Taming the Town Crier: Effective Leadership in the 21st Century Media Age

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This paper has been prepared for general information and is not intended to be relied upon as legal advice.

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INTRODUCTION

The media and the legal profession have long maintained a complicated, deeply intertwined relationship. Given the media's vitally important role as the fourth estate in our system of democratic self-government, legal practitioners and their clients must rely on the media to accurately report on the facts and developments in legal disputes. Far too often, however, we see that the media presents what are at best wholly incomplete snippets of coverage, which zero in on the more sensationalized aspects of high-profile litigations and drawn-out legal dramas. The result is that the populace is generally left with a highly distorted, largely incomplete understanding of the true facts and circumstances surround a particular legal dispute. This reporting phenomenon is not confided to traditional print and television news journalism, but is also ever present in the content appearing on social media forums, blogs, and other untraditional news sources, which are ever more increasingly relied upon to supplement or replace information which in the past was obtained solely from traditional media outlets. This being so, legal professionals, and the business and industries leaders which rely upon legal professionals to protect and safeguard their interests, must understand and adapt to today's media environment, which is driven not by dispassionate news gathering, but by the ceaseless 24/7 news cycle and increasingly fierce competition for market-share. In this hyper-charged environment, effective leadership requires one to be cognizant of and responsive to the ways in which media coverage will shape and dictate public perceptions regarding legal disputes, and to effectively manage and control the news coverage in order to best frame the public narrative. This is especially true in times of crises and unanticipated business disruptions, where the stakes are especially high and where missteps by management in dealing with media scrutiny are magnified and will have long lasting ill effects. In this paper, we endeavor to discuss the

interplay between modern media and the legal profession, discuss the impact of this interplay on the perceptions and understandings held by the public-at-large, and provide advice and best practices for effective leadership and media management.

Specifically, in Part I, we provide a brief overview of how media reporting influences the civil litigation system. In Part II, we cite some telling examples of how media coverage contributes to commonly held misconceptions regarding civil litigation and the outcome of legal disputes. In Part III, we analyze the public relations disaster that unfolded in the aftermath of British Petroleum's oil spill in the Gulf of Mexico, and examine how that company's leadership and key decision-makers failed to effectively manage the media's coverage of the catastrophe and thereby tame the "town crier." And finally in Part IV, we offer leadership tips and best practices with respect to how to effectively deal with the media juggernaut, so that you can better combat inaccurate and harmful reporting and harness press coverage to your advantage.

I. The Media and Its Impact on the Outcome of Legal Disputes.

Not long ago, two scholars, Jennifer K. Robbennolt and Christina A. Studebaker, set out to study the relationship between media reporting and civil litigation. The results they reported are startling, and an appreciation of their findings is of profound importance for effective leadership in the modern media age.

In essence, their report, entitled *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*,[1] definitively confirms that "news reporting of civil litigation presents a systematically distorted picture of civil litigation and that this reporting can influence perceptions and outcomes of civil litigation in various ways." The authors observed that the citizenry generally relies upon the news media for information and an understanding of our court system, thereby granting the press an especially outsized role in dictating public perception of the Third Branch.[2] The end result, according to the authors, is that Americans have a largely skewed view of the nature of legal disputes and our civil litigation system. In large part, this misconception is driven by the media's tendency to focus its coverage on sensationalized cases where plaintiffs obtained large monetary rewards, while forsaking coverage of other more mundane, but common place, aspects of legal disputes.[3] Stated bluntly, it was observed that the "[t]he picture of civil litigation that one is likely to draw from the information available in the media is that of a system characterized by frequent litigation, frivolous lawsuits, greedy plaintiffs, and high damage awards."[4]

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1 Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, Law and Human Behavior, Volume 27, No. 1, February 2003 ("Robbennolt & Studebaker").

2 Robbennolt & Studebaker at pg. 6.

3 Robbennolt & Studebaker at pg. 9.

4 *Id.*

Listed below are some additional, and especially important, findings uncovered by Robbennolt and Studebaker, including that:

- Judges and jurors are more likely to judge a defendant liable when they had been exposed to "pro plaintiff" information than when they had not, even when they had been told to disregard it.[5]
- "[S]everal studies have found a positive relationship between perceptions of the frequency of large damage awards and damage award decisions."[6]
- Although only 8% of jury awards are greater than $1 million and that punitive damages are included in only approximately 6% of civil cases that result in a monetary award, "many people believe that large money awards and punitive damages are common."[7]
- "[A] substantial minority of participants in a jury decision making study believed that damage awards greater than $1 million are routine, with 11% … estimating that 50% or more of plaintiffs receive jury awards of more than $1 million."[8]
- In criminal trials, "prejudicial publicity tends to negatively influence perceptions of the defendant as well as pre-trial and post-trial judgments of guilt."[9]

