

LITIGATION MANAGEMENT

A SPECIAL REPORT

Warning: Anything you say can be used against you on TV

When discussing a case with news reporters, the smart move for litigators is to keep it simple.

BY ERNEST TEITELL AND SUSAN HELLER

Big Brother is watching. Any unfortunate comment by an attorney can be caught in the blizzard of new media devices and can spell disaster for a case. Here is a primer of what attorneys should watch for and how to overcome instincts that could make an attorney into a victim.

Case in point: A capable reporter was working on a special report about the death of a child due to negligence. The case made national headlines. The plaintiff's attorney spent days going over the details of the case with the reporter. He introduced him to expert witnesses and provided analogous material from other cases across the nation. The reporter's intent was sincere—it was a public safety issue about which he felt passionate. And yet, when a major network aired the coverage, the facts were distorted, the sound bites irrelevant, the crucial information missing and the entire presentation mangled. What went wrong?

There are a number of ways to control or at least minimize the possibility of a client's narrative being reinterpreted outside of the facts. Attorneys need to understand four basic components:

- Understand that how one interacts with the news media in all its myriad forms is completely counterintuitive to everything one has been taught to date.

- A solid grounding in what reporters are trying to accomplish and the set of obstacles they face is crucial to creating good outcomes for the case.

- Appreciating how to get up to speed with those interactions so that one's intended message cannot be parsed into something altogether different is of the utmost importance.

- Finally, attorneys need to be aware that, without their consent or knowledge, their comments may appear or be shared via print, cell-phone cameras, television, Webcasts, radio, YouTube, iPods, the blogosphere, BitTorrent, Facebook, visual instant messages, Twitter and other Internet protocols.

From elevator cameras with signs warning against discussing client business to public security surveillance, attorneys are spending a disproportionate amount of their time on camera. The ubiquitous quality of all that air-time can lure them into a false sense of familiarity. That sensibility and the need to engage the media in a positive way often result in letting one's guard down. This is a very bad idea.

Even in an informal situation, as in a press briefing or a conversation outside a courtroom, attorneys must remain vigilant. They must be cognizant that they are under a gigantic and unforgiving microscope, with every misplaced word frozen in time. All interaction must be scripted.

Direct communication with the press in any of the forms listed above heightens an attorney's exposure and the chance of unwittingly saying something that can be taken out of context, or that might compromise the case or grant the opposition an advantage.

For lawyers, there is no such thing as too much information. They need to have every possible piece of evidence that may have bearing on their case, be it a photograph, e-mail or video clip. Even material considered wildly ancillary could, if overlooked, end up costing the client in court.

That very well entrenched instinct is exactly what attorneys have to learn to disengage when dealing with the press. Learning to do so is more difficult than one might imagine. Suffice it to say that, from the moment someone enters law

school, he or she hones and perfects intrinsic hunter-gatherer skills through continual practice and use.

When dealing with the press, attorneys have to learn to rein in their autopilot responses and instinct to provide as much corroboration and relevant data as possible. They must use as few words as feasible and those must be skillfully chosen.

Reporters don't have time for attorneys to facilitate their understanding of the law in general or one case in particular. The only way to further the client's cause is to get up to speed on the hierarchical changes in the reporter's world.

News is big business with a bottom line that brooks no interference from others and makes no apologies for going after the highest ratings. That holds true for traditional media and the Internet. Bloggers often are the ones breaking news these days, and this has intensified the already cutthroat competition. A natural response is to provide all possible background to ensure that the context of the case is appreciated and understood. Turns out, that is another very bad idea.

It may seem appropriate to provide the plaintiff's complaint in writing so there can be no misquotes or misrepresentation. However, it isn't fair to expect a reporter to understand complex legal jargon. Even two typewritten sheets can be more than they have a context for understanding, and it's 10 times the material that will fit into a five-second sound bite or a three-line blog item.

CONSISTENT INCONSISTENCIES

A review of a broad sample of the resulting news reports generated by the above incident, which were aired in big cities like Chicago and New York and small towns in Texas and Kentucky, found that every report contained

major inconsistencies and flaws that could have serious implications for the case. Many of those errors were due to the overly long interview granted by the attorney.

Not all media mess-ups are splashed across the country. All that has to happen is for the hometown paper, blogger or even someone standing by with a cellphone to take what an attorney says in an unguarded moment and wreak havoc for the case and client.

Once an attorney shares the information, it's no longer in his or her chain of custody, or even that of the original reporter. Any explanation or details the attorney provides may not be passed on to the news director, Web or TV producer or newspaper editor. Beyond that, if it's a big story, far-flung news outlets will want to use their own reporters to tell the story. So the material will be additionally rehashed by people even further removed from the facts. It's not unlike taking a photocopy of a photocopy of a photocopy. The information degrades with every iteration.

That's why it's important to understand the reporter's point of view. An on-camera interview may result in a five-second sound bite. The attorney will not choose which words taken out of context, that is what will be repeated throughout multiple news cycles across whatever news markets are involved. The rest of what the attorney tried to communicate will be paraphrased so that the local reporter or blogger is the one featured as the story narrator.

