

CHAPTER ONE

Welcome to the Hotseat: This Is Litigation PR

"Oh sure, litigation PR. That's an interesting niche you've carved out for yourself." This from a technology reporter at the New York Times as we poured over some legal documents relating to an Internet lawsuit I was working on.

It seems litigation communications is on many lips these days—but there's a great deal of misunderstanding among businesspeople and their lawyers as to what the term really means. In this chapter, we'll consider the use (and misuse) of communications as a means of advancing your position in legal disputes. Along the way, we'll look at the difference between litigation PR and other forms of crisis communications. We'll also look at the birth of the discipline, less than 20 years ago. Finally, we'll examine why some of the usual rules of public relations don't apply, using one of 2001's top tabloid stories—the divorce case of former New York City Mayor Rudy Giuliani—as an example.

What is *litigation public relations* or *litigation communications*, as it's also known? To some, it's a press conference on the courthouse steps, or Alan Dershowitz arguing with Geraldo Rivera on late-night cable over the guilt or innocence of O. J. Simpson, or Microsoft's daily briefings at its recent antitrust trial.

In truth, it is usually none of these things. Each scenario occasionally comes up in the practice of litigation communications, but only in isolated instances. The late night shoutfests in front of Chris Matthews or Sean Hannity, the impromptu courthouse press conference, the mass-produced and distributed press release announcing the commencement of a lawsuit—these are only a part of what we do, and a small part at that, especially for the classic “business” lawsuit, which is more often fought in the pages of the relevant business and trade magazines than on *Nightline*. In fact, for reasons that will become clear in the course of this book, press conferences and other “in-your-face” approaches are precisely the types of tactics I *don’t* recommend in most circumstances.

Which brings me back to my original question—What is litigation PR? Well here’s the textbook definition:

Litigation PR can best be defined as managing the communications process during the course of any legal dispute or adjudicatory proceeding so as to affect the outcome or its impact on the client’s overall reputation.

Now that’s a bit dry. So to illustrate the power of public relations in influencing the course of litigation, let’s consider the following example, *not* from my work as a consultant to lawyers and their clients in high-profile court cases, but from my experience as an attorney. It is a “small” case, which further illustrates that using the media to influence the course of legal proceedings is not necessarily the domain of the Microsofts or O. J. Simpsons of the world, but anyone whose case has the potential to bring them into the public eye.

AN APPEAL TO REPUTATION

Let me be clear: Although I am an attorney licensed in New York and Florida, I’ve rarely practiced law. For about six months after law school, I did some legal work in an insurance defense firm in Florida, writing briefs and motions relating to auto accidents. Anyone who knows me and knows this type of work will understand why I’m in the communications field today. The usual case went like this: Car A hits Car B. Whose insurance covers first? Whose insurance

covers second? I lasted about six months before I had to give it up. (I don't mean, by the way, to offend all of the very talented insurance defense attorneys out there. It just wasn't for me.)

These days, I tell clients that law is my hobby, and I generally only get involved in cases as a *lawyer* if it involves an issue of particular interest to me.

This was one of those cases. John* was a five-year-old boy who walked with a brace on his left leg. In late August, just before the beginning of John's first day in kindergarten, his mother called me. John needed a new leg brace to begin school. The old one, affixed to a heavy brown shoe, was worn, even rusted at points, and had a noticeable squeak when John walked. It was barely functioning and clearly unacceptable for a child just beginning the educational process. Kindergarten, as we all know, is the first great leap into socialization for a boy John's age, and his mother was worried that if he went to school with a rickety leg brace—or even worse, with no leg brace at all—it would exacerbate what was already an anxious situation for the child. John's mother had already been to the orthopedist: The new leg brace was measured, fitted, and ready to go.

But here's the problem: John's father had recently switched jobs and his health insurance was refusing to cover the cost of the new leg brace. He'd been at the job for too short a time, they told him; thus, coverage for special services hadn't kicked in yet (a questionable reading of the health insurance contract, by the way). Come back in six months, they said. It was days until school was to begin, and John's parents didn't have the money to buy the leg brace outright.

In my capacity as attorney, I spoke to the claims representative. "Sorry," he said, "rules are rules." If John and his family didn't like it, they could appeal the decision, and if they didn't like the results of the appeal, they could go to court. I figured John would be a college graduate before we ever saw a final decision.

I next wrote a letter to the General Counsel of the insurance company, explaining the situation and asking for his intercession to waive the appeal requirement—I was relatively sure insurance companies could do this under the right circumstances. I mentioned in the letter that it probably wouldn't look good for the company to be denying a child's claim on a technicality just before he

*Not his real name.

started school. No response. It was Wednesday at that point, and kindergarten was set to begin the following Tuesday.

On Thursday morning, I finally was able to get the General Counsel for the insurance company on the phone. I described the situation and how unseemly it was that this child should be starting school in a few days without the leg brace that the insurance company would approve under any other circumstance. Wasn't there anything he could do?

It turned out there was a procedure for overriding the decision on coverage without going through the normal appeals process. He just wasn't going to do it.

"Why?" I asked.

He said something along the lines of: "Because I don't think it's warranted in this situation." I can't remember exactly, because at this point, I was getting pretty angry.

We argued back and forth a while longer, and then—just before hanging up—I pulled my trump card. I said, "Well let me tell you this: That child is going to start kindergarten on Tuesday, and he's going to be accompanied by a new leg brace or a television crew." I hung up.

John's mother called me again on Friday morning—this time to let me know that the insurance company had reconsidered her claim, approved it, and that the leg brace would be delivered later that afternoon.

This is the power of litigation PR.

