed the traditional role of an AG," says Rich Klein, president of Riverside Public Relations. "It seems to me that other AGs across the nation will now become even more activist as a result of Spitzer's actions, particularly those who also aspire to higher political office."

While it might be painful for some companies, it is difficult to argue with the results of Spitzer's blitzes.

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"Spitzer's effect on the litigious business climate is helping push companies to become more aware and proactive about their litigation communications strategies," says Wendy Lane, president of Lane Marketing Communications. "Several *Fortune* 500 companies have recently moved some of their in-house PR staff into their legal departments."

Those companies recognize that the communications interests of the company must be represented in any litigation in order to minimize negative perceptions and defend the equity of their brands, Lane explains.

Meanwhile, public demand for full disclosure, particularly from the investment community, led to the current wave of necessary - but also politically driven - Wall Street reforms.

"In that painful transition, it's imperative to restore or, in the case of good companies, reinforce trust with the public," says Erin Powers, president of Powers MediaWorks, whose PR litigation work includes claims against Enron and WorldCom. "The evidence of this shift is in the nature of the financial sector's collective advertising; it's gone from, 'We can make you rich' in the 1990s and 2000 to, 'Here's why we can be trusted.'"

If litigation PR is neglected, then a win in court can still be a loss. There is little benefit in winning a case if your client's reputation is irreversibly harmed.

"I heard an executive tell his outside counsel, 'You may win this case three years from now, but it won't matter because we'll be out of business,'" Powers recalls. "Anyone with reputational assets to protect should prepare to communicate with their audiences about the consequences of litigation, even if victory is expected."

With the rise of cable news and Court TV-type shows, coverage of legal proceedings has proven extremely popular with a viewing public obsessed with reality. Combine that with more sophisticated jury pools, and there's more need than ever for litigation PR.

"Given the 24-7 media world and litigious landscape, companies need to quickly get the facts out," says Rich Tauberman, SVP at MWW Group. "Media, investor, and even consumer scrutiny of companies' activities has never been greater. High-level corporate scandals have over-sensitized these audiences to any whiff of impropriety."

Incorporating PR

Inevitably, an intensifying regulatory environment, marked by such sweeping reforms as Regulation Fair Disclosure and Sarbanes-Oxley, has led to far more transparency in the corporate world, while nurturing substantial investor uprisings in recent years. As such, it was only inevitable that litigation would follow in the wake.

Still, fewer companies than one might think are embracing PR. "For sure, companies are lawyering up and spending gobs of money on corporate governance and compliance," Hellerman says. "But, for the most part, they stop there and leave it to the lawyers to manage. And I don't see many lawyers bringing communicators into the initial planning process. They tend to call at the last minute or past that, when things become nearly unmanageable."

No doubt, incorporating an effective PR plan to address and even affect your client's legal woes can be expensive.

As a partner at law firm Crowell & Moring, Kathleen Taylor Sooy acts as national coordinating counsel to companies in commercial and product liability litigation. As such, a great deal of her practice involves advising corporations and their legal departments on how to hire PR agencies and manage them through litigation.

"We're increasingly seeing agencies with lawyers on staff, not as legal counsel, but PR pros actually holding JDs," Sooy says. "Sure, hourly rates tend to be a bit higher, but you are paying for the legal expertise. Savvy clients realize the ROI, so we are not seeing push back."

But for all the evidence of how effective litigation PR can be, it's also important to be aware of potential pitfalls.

"PR people [must] understand limitations, like gag orders imposed by judges and respect for attorney-client privilege," Klein says. "Lawyers also need to trust the judgment of their PR people when it comes to maintaining and defending a corporate reputation."

Lastly, there are limitations to how effective your counsel can be.

Inevitably, as Powers explains, no matter how sophisticated or clever a communications strategy may be, litigation PR rarely overcomes bad facts, bad law, and extraordinarily bad behavior by litigants or counsel.

Spitzer's sound bites

Perhaps no one embodies the effective use of litigation PR tactics more than Eliot Spitzer. Here is a list of companies that wilted under the intense media spotlight drawn by his crusades and the consequences they suffered.

Marsh & McLennan Cos.

On January 31, the nation's largest insurance broker agreed to repay customers \$850 million and overhaul its business practices to settle charges by Spitzer and the New York insurance regulator that it had accepted kickbacks and colluded with insurers to rig bids over the past four years. Two execs each from AIG and Zurich American, and one each from Marsh and ACE pleaded guilty to criminal charges.

Spitzer: *"We are persuaded that the goals that would have been advanced by a criminal prosecution of the corporation - punishment, restitution, general deterrence, and industry reform - will be better accomplished by criminal prosecution of individuals."*

Merrill Lynch & Co.

On May 21, 2002, the nation's largest brokerage house agreed to settle with Spitzer its highly publicized conflict-of-interest case. Merrill Lynch agreed to pay \$100 million in fines, but would not admit any wrongdoing.

Spitzer said the settlement should "send a message" to every brokerage house on Wall Street, recommending to firms that they review e-mails and documents, and "come in and have some forthright discussions with us."

Less than an hour after Spitzer's comments, Goldman Sachs announced changes to its research analyst policies, including the creation of a research ombudsman position. Within months, Spitzer had rounded up the Securities and Exchange Commission, a dozen other state regulators, and 10 of Wall Street's largest banks into an enormous \$1.4 billion "global" settlement.

Spitzer: *"This is brazen. It didn't appear to us that this [behavior] was something around the edges. It seemed to be par for the course. It was the Wild West."*

Alliance Capital Management

On December 19, 2003, Spitzer released details of a \$600 million settlement with Alliance to resolve an investigation into the mutual fund's trading practices. Alliance agreed to reduce its mutual fund fees by 20% and freeze the fees for five years, costing it \$70 million a year, according to Spitzer's office. Alliance also agreed to establish a \$250 million fund to compensate shareholders for the adverse effects of market timing in some of its mutual funds. The mutual-fund industry has since given up more than \$2.3 billion in restitution, penalties, and reduced customer fees.

Spitzer: *"This settlement will fundamentally alter the way this company is run. Instead of favoring managers, [it] will now focus on the interests of investors by eliminating harmful market timing and reducing fees for all shareholders."*

Allegheny Energy

In May 2004, Spitzer joined state attorneys general in New Jersey, Connecticut, and Pennsylvania in issuing a threat to sue this West Virginia power giant for air emissions from seven power plants in West Virginia and Pennsylvania that allegedly contributed to acid rain and smog in those states. The case won national attention not only for the environmental angle, but because it marked the only time in which a state picked up an environmental enforcement case after it was dropped by the Environmental Protection Agency (EPA). In fact, Spitzer wrote a letter to EPA administrator Mike Leavitt that said: "If you're not going to do it, give us your case files and we'll do it."

Spitzer: *"When the federal government failed to enforce the law, we decided to step in."*

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