So what are we to make of these findings? Perhaps most fundamentally, as those tasked with effectively managing and responding to legal disputes, and mitigating the public fallout in times of crisis, you must at all times remain mindful and responsive to the extreme power

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5 *Id.* at pg. 18.
6 *Id.* at pg. 15.
7 *Id.* at pg. 11.
8 *Id.*
9 *Id.* at pg. 17.

yielded by media reporting. As we see, the plain reality is that the power of the press will inevitably play a significant role in dictating the public perception and even the ultimate outcome of legal disputes.

With the findings of Robbennolt and Studebaker serving as the backdrop, we now turn to Part II, wherein we discuss some demonstrative examples of how the media routinely skews and distorts coverage of civil litigation, and the effect this distortion can have on legal practitioners and the business leaders who rely upon the legal profession.

II. "If it Bleeds, it Leads" – Blaring Headlines, Sensationalism and Eye-Popping Verdicts Still Rule the Day in the 24 Hour Media Cycle

Even a cursory analysis of modern media reporting reveals that only in the rarest of circumstances does a media consumer have to read the full text of a report, or hear the full content of a news segment, in order find out about a sizable jury verdict or other sensationalized trial outcome. To the contrary, in most situations, the individual only need glance at the headline, and will thus not endeavor to seek out the underlying facts and context which we know to be crucial in accurately understanding a particular legal dispute. For example, the following is a compendium of headlines drawn from newspapers published throughout the United States trumpeting big verdicts:

- $2.7M FOR DEATH ON THE RAILS[10]
- $7M FOR TRIAN HIT[11]
- DRUNK RIDES GRAVY TRAIN - $2.3M FOR LOSING LEG IN SUBWAY[12]
- COP'S GOOD $HOT -- $4.5M FOR MISHAP[13]

[10] William J. Gorta, N.Y. Post, July 31, 2010 at p. 5.
[11] Tom Namako, N.Y. Post, March 10, 2009 at p. 15.
[12] Tom Namako and Dareh Gregorian, N.Y. Post, February 18, 2009 at p. 5.

- Judge orders Lorillard to keep $270m on hand to pay judgment; Tobacco company appealing award[14]
- Injured woman wins $66m verdict against Cybex[15]
- Ex-Cargill worker gets $2.49 million[16]
- Iowa exec who alleged sexual harassment gets $500,000 settlement[17]
- Jury awards $33 million in van crash[18]
- Jury says SAP must pay Oracle $1.3 billion; Copyright infringement found in use of software[19]

These headlines, and the news content that appears under them, appear to confirm Robbennolt's and Studebaker's core conclusions—"media reports tend to focus on the concrete events of trials, with little systematic consideration of aggregate information."[20] This is of course problematic for legal practitioners, because it means that the public will typically not know of, let alone appreciate, the true nature and circumstances surrounding complicated, multi-faceted legal disputes.

An examination of the article that bore the headline "DRUNK RIDES GRAVY TRAIN - $2.3M FOR LOSING LEG IN SUBWAY," is illuminating. The article chronicles several concrete events in the trial, culminating in the jury's multi-million dollar verdict. According to the article, the twenty-five year old plaintiff was drinking with friends at a bar.[21] By the time he arrived at the subway station, he had a blood-alcohol level of .18 – more than double the legal

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13 Alex Ginsberg, N.Y. Post, November 27, 2008 at p. 3.
14 Travis Andersen, The Boston Globe, January 6, 2011 at p. 3.
15 The Boston Globe, December 9, 2010, p. 11.
16 Jeff Eckhoff, The Des Moines Register, March 3, 2011 at p. B12.
17 Jeff Eckhoff, The Des Moines Register, August 8, 2010 at p. A1.
18 Grant Schulte, The Des Moines Register, March 20, 2010 at p. B1.
19 James Temple and Benny Evangelista, The San Francisco Chronicle, November 24, 2010 at p. A1.
20 Robbennolt & Studebaker at p. 7.
21 Tom Namako and Dareh Gregorian, N.Y. Post, February 18, 2009 at p. 5.

limit if he had been driving.[22] The plaintiff admitted that he was so intoxicated "he didn't remember anything about the 1:50 a.m. accident – including how he ended up on the tracks – but the jury still found he didn't bear the majority of the blame."[23] While the article noted that the jury found the plaintiff "35 percent responsible," it did not discuss in any significant detail the notion of comparative fault and how liability is apportioned in a typical tort case.[24] The article also entirely fails to explain that that expert testimony was the crux of the plaintiff's case, even though the jury had found the transit authority liable by relying upon a mathematical formula that used a purported average reaction time as a factor in calculating whether the defendant's train operator could have stopped the train to avoid running over the intoxicated plaintiff.[25] As the article failed to substantively discuss the concept of comparative fault or explain the key role of expert testimony in the ultimate verdict, the reader is left with the misimpression that the jury made a decision without any rational basis.