Interestingly, I was watching *60 Minutes* recently and saw a similar scenario play out in a segment on experimental brain tumor treatment pioneered by Duke University doctor Henry Friedman. The insurance company refused to cover the experimental treatment—and did so, unfortunately for them, with Ed Bradley of *60 Minutes* in the room:

BRADLEY: [Voiceover] Thirteen-year-old Daniel Glancey has a fast-growing brain tumor, and Dr. Friedman believes that experimental therapy is the only chance he has to survive. So Dr. Friedman calls the family's insurance companies and threatens them with negative media exposure if they don't give in.

FRIEDMAN: [On telephone] Everybody has to understand what you're saying, basically, means you won't treat cancer—treatable cancer on your policies. I think this is something that people who purchase insurance from your group really must be aware of.

UNIDENTIFIED MAN: [On telephone] We're not going to participate in an argument through the press.

FRIEDMAN: [On telephone] Well, belatedly, I'll tell you that you're already involved with the press as we speak.

[Later that day] The question was posed, and I posed it: "Who would like to receive the call from Mr. Ed Bradley to discuss this for a forthcoming segment of *60 Minutes*?" I don't think they liked you, because they didn't want to talk to you. But yet that night, they called back and said it's been approved.

BRADLEY: You enjoy this, don't you?

FRIEDMAN: I enjoy helping my patients. I'm not afraid to mix it up with anybody to help my patients. I won't break federal or state laws. I'm not about to commit a crime. But I believe that showing people the right way to do things and the consequences to their business of not doing the right things is very appropriate. Yeah, I enjoy this.¹

MEDIA'S INFLUENCE ON THE COURSE OF LEGAL DISPUTES

These examples are not earth-shattering cases, not cases with the national or worldwide ramifications of a Microsoft antitrust case or Ronald Perelman divorce. But they highlight the enormous power of the media to influence the course of legal disputes—and how effective that power can be if attorneys and clients know exactly which buttons to push.

These examples also illustrate why communicating during litigation is not all press conferences on the courthouse steps and end-of-day summaries of court proceedings on *Nightline*. The simple fact is this: Most cases settle. According to R. Lawrence Dessem in his book *Pretrial Litigation: Law, Policy & Practice*, less than 10 percent of lawsuits filed in this country ever see the inside of a courtroom.² That's not counting the untold millions of *administrative*

cases (cases that are not in a courtroom but before an administrative body such as the Social Security Administration) and *regulatory investigations* (where government regulators—such as those that deal with Medicare fraud among doctors—begin investigating a client in anticipation of litigation). Not to mention the many cases that are settled before a formal action is even filed. Clearly, the bulk of the legal activity in this country goes on *outside* the courtroom, long before a lawsuit ever goes to trial—and the overwhelming majority of communications counseling in litigation occurs outside the courtroom as well.*

Thus, litigation PR more often than not involves managing the communications aspects of litigation well before a case is ever adjudicated. And while its impact can be enormous, admittedly, sometimes there's precious little you can do. Several years ago, for example, we were approached by a major national restaurant chain that was being threatened with a lawsuit by several employees for racial discrimination. Leading the plaintiffs in the case was the popular pastor of a major Southern church. The client had clearly done some things wrong, so we worked with them to admit publicly that mistakes had been made, that the company was doing its best to resolve the issues, but that they would not allow themselves to be the victim of frivolous lawsuits. They were able to settle the matter quickly and amicably, and their reputation survived relatively intact.

About a year later, they called again. There was another case about to be filed on similar racial discrimination grounds in another Southern city. The case itself was highly questionable, but in reviewing the new facts, it became clear that the company's message of change hadn't been entirely sincere. Little had been done to rectify some of the real problems with the company's behavior. The language that accompanied the prior settlement seemed nothing more than "lip-service," designed to put the episode behind them so that they could get back to business as usual.

*Some other statistics, also from Professor Dessem's book: For the 12 months ending June 30, 2000, only 2.3 percent of civil actions in U.S. federal court ever made it to trial. Moreover, a 1991 study of 2,000 contract and tort cases in federal and state courts showed that all but 2.9 percent of contract cases and 3.7 percent of tort cases were settled before trial.

What is the best way, we were asked, to resolve the matter without creating a media firestorm that would quickly spread nationally and damage the restaurant's reputation forever?

My answer was this: Get the correct spelling of the plaintiff's name for the check.

Sometimes the best solution for a company, from a reputation standpoint, is to settle the matter quickly and quietly well before it ever reaches the courthouse *or* the media. Particularly when it becomes obvious that, from a public opinion standpoint, the case is a sure-fire loser.

BIRTH OF A NEW DISCIPLINE

I want an article as soon as possible in the *Globe*—"St. Cat's, neighborhood giant, serving the community, etcetera"—they've got it in the files. And I want something in the *Herald* Monday morning—"Our gallant doctors . . ." eh? Be inventive!

And television . . . we've got to have television. Friedman, since you're still with us, why don't you have a word with, ah your friend at GBH, hmmm?

—James Mason in the 1982 movie *The Verdict*, playing an unscrupulous defense lawyer fending off a medical malpractice lawsuit against a prestigious Boston hospital.

Ah, if only life were this easy—I could take more vacations.

Obviously, this is not the way things work, and in an otherwise wonderful movie you get a bit of a skewed perspective of how easy it is to influence the media in the course of a lawsuit—in this mythical case, a personal injury suit by a brain-damaged former patient of the venerable old-line hospital St. Catherine's. But even if James Mason is your lawyer, things are never that easy—not in 1982, and certainly not now.

What is interesting about the quote is this: It is no coincidence that this quote was from a movie made in the early 1980s. It was just about that time that public relations techniques first started being used in major litigation, and many of the techniques that are now considered *de rigueur* were just then in the process of being born.

