How To Avert Media Narrative And Get A Fair High-Stakes Trial

By **Jessie Zeigler** (July 2, 2021)

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Our court system is intended to be a place where justice is served. But as technology has expanded and with a 24-hour news cycle seemingly here to stay, it can be difficult for a corporate defendant to find justice in our courtrooms when its industry as a whole is portrayed as a villain in the media.

For example, regardless of whether the defendants in the infamous "Varsity Blues" college admissions bribery cases were guilty or not, their attorneys faced an uphill battle as the widely publicized scandal led to massive press coverage with negative sentiment toward their clients.

Another recent example of media influencing perception in big cases is the treatment of big banks during the recent economic crisis.

This is a conundrum all too familiar for businesses that find themselves portrayed as the bad guy in the media while dealing with legal challenges.

In all manners of bet-the-company litigation — whether it be mortgage, tobacco or pharmaceutical litigation, or any other high-stakes litigation involving a corporate defendant — in certain courtrooms across the country, a company may find itself defending not against the facts pertaining to it, but facts expounded in the media about the industry as a whole and the perception that any entity in that industry is a bad actor.

Beating the perceptions portrayed by the media in the courtroom is challenging at best.

In some courtrooms, every motion may go against the corporate defendant in high-stakes litigation, whether it be related to compelling discovery, scheduling a trial date or the application of law to bar claims from proceeding. There may be times when it seems there is no application of the law to the facts in a particular case.

When faced with a complete inability to obtain any favorable rulings in a high-stakes case, there are some tools in the trial toolbox that can be used to help build a more constructive defense and to try to change the dynamic.

Hire a Public Relations Professional

Messaging is critical during bet-the-company litigation.

It can be a daunting task to get a favorable message out, particularly when the industry as a whole is being villainized through an ambush of bad press. A public relations professional with specialized training in preparing a unified message and speaking with one voice during pending litigation can be an important part of the litigation team.

Certain factors must be considered, however, to work effectively with a media spokesperson.

Gag Orders

Before making any public statements, make sure a judge has not imposed a gag order to prohibit speaking to the press during a pending case.

Preserve Attorney-Client Privilege

Communications with third parties generally breaks the chain of attorney-client privilege.

The laws are very specific to the jurisdiction where litigation is pending. In mass litigation, consider the laws of each jurisdiction where cases will be heard to ensure that any information shared with a media spokesperson either maintains its privilege or is known to be nonprivileged.

If such communications are not privileged in the relevant jurisdiction, it is imperative that any information shared with a media spokesperson is carefully tailored to ensure that confidential information is not shared.

Work Within the Confines of the Ethics Rules

Some jurisdictions have ethics rules that prohibit a party from trying its case in the press. It seems unfair, given the barrage of anti-industry media that occurs when a company is in the midst of being villainized on a daily basis while cases are pending.

However, counsel and a party can be subject to sanctions, so the applicable ethics rules must be carefully reviewed and any public statements tailored accordingly.

For instance, the American Bar Association's Model Rules of Professional Conduct Rule 3.6(a) prohibits an attorney from making:

> an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.[1]

There is a list of exceptions set forth in that rule, however, as well as a catchall exception in Rule 3.6(c) that provides:

> Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.[2]

The company's legal counsel should review the specific ethics rules in the jurisdiction where the case is pending when working with a spokesperson to address adverse publicity during the proceedings.

Lack of Subject Matter Jurisdiction

When it does not appear that the company can have a fair trial, research the possibility of arguments that the court lacks subject matter jurisdiction over the dispute.

When a court lacks subject matter jurisdiction, it has no "authority to adjudicate [the]

dispute brought before it," as the Tennessee Court of Appeals held in its 2010 decision in Freeman v. CSX Transportation Inc.[3] Any "[j]udgments or orders entered by a court without subject matter jurisdiction are void and bind no one."[4]

Because "a lack of subject matter jurisdiction is so fundamental ... it requires dismissal whenever it is raised and demonstrated even if raised for the first time on appeal," the court held.[5]

Investigate a Change in Venue

When the plaintiff is trying its case in the local press, consider whether you can move for a change of venue under the applicable law of the jurisdiction where the case is pending.