It's easy to see how and why this process goes so wrong so often. To make it work, attorneys need to become absolute minimalists when sharing information of any kind with the press. It's a mistake to overload reporters with material, however relevant. The attorney's rational brain is going to require re-wiring to stay with the prepared and parsed sound bite, and that requires rehearsal.

The idea is to control and prepare the details of the narrative so tightly that it becomes far more difficult to distort through accident or intention—to prepare two or three 10-word sentences that say exactly the same thing, backwards, sideways and upside down. Regardless of the question being asked.

Grammatically, there are ways to construct sentences so that it is harder for an editor to cut without making the sound bite or printed quote unintelligible. Far better to have limited but correct details than to accidentally give the opposition something to bring into court in terms of establishing bias or prejudice.

This takes time and expert assistance. Very few lawyers know how to school their features when in front of a lens, which will preserve for all time every tic, loss of focus or thinly veiled attitude of annoyance. Unless they have been professionally trained, most people's idea of what they look like and how they actually appear on camera are two very different things.

Any recording is forever. It is duplicated,

numbered, dated and awaits recovery at any time, by anyone, including the opposition. That tape or quote may also be accessible to the billions of people who are hooked up to the Internet.

There is nothing anyone can do and no way to modify, change or take back a single word spoken.

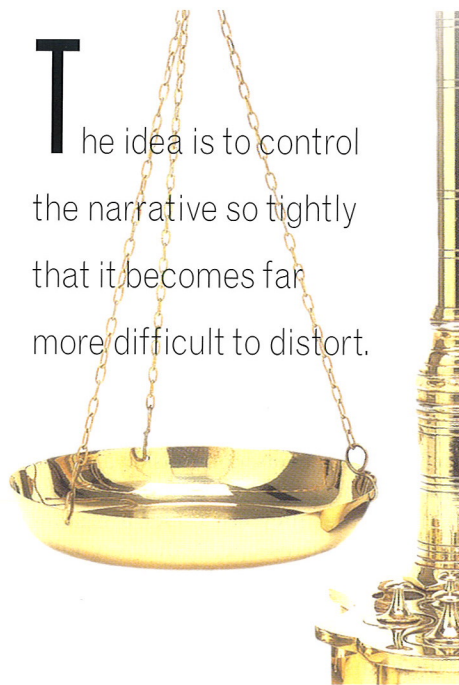
Worst of all, it is entirely possible to use the exact same information and footage to make someone appear either idiotic or incisive. Quotes and visuals can be time-swapped and even the best of intentions won't preclude the muddling of facts and figures in a way that damages the client, which ultimately becomes the lawyer's responsibility.

FACING REPORTERS

Consider the following scenario: An unprepared attorney steps out of the office to face a group of reporters, cameras and mikes at the ready.

Reporters: "Can you tell us if you are going to go after Bishop Smith? Are you aware that he is in ill health? Do you intend to ask him for details about the sexual proclivities of the accused priest?"

The idea is to control the narrative so tightly that it becomes far more difficult to distort.



Attorney: "The law requires that we pursue all likely avenues of information. John Doe's life has been permanently damaged due to the abuse he suffered, so yes, we're intent on pursuing a formal deposition with the bishop. We need to understand if, in fact, he was told that Father Jones was a pedophile. We want to know when he was given that information. His health does not mean he's not responsible for telling the truth."

This sounds perfectly normal for a spoken answer to a multiplicity of question, but here's how a reporter can use out-of-context portions of different sentences to establish false facts in a news report:

Reporter: "Can you tell us if you are going to go after Bishop Smith?"

Video clip of attorney: "The law requires that we pursue all likely avenues of information...he was told that Father Jones was a pedophile."

Here's how a reporter can reframe the story by flip-flopping the quoted material:

Reporter: "When asked about the fragility of the bishop's health, the attorney had this to say:"

(Audio only of the attorney played over a photograph of an old man being wheeled into a hospital) "His health does not mean he's not responsible for telling the truth...so yes, we're intent on pursuing a formal deposition with the bishop."

There are ways for this to damage this case. The defense could attempt to use these reports as ground for a change of venue. Or the court, having agreed to use pseudonyms, could now reverse and force the attorney to reveal the name of the plaintiff in public.

Here's a better way:

Reporter: "Can you tell us if you are going to go after Bishop Smith?"

Attorney: "We are interested in getting all the facts so that a jury can fairly decide what happened."

Reporter: "Are you aware that he is in ill health?"

Attorney: "It's important that a jury can fairly decide what happened. Our intention is to get all the facts."

Reporter: "Do you intend to ask him for details about the sexual proclivities of the accused priest?"

Attorney: "The most important thing is for us to get all the facts so that a jury can decide fairly what happened."

Regardless of how the above sentences are parsed, they all say the same thing. This is a simplistic example, but the point is that hubris in dealing with the media can be devastating for a legal case. Attorneys' initial instinct is to explain, elucidate and elaborate, but in front of a camera is not the place to do that. It should be saved for the courtroom, where it belongs.

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