Think about that for a moment. Twenty years. That's how new communications in the legal context actually is, while the law

itself dates back at least to the time of Hammurabi. Thus, among most business executives, lawyers—and even public relations professionals themselves—there’s only the vaguest notion of how the process of using communications works, how it fits into the overall practice of law, and what parties are really trying to achieve when they use public relations techniques to manage the course of litigation. It is too new a practice to have been subject to much critical scrutiny thus far. It’s true, of course, that the media has always covered certain court cases, and parties have always attempted to influence public opinion during lawsuits—informally for the most part. But as a formalized discipline, litigation communications is still in its infancy—and most observers believe it had its birth with the famous libel lawsuit of the early 1980s by William Westmoreland against CBS News. And its father, most agree, was the Runyonesque, sometimes scurrilous public relations man John Scanlon.

I got to know Scanlon a bit before his death in 2001—but then again, everyone in New York, it seemed, knew him to one extent or another. We had been on opposite sides in a few battles. Like myself, he was the son of Irish immigrants who started out his career working on economic development projects for the City of New York. Perhaps that’s the basis of my grudging admiration for Scanlon, despite the sometimes nasty nature of the clients he represented and ethical byways he chose.

Named by *PR Week* magazine as one of the most influential public relations professionals of the twentieth century, Scanlon was a remarkable figure in many respects—not the least of which was the way the media loved him. I mean they *loved* him. So much so that Pete Hamill wrote a full column in New York’s *Daily News* after Scanlon’s death entitled “No Sad Songs for Scanlon: Our 35-Year Friendship Lasted Through Thick and Thin.” The story detailed his friendships with leading media figures like Peter Jennings, his ability to quote Yeats and Shakespeare, his tendency to launch into an Irish ballad on a whim. “In his presence,” Hamill wrote, “I always felt as if I were talking to one of those Irishmen from New York’s nineteenth century. Many were rogues, absolutely capable of ruthlessness, driven by a belief that after decades of hunger and bigotry, their time had come. They rose

out of the squalor of the Five Points and built Tammany Hall and their own fortunes and the modern City of New York. I can hear Scanlon, at his table in Delmonico's, trying to convince me that Boss Tweed was framed (he was) or that Jim Fisk and Jay Gould were innocent (they weren't). Life is tragedy, says the Irish fatalist, so pass the butter."³

Again, this was the ethical divide that puzzled many who knew Scanlon and admired his work. He could represent anyone, and over the years, he did: at various times, Corazon Aquino, Monica Lewinsky, Bruce Ritter (the famed priest and founder of Covenant House, who was accused of having sexual relations with some of the runaways he took in), Jesse Jackson, Ronald Perelman, Bob Kerrey. All in highly contentious legal matters that thrust his clients into the public spotlight. In the process, a new practice of public relations was born.

It began with the case of *William Westmoreland v. CBS*, a real barn-burner of a lawsuit over one of the most controversial U.S. activities of the past half-century: Vietnam.

Westmoreland: A Media Case Launches a New Media Strategy

The gist of the Westmoreland libel trial against CBS News was as follows: CBS had broadcast a segment by Mike Wallace on its *60 Minutes* program that alleged that Westmoreland, while in charge of U.S. forces in Vietnam, knowingly exaggerated enemy casualty figures to convince the Johnson administration—and the American public—that we were winning the war. Westmoreland sued CBS, charging that he had been libeled by the report, and a media circus seldom seen in noncriminal court cases ensued. Every step of the way, from shortly after the filing of the complaint until the case actually reached the courthouse, there was John Scanlon, cleverly working to manage the coverage of the case on CBS's behalf.

How new was what Scanlon was doing? Consider the wonder with which his performance was documented at the time of the Westmoreland trial—not by any public relations trade publication, but instead by the venerable *New York Times*:

PUBLIC RELATIONS A FACET OF WESTMORELAND TRIAL

(October 23, 1984)—Almost every day, a 49-year-old barrel-shaped man with a ruddy face and a gray curly beard shows up in the courtroom where General William C. Westmoreland is suing CBS for libel. He sits with the press. He knows each reporter by first name. He laughs with them, and when the day's session is over he is very often standing outside the courtroom handing out documents.

Sometimes the documents are the evidence that had been discussed in court that day and sometimes they are materials that have *not* been used in court, but relate to the day's evidence. The man, John Scanlon, is not a member of the press, and he is not a lawyer. He is on CBS's side, but he is not a CBS employee: He is new scenery on the landscape of legal procedure. He represents one of two public relations companies working for the opposing sides, and while the legal battle is being fought according to the principles of law, Mr. Scanlon and General Westmoreland's representative, David Henderson of Washington, are fighting with the uncodified art of public relations.

The presence of two public relations companies at this trial has raised questions: Should the opposing sides in a trial be seeking the outside world's approval when the ostensible goal of litigation is to attain justice inside the courtroom? And what is the propriety of the press possibly taking its cues from a paid information officer during a trial?

When the press needs transcripts of the day's testimony, Mr. Scanlon, a senior executive vice president of the Chicago-based public relations company Daniel J. Edelman Inc., provides them. When the press asks for documentary evidence submitted from either side, he, or an associate, James Noonan, checks with the CBS attorneys and does his best to produce it. Reporters turn to him for material, and he gives it to them, along with a passionate discourse about the trial. Sometimes when he thinks they have described CBS's case clearly, he congratulates them the next day.

"It's pretty unusual," said Professor Arthur R. Miller of the Harvard Law School. "I've noticed other instances of it in the last couple of years. You sort of get the feeling that you want to get your point across in the newspapers, or the broadcast media. When you're dealing with the integrity of a broadcast organization, you want to get CBS's message out so there's no ripple effect in the public—that

unless you get your side of the story communicated, people lose their faith in CBS News.

“For the Westmoreland side, there may be a feeling that there’s a certain symbiotic relationship between the media and CBS.”