For instance, the Tennessee Code provides that a party may apply for a change of venue for "good cause" by making:

> a statement of facts, in writing, under oath or affirmation, that the party verily believes that, owing to prejudice, or other causes then existing, the party cannot have a fair and impartial trial in the county, or before the general sessions judge, where the cause is pending, the truth of which statement shall, in a court of record, be verified and supported by the oath of at least three (3), and before a general sessions judge, of one (1) or more, respectable and disinterested persons.[6]

Unfortunately, changing venue may be in the discretion of the presiding judge in many jurisdictions.[7] You may find there is a strong precedent for moving a criminal trial in the face of adverse publicity, but a dearth of such cases for moving a civil case.

Given the high stakes of these cases, conduct thorough research to determine whether a motion to change venue is worth attempting.

Factors to consider include whether a change in venue also results in a change in the judge assignment and whether an interlocutory appeal of a denial of a change in venue is permitted.

When to Consider a Recusal Motion

Canon 1 of the Code of Conduct for United States Judges is titled, "A Judge Should Uphold the Integrity and Independence of the Judiciary." It states:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.[8]

Despite this first and foremost obligation of judges, a company may at times find itself in a forum where a judge repeatedly does not apply the clear mandates of a statute or binding judicial precedent.

The company may find that it can never get a favorable ruling, whether it is on a simple scheduling motion or a critical dispositive motion. And it may find that the judge continuously parrots what the plaintiff's counsel says in orders or in open court without ever swaying or even changing the language used, such that the plaintiff's submitted orders are

those constantly adopted by the court.

This also brings to bear the second canon of judicial conduct, which is titled, "A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities," and instructs judges to respect and comply with the law. It states that judges should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.[9]

The cons of a recusal motion are evident: A failed motion likely results in a judge even less happy with the company presiding over the remainder of the case.

But in circumstances where not much can get worse, it may be worth considering. A successful motion would hopefully land the company before an impartial judge who rules based upon the laws and facts before the court. And in some jurisdictions, filing the motion may stay the case while a denial goes up on appeal.

Create an Appellate Record

Unfortunately, in certain instances, relief from unfair or biased rulings can only be obtained from the appellate court.

It is therefore crucial to build a record that includes context for the judge's rulings, which can expose unfair proceedings. Throughout the pretrial and trial proceedings, consider filing the following:

- Transcripts of all hearings;

- Proposed orders submitted by both parties; and

- Motions to reconsider to allow the court another chance to follow the law and facts presented.

An appellate court can only review what is in the record, so make sure to file items you may later want considered that are not typically otherwise filed with a notice of filing.

In addition, it can be helpful to keep a running list of all discovery/pretrial issues, which should include a description of how they were ultimately resolved, as well as a list of any delays that occurred in pretrial proceedings, with an explanation for each.

These types of notes will be helpful in constructing an appellate argument, which may occur several months, or in some instances, years, after the trial.

Conclusion

In zealously defending our clients in high-stakes litigation, it is critical to think strategically and consider all options that may allow the client to change course to a fair trial, despite being villainized in the media.

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[1] Mod. Rules Prof. Cond. 3.6(a).

[2] Mod Rules Prof. Cond. 3.6(c).

[3] Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 176 (Tenn. Ct. App. 2010); See also Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."); Varian Med. Sys., Inc. v. Delfino, 106 P.3d 958, 969 (Cal. 2005) ("[I]the absence of subject matter jurisdiction, a trial court has no power," and "any judgment or order rendered by a court lacking subject matter jurisdiction is void on its face" (internal quotation and citation omitted)).

[4] Freeman, 359 S.W.3d at 176 (internal citation and quotations marks omitted).

[5] Id. (internal citation and quotation marks omitted).

[6] Tenn. Code Ann. §§ 20-4-201, 20-4-203.

[7] See Tenn. Code Ann. 20-4-204.

[8] Code of Cond. for United States Judges, Canon 1.

[9] Id. at Canon 2.