Indeed, the inherent problem with reporting that blares sensational headlines but fails to provide the necessary context and explanation, is that it falsely conveys the message that large, irrational awards are commonplace, fueling the misconception that plaintiffs almost always prevail in civil litigation, and moreover, that plaintiffs typically make out big. In reality, however, irrational jury awards are rare, and are frequently reversed on appeal or reduced by the trial judge. However, in the typical media report, this incredibly important fact often goes entirely unmentioned, or is treated with especially short shrift.

For instance, typically a media report will contain at best a dry quote from the losing lawyer, who states in some fashion that his or her side will appeal. For example, a report

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22 *Id.*

23 *Id.*

24 *Id.*

25 *Dibble v. New York City Transit Auth.*, 76 A.D.3d 272, 273 (1st Dep't 2010), *leave to appeal granted*, 2011 NY Slip Op. 67676 (N.Y. 2011).

appearing in *The San Francisco Chronicle* about a jury award of $1.36 million in favor of a man who sued a cigarette manufacturer dedicated two lines to the tobacco company attorney: "Defense lawyer Randall Haimovici said the companies would appeal. The negligence verdict shows that jurors agreed 'we didn't do anything wrong by using asbestos in filters back in the 1950s.'"[26] Similarly, the *New York Post* article reporting on the $2.3 million jury verdict in favor of the drunken man struck by a subway train contained just a single, entirely uninformative sentence about the losing side: "A spokesman for NYC Transit, Paul Fleuranges, said lawyers are reviewing the Feb. 9 verdict."

In fact, NYC Transit lawyers in the drunken subway rider litigation did review the verdict, appealed it, and won a complete reversal. However, news of the appellate court's reversal of the award, and of the subsequent dismissal of the plaintiff's suit, did not appear in the pages of the *New York Post* until more than one year later.[27] Thus, for the majority of the reading public, news of a drunken man's almost fatal encounter with a subway train, and resulting $2.3 million tort award, further cemented in their minds the notion that civil litigation is a wellspring of cash for plaintiffs and their counsel, even though this is not the case.

In this regard, consider the following article, which also appeared in the *New York Post*. With a headline of "STUNNING BLOW FOR KING OF MALPRACTICE CASES,"[28] this article profiled a medical malpractice attorney who rejected an $8 million settlement offer and then lost at trial. The article went on to note that the medical malpractice attorney had won more than 84 verdicts since 1979 – the author does not indicate whether any of these 84 verdicts had been modified or vacated post-trial or on appeal – and quoted him saying: "'I have turned down

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[26] Bob Egelko, *Ex-smoker wins asbestos-filter suit*, The San Francisco Chronicle, March 11, 2011 at p. C2.

[27] Dareh Gregorian and Tom Namako, *Legless Drunk's $2M Win Tossed*, The New York Post, June 23, 2010 at p. 2.

[28] Dareh Gregorian, N.Y. Post, June 23, 2009 at p. 7.

34 times amounts of $8 million or more,' but they'd always settled or gone to verdict for more than that amount." This article certainly gives the reader the misimpression that big verdicts are the norm and "no-cause" decisions are the exception.

Indeed, an unscientific survey of major publications inevitably leads to the conclusion that "no-cause" decisions are rarely reported. This makes sense. A losing plaintiff's lawyer is certainly not likely to alert the local newspaper of a loss, or hold a press conference discussing the merits of a case when the jury found that there were none. Similarly, a courthouse reporter, already battling negative readership trends in the newspaper industry and competing with countless other media outlets, is not likely to write about a successful defense motion for summary judgment. This is especially troubling for legal practitioners and their business counterparts, as the public often does not ever hear about those frequent instances when meritless, unfounded lawsuits are dismissed in their infancy, thereby heightening public misconceptions about the nature of our dispute resolution system.