“Both sides,” said Professor Geoffrey Hazard of the Yale Law School, “are seeking a public opinion verdict as well as a jury verdict.”

Neither professor found anything wrong or improper in the presence of public relations men at the trial.

Source: Peter W. Kaplan, New York Times, October 23, 1984.

The first thing you’ll notice about this article is how far we’ve come in such a short time (or, perhaps, traditionalists in the legal community might say, how far we’ve fallen). As you’ll see throughout this book, in most major pieces of litigation today—and certainly in those of the high-profile variety—it is expected that both sides will have spokespeople reaching out to the media on a daily basis. Indeed, a party to a lawsuit that attracts media attention might be considered remiss if they did not have a point of contact for the case.

Of course, it’s important to note that the Westmoreland case is atypical in certain respects—including the fact that it actually went to trial, which, as we’ve already noted, is a rare occurrence in the American legal system. But a closer look at the *Times* description of Scanlon’s work reveals that, even in 1984, he was using many of the tactics that have become the basis of the practice of influencing the media during court cases, many of which we’ll discuss through the course of this book. Consider:

- “He sits with the press. He knows each reporter by first name. He laughs with them, and when the day’s session is over he is very often standing outside the courtroom handing out documents.” Scanlon is working here to develop the type of relationship with the media that will establish credibility, and therefore make reporters more predisposed to his client’s point of view.
- “When the press needs transcripts of the day’s testimony, Mr. Scanlon . . . provides them.” Scanlon is working to make the media’s job easier—and showing a willingness to work

with the media to get reporters the kind of information they need to cover the story.

- “Sometimes the documents are the evidence that had been discussed in court that day and sometimes they are materials that have not been used in court, but relate to the day’s evidence.” Scanlon is choosing his message carefully, and working to adapt that message to the events of the day in a way that brings reporters, however subtly, back to the “theme” that CBS is looking to advance.

In the Westmoreland libel trial, Scanlon’s tactics seemed to work. Just at the height of the contentious court proceedings, the case was settled, in a manner highly positive for Scanlon’s client, CBS—and of high interest in our discussions:

General William C. Westmoreland dropped his \$120 million libel suit against CBS last night, the network announced.

Under the terms of the settlement, CBS will not disavow the 1982 documentary on the Vietnam War that is the basis of the suit, and will not pay any money to General Westmoreland.

The parties, according to legal sources on both sides of the case, will issue a joint statement today saying *they now agree that the court of public opinion, rather than a court of law, is the appropriate forum for deciding who was right in the case* [emphasis added].⁴

In this case, not only was the media used decisively by CBS in fending off General Westmoreland’s advances, it was ultimately decided that the public arena was where the case should be decided. The use of public relations techniques in litigation had arrived.

A sad postscript to the Scanlon story is that John was also involved in one of the biggest litigation communications blunders of the past 20 years—The Brown & Williamson/Jeffrey Wigand imbroglio that served as the basis for the movie *The Insider*, starring Al Pacino and Russell Crowe (and Rip Torn in a small role as John Scanlon).

In the Wigand case, former Brown & Williamson employee Jeffrey Wigand had gone public and with certain allegations about the tobacco giant and its research. In response, the Brown

& Williamson team did a background investigation of Wigand and produced a report titled “The Misconduct of Jeffrey S. Wigand Available on the Public Record.” The report was compiled by a private investigative firm, Investigative Group Inc., whose New York office was headed at the time by Raymond Kelly, now New York City’s police commissioner (in an odd coincidence, in 2002, Kelly’s boss, New York City Mayor Michael Bloomberg, publicly embraced Jeffrey Wigand at a hearing related to Bloomberg’s proposed anti-smoking regulations. Small world!)

The fact of the matter is that this type of investigation goes on all the time in litigation. It is as routine to see what dirt exists on a plaintiff in litigation as it is in a political campaign. But if you handle the dissemination of such information in a reckless or ham-fisted manner—or if your information is misleading or factually inaccurate—such research can blow up in your face. And that’s exactly what happened in the Wigand/Brown & Williamson mess.

Someone—maybe Scanlon, maybe the lawyers—decided to supply the entire investigative report to the *Wall Street Journal*. The entire thing, without winnowing the good facts from the bad, without removing the irrelevant claims and unproven allegations—without even a good editing job, as I understand it. The report included such subheadings as “Wigand’s Lies about His Residence,” “Wigand’s Lies under Oath,” and “Other Lies by Wigand.” But many of the allegations were unproven, others were so small and strange as to seem silly. As revealed in a comprehensive article on the case in *Vanity Fair*, the report detailed, for example, that “On November 10, 1991, Wigand wrote to Coastal Cutlery Company and returned an allegedly damaged knife for repair,” and “On March 18, 1992, Wigand wrote Coach for Business requesting credit to his American Express card for two returned items.”⁵ There were more serious allegations as well, but the effect of leaking all of this information created a public relations firestorm—with John Scanlon firmly at its center. The *Wall Street Journal* published a highly skeptical account of the report under the headline “Getting Personal: Brown & Williamson Has 500-Page Dossier Attacking Chief Critic”;⁶ and, in a bizarre coincidence, a *60 Minutes* news crew chased John Scanlon down a snowy Manhattan street for a story they were doing on the investigation

and its aftermath—the same *60 Minutes* Scanlon had so skillfully defended years before.*

Rather than discrediting Mr. Wigand and his assertions, Brown & Williamson wound up doing exactly the opposite, feeding every conspiratorial notion about big tobacco companies as Soviet-style monoliths, complete with secret police and a ministry of propaganda. It was a stunning public relations disaster, and while it doesn't take away from Scanlon's reputation as the father of litigation communications, it certainly shows that toward the end of his career, he might have been forgetting many of the very lessons he put forth in cases like *William Westmoreland v. CBS*, when the practice of litigation communications was being born.

LITIGATION IS NOT JUST ANOTHER PR ASSIGNMENT

In my surlier moments, I curse the perception of public relations, the training offered at many schools (and, indeed, on the job at many PR firms), and the general public's sense of what works and what doesn't, especially in the litigation context. I roam the halls of my office, decrying (to anyone who will listen) the perils of thinking that all public relations is handled in the following manner:

1. Write the press release.
2. Prepare the media list.
3. Send the press release to the media.
4. Repeat steps one through three.

This is the “lather, rinse, repeat” method of public relations. Unfortunately, unless you're publicizing a simple product like shampoo, it usually doesn't work. In fact, it often does more harm than good by sending the wrong message to the wrong audience at

* There was, of course, another big issue in the Brown & Williamson saga: *60 Minutes* initially killing its own interview with Jeffrey Wigand under a threatened lawsuit from Brown & Williamson—events at the center of *The Insider*, but less germane to our discussion here.

the wrong time. Then everyone sits around and tries to blame everyone else for why they didn't get the particular story they wanted.

Why don't these tactics work? They fail primarily because they reinforce the perception that public relations is "mindless" work, that it is just about "connections" and the logistics of getting information "out there," a sense that with the proper writing skills, the right list of media, and an operable fax machine, anyone can do the job. This can be a particular mindset of attorneys, by the way, who seem at times to believe they could do everything themselves—if only they had the time.

I usually tell clients this: It may look easy, but Willie Mays made centerfield look easy, too. There's a huge difference between doing this job and doing it well. (Being a lawyer myself, another thing I often say to lawyers is: "And I could try your next case, couldn't I?" They tend to cringe at the suggestion, thus further driving home my point.)

This premise is particularly important when dealing with communication in litigation—because the stakes are so high, the issues so complex, and because, in my estimation, litigation PR is unlike any other kind of public relations out there.

Invariably, lawyers and their clients come to my firm with the following preconceived notions about the procedure for promoting their case:

- If you want to announce something important, write a *press release*.
- If you want to make an even bigger impression, hold a *press conference*.
- The best way to get a story in the media is to speak to a *reporter you know*.
- Litigation is just like any other *crisis*—you need to get out all the information you can, as quickly as you can, to the widest possible target audience.

Moreover, it is *exactly* because these methods are so procedural that lawyers fall prey to thinking that this is how you handle public relations in the litigation context. Litigators eat, sleep, and drink procedure: Rules of Civil Procedure, Rules of Evidence, local court

rules. When they need to know *how* to do something, they go to the library and find the proper procedural guide. It is natural, therefore, that they translate this thinking to communications in legal actions, and fall prey to thinking the tactics listed above are the procedural rules of the game.

The last point, by the way, regarding crisis communications may be the most important one. Therefore, I feel it's important to spend a little time discussing how litigation differs from traditional crisis communications.

LITIGATION PUBLIC RELATIONS VERSUS CRISIS COMMUNICATIONS

Think crisis: the Coca Cola recall in Europe; the syringe-in-the-Pepsi-can incident; the Union Carbide explosion in Bhopal, India; and the seminal case in the field—the cyanide in the Tylenol incident. These are all classic examples from the discipline known as *crisis communications*. Crisis communications is a high-pressure, high-stakes specialty in public relations, a specialty that many firms excel at. But it is often confused with communication during litigation, and that confusion can cause unintended—even disastrous—consequences.

How does communication during a lawsuit differ from crisis communications? At its essence, crisis communication is about *immediate* response—response that allows a client, usually a corporation, to limit the damage from a story about an incident or event that will affect the reputation of the client. Some of the major elements of effective crisis communications include the following:

- Having a crisis plan and a crisis team in place well before a crisis ever occurs. This is called *crisis communications planning*, it is an activity many corporations have undertaken in recent years to prepare for the sudden, immediate crisis that can damage their company forever.
- Alerting the crisis team at the earliest possible moment, so that the crisis plan can be put into effect at the outset of the event.

- Securing the site or crisis location (if there is one) to limit access and prevent unwanted leaks or other dissemination of information.
- Assembling all the facts, to ensure that accurate information is flowing to the media.
- Having a spokesperson ready to communicate to the media—the higher up in the organization the better (and in the best-case scenario, never, never, never the company's lawyer or PR representative).

Virtually all of this activity happens within the first 24 to 48 hours after a crisis has occurred. Companies and consultants skilled at crisis communications are usually ready to respond to any crisis, anywhere, at a moment's notice.

While all of this *may* be necessary when the crisis in question is a lawsuit, litigation PR is much more than this—and strict reliance on classic crisis communications techniques can at times do more harm than good.

Why is communications during litigation so different? Consider the following:

- *Litigation unfolds over weeks and months (and sometimes years), not days.* Therefore, the 24- to 48-hour crisis response model usually doesn't work. As we'll see throughout this book, communications during the litigation process needs to follow the ebb and flow of the litigation itself. This requires a constant exertion of pressure—building relationships, telling a party's story, explaining complex legal ideas and maneuverings, building trust with your target audiences (including media, regulators, and the public at-large). Absent this foundation, other efforts tend to crumble. Wise lawyers, clients, and communications consultants need to know when and how to apply the pressure—and how to cut through any interference to focus on activity that will help the client prevail in the long run.
- *Litigation is less event-driven than traditional crisis communications.* More often than not, the big event—the rally, the press conference, the petition drive—is less effective here, where the story is stretched out over months, if not years. Usually, an

event strategy falls flat on its face with the media, who see it as a less-than-subtle attempt to influence the outcome of litigation. The one time that I can think of where an event strategy worked was in the Hooter's EEOC case several years back, where they dressed up a big, hairy guy in a Hooter's outfit at a press conference to show the absurdity of an EEOC suit alleging men were being discriminated against for waitress positions. It worked. But how often in lawsuits do you get the opportunity to dress up a big, hairy guy like a woman?