Indeed, to the contrary, legal reporting will likely instead zero in on a denial of a motion for summary judgment, especially if it is coupled with a snappy quote from the presiding judge. For instance, consider this article published in the *New York Times*, which reported:

> A class-action lawsuit alleging that Novartis Pharmaceuticals practiced sex discrimination against female employees is set to go to trial on Wednesday in federal court in New York.
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> The complaint seeks more than $200 million in damages on behalf of more than 5,600 female sales employees.
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> * * *
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> Judge Gerard E. Lynch, who was then on the United States District Court, certified the Novartis class action in 2007. Judge Lynch is now a federal appellate judge. In October, District Judge Colleen McMahon denied Novartis's motion for partial summary judgment.
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> 'The fact is, a massive amount of paper has been wasted by defendant in a quixotic quest to keep much of the plaintiffs' case from the jury,' Judge

> McMahon wrote. 'Plaintiffs have demanded a jury, and a jury they shall have.'[29]

As discussed above, this type of reporting serves to perpetuate the myth, promoted by many in the plaintiffs' bar, that the vast bulk of civil litigation is a David and Goliath battle in which average Americans battle valiantly against unscrupulous corporate titans, even though this is an entirely inaccurate portrayal of our civil litigation system.

III. Analysis Of The British Petroleum Public Relations Disaster – A Case Study in Missed Opportunities to Exert Effective Leadership

The bumbling by British Petroleum ("BP") in the wake of its massive oil spill in the Gulf of Mexico is a case study of what happens when a company's leadership fails to effectively control and harness a media firestorm. Indeed, while the massive environmental disaster caused by the oil spill was such that BP would have in all events incurred substantial negative press and justified public scorn, the fact remains that BP's decision-makers botched many opportunities to better manage the media's narrative and limit the ensuing reputational damage. In so failing to "tame the town crier," BP became the focus of additional criticism and bad press which it could have otherwise avoided.

Perhaps the most infamous leadership failing was the incredibly tone-deaf remark from BP's former CEO, Tony Hayward. In an off the cuff televised interview, Hayward told the media that he was looking forward to having his life back. This callous comment instantly reverberated throughout all forms of the modern media landscape. Indeed, the sound byte was repeated over and over again on the 24 hour news networks, was quoted endlessly in traditional print news media, and was the subject of ceaseless commentary and discussion in social media

[29] Duff Wilson, Novartis Bias Suit to Begin, The New York Times, April 7, 2010 at p. 1.

forums. As such, the image of BP as a whining, heartless, out-of-touch corporate leviathan was forever seared in the minds of the general public.

To be certain, Hayward's comment would have been incredibly harmful no matter how it was handled after the fact, but BP's leadership missed many opportunities to curtail the fallout. Indeed, there was a seemingly glaring absence of publicly expressed compassion from BP's top executives in the midst of the disaster, and this was the driving force behind the public relations firestorm. For instance, the *Associated Press* observed that Hayward's gaffe was only the tip of the iceberg when it came to BP's mismanagement of the media juggernaut, reporting that:

> Executives have quibbled about the existence of undersea plumes of oil, downplayed the potential damage early in the crisis and made far-too-optimistic predictions for when the still could be stopped. BP's steadiest public presence has been the ever-present live TV shot of the untamed gusher.[30]

The AP article went on to note that even Hayward's British accent was a liability when it came to crisis response:

> Former Shell chairman John Hofmeister said it might have been more appropriate for U.S. executives of the company to take the heat. Hayward is an Englishman, and BP is based in Britain.
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> 'I think it was a mistake for Tony Hayward to come and put his physical presence in the U.S.,' Hofmeister said. 'The U.S. has its own culture and traditions. Foreign companies can come and do business there, but they are not necessarily welcomed.'[31]

The report also contained a quote from a public relations executive who observed that the smarter move would have been to have U.S.-based officials from BP on the ground in the midst of the crisis doing everything they could to help with the clean-up: "'All crises are personal,'

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[30] Erin McClam and Harry R. Weber, *BP's failures made worse by PR mistakes*, Associated Press, June 11, 2010.

[31] *Id.*

said Richard Levick, who runs a public relations firm, Levick Strategic Communications, that advises companies. 'Action and sacrifice is absolutely critical.'"[32]

However, rather than personalize the crisis or show a commitment to clean-up the damage, BP's leadership adopted a bunker mentality, compounding its mistakes by clamming-up to the media, even going so far as to bar reporters from the oil-slicked beaches. It may seem a natural, self-preservation instinct to seek shelter when bombarded, but this can have catastrophic effects in times of crisis. Here, by refusing to sufficiently engage the press and meet the media firestorm head-on, BP's inaccessibility to the press became its own story, driving the narrative and further solidifying the impression that BP was trying to cover-up and avoid responsibility for the disaster by shielding it from public view.