- *In litigation, the issues involved are usually considerably more complex.* I like to tell clients—especially lawyers—that even the most complex issue can be summed up in the proverbial 10 words or less. But I am being a bit facetious, because unlike other areas of public relations—including most forms of crisis communications—litigation often revolves around issues that are stupefying in their complexity. As we'll see, even the best reporters only “skim the cream off the top” of any issue. Distilling the complexities of a particular court case into a format reporters can easily digest is an art form most communications counselors don't routinely have to master.
- *In litigation, the client may not be the most appropriate spokesperson.* This flies in the face of one of the central tenets of crisis communications, but it's true. Sometimes positioning the client—whether it be a CEO, an organization head, or a high-profile individual—as spokesperson for the case is inappropriate and even damaging. In fact, litigation PR is one of the few areas where you can hand off the spokesperson's role to one of the attorneys on the case without fear of repercussions. These are, after all, legal issues we are dealing with. The press and the public want to hear from the real “experts” on the case—in this case, the litigators handling the matter (assuming they are well-trained in media response—a matter that we'll get to in subsequent chapters).

These are just some of the differences. Thus, classic PR techniques—even crisis communications techniques—can fall far short of what is needed to properly do the job in litigation PR. A widely disseminated press release, a press conference, or a rally of

supporters may be far less useful than the highly targeted story that reaches the *right* audience with the *right* message.

Here's a perfect example of how the "issue-the-press-release" approach can sometimes backfire, from an intellectual property case between two pre-IPO dot-coms. The plaintiff in the case requested a continuance for additional discovery—in layman's terms, another week to collect relevant documents. The judge granted the continuance, a routine event in any litigation. This is where the fun began.

The plaintiff, used to issuing laudatory press releases for every milestone—a new round of financing, new product, new advisory board member—issued a press release with a headline along the lines of the following: "Judge Rules in Plaintiff's Favor in Intellectual Property Case." The press release described in considerable detail the plaintiff's "victory" and what a positive sign it was for the future of the company. It went out over one of the business wires, reaching media, analysts, and all sorts of financial-types. This was standard operating procedure at the time for dot-coms and their public relations firms looking to create the kind of buzz that attracted interest, and investors, to their company.

But in the lawsuit, the results were disastrous. The defendant in the case (with our help, of course) launched a publicity attack of its own—more sophisticated and, ultimately, more successful. Furthermore, the plaintiff lost credibility with the legal media who knew just how routine a continuance is in major litigation. And—perhaps most importantly—the judge in the case was not amused, and this was reflected in his future rulings on the case.

This is an extreme example, but it highlights the important differences between public relations in litigation and public relations in other contexts. Not every piece of information needs to be broadcast to the widest possible audience. And not every legal ruling in your favor is a "victory."

UNFEATHERING RUDY'S LOVE NEST

Finally, one more example of why the press release/press conference approach can be less than effective in certain situations. It is a good example, because it was not a long, drawn-out dispute with myriad twists and turns (like many of the cases in this book), but instead

involved an intense *day* of activity where we were able to use the threat of imminent litigation to achieve the client's desired result. It is also an example I love to use not just because of the high-profile story or the good result, but because there were probably a dozen ways we could have overplayed our hand and blown the resulting coverage.

One of the top legal stories in New York in late 2000 and early 2001 was New York City Mayor Rudy Giuliani's rather acrimonious divorce proceedings against his wife, television personality Donna Hanover. This was a battle primarily waged in the months preceding Giuliani's dramatic and inspiring efforts in the aftermath of September 11, back before the heroism that earned him *Time* magazine's Man of the Year honors (deservedly, I believe), back when he was just Rudy!—the controversial lame-duck mayor and cancer survivor with an in-your-face style and a very tangled private life.

I won't go over all of the sordid details of the Giuliani divorce saga and its tabloid headlines, but suffice to say this was *the* New York City tabloid story of early 2001. Our part of the case dealt with only one aspect of the Giuliani/Hanover divorce: the infamous *New York Post* "Rudy's Love Nest" story:

The original story appeared on the front page of the *New York Post* on Tuesday, June 5, 2001, under a *Post* front-page banner headline "Rudy's Love Nest":

**RUDY AND JUDY "INN" LOVE—POSH ST. REGIS HOTEL
IS THEIR SECRET HIDEAWAY**

Mayor Giuliani and his "good friend" Judi Nathan have a romantic hideaway at one of the city's priciest hotels, the *Post* has learned.

Although the city's spurned first lady, Donna Hanover, convinced a court last month to keep the "other woman" from Gracie Mansion, nothing is standing in the way of the sweethearts staying at a suite at the posh St. Regis hotel, sources said.

One source said the mayor and his girlfriend spent several nights at the hotel, on East 55th Street off Fifth Avenue, last week. The source said the pair also shared a room or suite there on previous occasions—including on New Year's Eve.

A room at the St. Regis can go for anywhere from \$590 to \$750 a night. A normal suite rents for \$1,100 a night. The Presidential Suite rents for up to \$11,000 a night. It's not clear what kind of deal Giuliani and Nathan made for a mayoral suite.

Another source said when Giuliani and Nathan stay at the hotel, they usually keep a low profile and rarely come out of their room.

A butler is sent up to deliver fresh flowers and fruit, this source says.

Giuliani usually has the hotel press his suits, and the couple always has coffee delivered with their early-morning wake-up calls.

A spokesman for the mayor could not be reached for comment.

Source: Larry Celona, David Seifman, Paula Freulich, and Cathy Burke, *New York Post*, June 5, 2001, page 1.

Now as it turns out, the story was dead wrong. Giuliani had indeed been in the hotel—for meetings and receptions and the like. His aides had booked a room for him to use to make phone calls, which is standard procedure for politicians at public events. But he never spent the night. The “Love Nest” angle was apparently hatched by some enterprising account executives at a New York public relations firm. They were looking for ways to get their client, the St. Regis Hotel, in the news. They found it!

Giuliani immediately threatened to sue for defamation, but the next day, the *Post* was back on the story again:

SUITE-HEARTS, INDEED! SOURCES BACK *POST* DESPITE RUDY DENIAL

They were there!

Five sources confirmed to the *Post* yesterday Mayor Giuliani and gal pal Judith Nathan have stayed together at the St. Regis Hotel within the past 10 days—despite the mayor's angry denial.

Giuliani disputed a *Post* report that the couple has been spending nights at the swank hotel. “It is entirely and categorically untrue,” the mayor said at a news conference in Washington Heights.

“I think the *New York Post* is shameless in what they did . . . And I can prove [the story is untrue] in court if I have to, not just beyond a doubt, but beyond any doubt.”

The mayor's lawyer Kenneth Caruso demanded a retraction and apology.

Source: Larry Celona, Kirsten Davis, Daneh Gregorian, John Lehmann, and Cathy Burke, *New York Post*, June 6, 2001, page 3.

On Thursday morning of that same week, my partner in Washington, Jeffrey Sandman, received a call from Bart Schwartz, president of Decision Strategies/Fairfax International, one of the largest private investigative firms in the world. Jeff's firm, Hyde Park Communications, is one of the fastest growing independent public relations/public affairs firms in Washington, and Jeff is considered one of the best strategic minds in the field. But equally important for my purposes is the fact that Jeff is an attorney who practiced at such stellar firms as Loeb & Loeb in Los Angeles and Baker & Hostetler in Washington, DC. Moreover, over the years, he had been involved in a communications capacity in some of the most high-profile cases in history, including breast implant litigation, asbestos class actions, and the historic tobacco litigation of the late 1990s. Given this background and experience, our firms formed a true partnership—most of the time we work together as if we were one and the same.

Bart Schwartz and Rudolph Giuliani are old friends—Schwartz was one of Giuliani's top aides when Giuliani was a crusading U.S. attorney in the 1980s. Decision Strategies had been retained to investigate the *New York Post* report, and Bart had already begun working on the case. He and Giuliani's private attorney, Kenneth Caruso, visited hotel officials the day before to interview them about the story and its origin. Rumors of these visits to the hotel by "detectives" were already making the rounds, there was concern that the tabloids might come to the conclusion that Rudy was using New York Police Department detectives to investigate, or even intimidate, employees at the hotel.

Bart wanted to know if we could publicize his investigation so that (1) after seeing the seriousness of Giuliani's intent to sue for libel, the public would be convinced the "Love Nest" story was false; (2) the *New York Post* would realize just how wrong they were and drop any further coverage of the story; and (3) any rumors of detectives visiting the hotel—who they were and why they were

there—would be effectively squashed before they did further damage to the mayor.

Our answer was a guarded “yes,” but we would have to work quickly—it was already 10 A.M., and if we wanted to get something going for the next day’s paper, we’d have to get things rolling right away.

A press conference was initially considered, but given the sensitive nature of the case, we ruled it out, along with any sort of a press release, for fear that the potential defamation suit would be drawn into all the other sensational aspects of the case.

There’s another reason why we ultimately decided not to pursue a press conference—or even write a press release for that matter—and it dealt with the probable defendant in this part of the case: the *New York Post*. Who would want to really stick it to the *Post*? Why the *Daily News*, of course.

As most people know, the *Daily News* is the *Post*’s vicious rival, and each paper loves beating the other to the exclusive—and beating the other up when they get the story wrong. We reasoned that we could likely get as much coverage through a well-placed exclusive with the *Daily News* as we could get with any news release or press conference.

So working with Jeff Sandman and my colleague, Liz Hall, here’s what we did:

1. We reviewed all prior *Daily News* articles related to the Giuliani divorce and determined that Mike Blood, City Hall editor for the *News*, was the reporter to go after.
2. I called Mike Blood and left a voicemail saying that I had some important information regarding the “Love Nest” story that we’d like to give exclusively to the *News*.
3. An hour later I called back and left another voicemail saying, provocatively: “You may have heard rumors of visits to the hotel by two detectives. I have some information about the rumors that we can give exclusively to the *News*.”
4. Mike Blood called back about 20 minutes later, a little confused but interested in what we had. I briefed him on Decision Strategies’ retention by Giuliani’s lawyer—leading off with the fact that it was Giuliani’s lawyer and Bart Schwartz,

not two NYPD detectives, who had visited the hotel executives the day before.

5. We emphasized that we were giving this to the *News* exclusively. I must have also said the following five times: (a) that this is another indication as to how false the “Love Nest” story was, (b) that Giuliani was investigating the story because he intended to sue for defamation, and (c) that Bart was one of New York’s preeminent private investigators and Decision Strategies one of the largest investigative firms in the world. We then offered to set him up on the phone with Bart Schwartz, again with the caveat that Bart would—initially, at least—be speaking to him for “background” purposes only.
6. We tracked Bart down about an hour and a half later, then contacted the reporter on his cellphone, and set up the call for about an hour after that, or around 3 P.M. In the meantime, I told the reporter I would send over a biography of Bart for his use.

It took a lot of hustle to put the story together, but the results were better than we could have expected. The news of Decision Strategies’ investigation made the front page of the first edition of the *Daily News*, under the full-page, banner headline “Hide and Seek.” The resulting story was a complete victory for Giuliani and his assertion that the *New York Post* “Love Nest” story was false and probably libelous:

**RUDY PROBING HOTEL STORY:
HIRES INVESTIGATORS TO FIND SOURCE OF
ST. REGIS “LOVE NEST” TALE**

Mayor Giuliani has unleashed private investigators—including one of his top guns from his days as a U.S. attorney—to probe a report that he and girlfriend Judith Nathan overnighted at the St. Regis Hotel several times last week.