In the viral age of twenty-first century media reporting, sound bytes and splices of sensational video footage live forever on the web and thus have a far more indelible impact on public perception than fact-based, dispassionate reporting. This being so, decision-makers simply cannot afford to stay above the fray, but must instead act affirmatively to refocus the media's reporting. A prime example of the ramifications of failing to effectively do so occurred in June of 2010, when ABC News posted a video on YouTube, where it remains to this day, which captures a BP employee hassling a reporter who was observing the clean-up effort on a beach. In the video, the BP employee can be heard off-screen chastising the reporter not to speak with anyone. Spliced into the video is a segment in which the ABC reporter discusses the encounter with a New York-based anchor, who in turn opines that BP's efforts to muzzle the press constitute a "pervasive paranoia."[33]

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[32] *Id.*

[33] *See* http://www.youtube.com/watch?v=VtimqwLxB0Q

Had BP decision-makers only gotten out in front of the disaster and not attempted to squelch press coverage, BP could have "tamed the town crier" by helping to more positively frame the coverage of the disaster. Instead of allowing the storyline to be that of an aloof CEO from England and a PR team's unsuccessful efforts to impose a media blackout, BP should have devoted its efforts to create an underlying narrative of responsiveness and compassion. BP could have nurtured this narrative by openly inviting coverage of the clean-up efforts, and having on-the-ground press conferences by top managers displaying a firmer grasp of the facts. Instead, BP only made matters worse by trotting out their hapless CEO who complained that the disaster marked a stressful time in his life. BP's leadership failures in responding to the Gulf oil spill will haunt it in perpetuity.

IV. Best Practices for Effective Leadership

We present, in no particular order, some tips and suggestions on how to handle and respond to the media, particularly in times of dire crisis and high-stakes legal disputes. We think these best practices will help you control the message and foster an advantageous narrative:

- If you are contacted by a media member, invite him or her to submit a list of written questions. This will give you time to strategize and carefully formulate a comprehensive, effective response which best highlights the information which you wish to be the focus of media reporting;
- Do not ever denigrate the media. Comments such as "I'm not going to try this case in the court of public opinion or in the press," often times fosters irritation amongst media members, and their superiors, causing unfavorable coverage. To the contrary, encourage media inquiries, and focus on creating the

perception that you look forward to the opportunity to answer questions and be as forthcoming as possible.

- Even if it seems dry or tedious, whenever possible take the time to explain to the media the full factual context of a particular dispute, as well as the mechanics of motion and trial practice. If you do not do so, there is little chance that these important contextual components of a new story will find their way into the media report. For example, explaining the notion of comparative fault may invite the particular reporter to take a much closer and harder look at the plaintiff's allegations and his or her own conduct, especially in the context of a tort suit, and to then report on the potential flaws in the plaintiff's case.

- Moreover, whenever you engage the press, it is imperative that you avoid taking any position that could come back to haunt you later on in the dispute, including during the litigation or trial, *i.e.*, ("My client categorically denies that he was in the park at 10 p.m."). A court could take judicial notice of the statement, and/or your adversary could use it to impeach your client ("Mr. Smith, you testified at deposition that you were in the park at 10 p.m. – isn't it true that your lawyer told *The Daily Planet* that you were not in the park at 10 p.m.?").

- Take the opportunity to learn from past crises, and look at both the good and bad. When the smoke clears, perform a hindsight analysis and determine what you would do the same, and what you would do differently. Ask these same questions of others around you.

- Be procactive. If a similar situation were to again arise, ask yourself and your colleagues if there are things you can do now to be better prepare for tomorrow's inevitable crisis. Failure to prepare is preparing to failing.

CONCLUSION

With the advent of digital media, blogging, and the 24-hour news cycle, it is more important than ever for decision-makers to recognize the impact of the media on the perception and outcome of legal disputes. Unwary and inadaptive legal professionals and business leaders can easily fall prey to a media firestorm if they do not effectively "tame the town crier," and act swiftly and effectively to harness the media's narrative. Through decisive leadership, and with strategic communication and sound planning, you can shape the public narrative and disseminate the facts and accompanying context necessary to sway public perception, even in the most trying of circumstances. Leaders who are mindful of these considerations will reap the rewards of a more advantageous media narrative and a better informed public.