Executives of Starwood Hotels & Resorts Worldwide, which owns the St. Regis, were grilled Wednesday in Manhattan by investigators from Decision Strategies, a company headed by Bart

Schwartz, who was Giuliani's criminal division chief when the mayor was Manhattan U.S. attorney.

"Our goal here is to figure out how this false story was concocted and disseminated," Schwartz said. The broadening investigation follows Giuliani's threat to slap a libel lawsuit on the *New York Post*, which reported Tuesday that the mayor and Nathan used the luxury hotel as a "love nest," where they "spent several nights . . . last week."

Decision Strategies, one of the world's largest investigation and security firms, was hired by Giuliani lawyer Kenneth Caruso.

"We are investigating the facts," Caruso said. "You talk to people, you look at documents."

This isn't the first time Schwartz has helped Giuliani deal with a crisis.

Earlier in his career, Schwartz served as chief of the public integrity section of the U.S. attorney's office; last year, Giuliani chose him to head a city task force on the long-troubled Buildings Department.

Source: Michael Blood, *New York Daily News*, L.P., June 7, 2001, page 3.

It was the story of the day, the lead on local radio and the local all-news cable channel, New York 1, every half-hour or so. It was also picked up by the Associated Press, *Newsday*, several New Jersey newspapers—and even some national news outlets like the *National Journal's Hotline*.

The most important result was this: After that day, the "Love Nest" story disappeared from the pages of the *New York Post*. Coincidentally, on the very same day, the *Post* also fired a slew of its reporters and editors in a housecleaning the likes of which New York City newspapers had rarely seen over the years. The stated reason was that the paper's new publisher, Australian Col Allan, wanted to start fresh. I would never suggest that the two events were somehow related. Still the timing does seem curious . . .

News Is News?

This is an important example because there is a habit in the public relations business of thinking that a particular event either is a

story, or it isn't. That in addition to getting the information out there, there isn't much we can do to influence whether a story is written, or how big the story will be. "We lead them to water," the saying goes, "it's up to them to drink."

As I will emphasize throughout this book, particularly in regard to legal cases, nothing could be further from the truth. The investigation into the "Rudy's Love Nest" case was not the biggest news in the world—particularly considering all the other stories surrounding Giuliani's rather strange and scandalous divorce proceedings. It was reported on that very same day, for example, that Giuliani's girlfriend, Judy Nathan, was ducking process servers at a Manhattan restaurant—in a story headlined "Court Papers Await Judy, Who's in Dodge City" (hence the front page headline "Hide and Seek"). The article, which was directly below our article on the "Love Nest" story, started off like this:

Where's Judy?

Mayor Giuliani's girlfriend, Judy Nathan, is playing a cat-and-mouse game with her ex-husband's private investigators, who are trying to serve her with court papers . . .

As an aside, why parties ever think it's wise from a public opinion standpoint to duck service of court papers is beyond me. But we weren't working that aspect of the case. My point is this: This single story alone had the ability to knock us off the front page, to bury our message deep within another story as part of a routine round-up of the day's events in this sensational case. I can imagine where the story might have wound up, deep in the text of an article regarding Ms. Nathan ducking service, a little tidbit something like this: "Giuliani's forces also announced today that they hired private investigators . . ." And that would be it. Our story would have withered and died on the vine, and the "Rudy's Love Nest" tale probably would have gone on in the pages of the *New York Post* for another week or more.

In other words, it only became a story because we *exactly* followed the procedures outlined earlier. We could have blown the story in any of the following ways:

- We could have written a press release, prepared a media list, sent it out to the relevant media—all of the “lather, rinse, repeat” methods described earlier.
- We could have taken hours to formulate the message, or wait to bring together the entire crisis team—thus blowing our chance to meet the reporter’s deadline.
- We could have thought to ourselves “what reporters do we know?” rather than “what reporter is most likely to do the story?”—and wound up going after the wrong person.
- We could have arranged a massive press conference—and then the *Daily News* would not have considered it an exclusive, and the *New York Post* would have had time to respond.
- We could have waited for Mike Blood to eventually get back to us, rather than staying on top of him and “teasing” him with the various elements of the story.
- We could have simply given him the facts—“We want to announce that Mayor Giuliani’s lawyer has hired a private investigator, blah, blah, blah . . . (snore!)”—rather than piquing his interest by offering an exclusive on the rumors about the detectives who visited the hotel the previous day.
- We could have been less aggressive about putting Bart Schwartz on the phone with the reporter to discuss the case in a timely fashion.

Again, lawyers and clients should think about this the next time they think that handling the public relations aspects of a case involves writing a press release, holding a press conference, or figuring out what reporters they “know.” And they should immediately dismiss any notion that handling the communications aspects of litigation is “easy.”

ACTION POINTS

- ✓ Litigation PR is not simply press conferences on the courthouse steps, mass-produced and distributed press releases, and late night shoutfests on *Hardball* or other public affairs programs.
- ✓ The vast majority of lawsuits settle before trial—thus, much of litigation PR takes place well before the case ever makes it to the courthouse.
- ✓ The media exert an enormous amount of influence over the course of legal disputes—in everything from noteworthy but small-scale cases to the most tabloid-driven slugfests.
- ✓ Litigation PR differs from virtually any other type of public relations—especially crisis communications, its distant relative.
- ✓ The “lather, rinse, repeat” tactics that most people associate with public relations—write the press release, create the media list, arrange the press conference—usually don’t work effectively when managing a litigation story.