

## HIGH-STAKES COMMUNICATIONS: WISHFUL THINKING VS. REAL-WORLD EFFECTIVENESS

by

Eric Dezenhall

The hardest question I have ever been asked by a client about litigation communications and crisis management is “Does it work?”

Despite desperate attempts by the public relations<sup>1</sup> industry to demonstrate its worth to clients in sticky situations with PowerPoint presentations and elaborate models, the most honest answer I could think of was “Sometimes.” Put a bit differently, we don’t know if engaging communications specialists will always help when you’re under attack, but we do know that it’s not smart to be without this kind of support.

In the current frenzy of anti-corporate witch hunts, academics, journalists and consultants are rushing to declare high-stakes communications efforts were mishandled by inept attorneys and public relations people. A case lost is a case botched, or so the logic goes. If Martha Stewart had only plead or apologized, “it” all would have gone away.

While most of these chestnuts of hindsight diagnosis should be dismissed as the musings of a Greek chorus that has never actually played a part in one of these dramas, there is one line of debate that merits examination: The natural tension between attorneys and public relations people.

As a rule, attorneys want the client — be it a manufacturer accused of making a faulty product or engaging in an unethical marketing practice, or a CEO under indictment — when it is under siege to be silent. Too much chatter, of course, is risky and can create trouble in court. Martha Stewart is

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<sup>1</sup>I will use the term “high-stakes communications” to encompass litigation and crisis communications, as a subset of the broader field of public relations.

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a primary case in point — it was Stewart’s comments *after* being accused of insider trading that got her into trouble.

The very same silence, however, that is legally shrewd can be problematic politically and business-wise. In the Age of Corporate Malfeasance, it is not guilt that convicts a business or individual, it’s often suspense — the mystery, the not-knowing. Shareholders, consumers, employees, and regulators demand to know the fundamentals of the matter: What happened here? Are we going to be safe? Will the company survive? What’s being done about it? Taking the proverbial Fifth and blaming one’s attorneys for silence may work in court, but not in the marketplace.

Unfortunately, there are no hard and fast rules for litigation communications and crisis management, but there are lessons to be learned from many years of racking up wins, losses and compromises. What follows are the unvarnished “facts of life” — including practical words of counsel — about engaging in litigation communications and crisis management.

### ***We Are in a Uniquely Hostile Climate***

The advice one gives a client cannot be separated from the climate in which it occurs. The anti-corporate atmosphere, due to a combination of scandals and a lackluster economy, is unprecedented in recent history. A good lawyer and communicator can navigate in this climate, not change it. For the time being, the public, the media and government are not motivated by justice, but by vengeance — the desire to see powerful people injured as a result of tangible hardship. A loss in a court of law or public opinion doesn’t necessarily mean a strategy failed.

### ***Identify What’s Do-able, Not What’s Ideal***

Prior to his indictment, a corporate scandal figure asked me what I thought was a viable objective for our defense program. I answered acquittal, and perhaps life in a smaller house. He was unhappy. He wanted a plan for broader vindication. He wanted to “tell his story.” Problem was, that the news media had “the story” written after his company collapsed. That story, I explained, was a largely optical one, juxtaposing an aerial view of his mansion next to the trailer home of one of his former employees who had lost his pension, which is exactly what happened.

Litigation support efforts can be doomed by utopian expectations. Of particular concern is the false expectation that audiences want to hear the message of an unsympathetic figure. In a climate characterized by virulent distrust of business, education doesn’t defuse outrage. Making the Firestone brand popular after the media feeding about faulty tires on Ford Explorers was simply not doable. Settling the lawsuits and resurrecting the company under the Bridgetown brand was.

With corporate defendants, the objective is acquittal in court, and cannot always be acceptance in public. With corporations under siege, the objective is getting back-to-business, not the hackneyed notion of “winning hearts and minds” about the beauty of “free enterprise.” Attorneys and clients alike embrace the utopian — and emotionally satisfying — promises of public relations people at their peril.

## ***Differentiate Between What's Strategic and What's Therapeutic***

In some of the corporate scandal cases I have worked on, the hope of broad cultural vindication must be set aside in favor of identifying arguments and juror personality types that may lead to acquittal. Is it really important that everyone love your client? Sure, it would be nice, but is it doable? Probably not. Acquittal in court, on the other hand, may be possible, and, in the short term at least, should be the primary goal.

With broader attacks against companies, the goal may be getting audiences to stop attacking your client, rather than getting them to like your client. When Oprah Winfrey attacked the American meat industry for supposedly not instituting safe practices, the industry didn't try a soft PR program to make the public like them more. They took the hugely popular Oprah straight into court. In the end, they won, and other media became more careful about recklessly attacking the meat industry.

## ***Preach to the Choir***

Too many businesses under fire wrongly attempt to win over adversaries. It's unlikely that Halliburton is ever going to get Susan Sarandon and Tim Robbins as celebrity spokespersons, so why try? In times of crisis, there's nothing shameful about picking low-hanging fruit — mobilizing vested interests and like-minded parties that may, in turn, be able to win over audiences on-the-fence. When President Bill Clinton was going through his Monicagate days, he rallied his ideological allies (who were at the time quite unhappy with him over welfare reform among other things) who turned the controversy into partisan spectacle. President Clinton, of course, survived.

## ***The Best Image Makeovers are Done Quietly, Over Time***

I was struck by media coverage of President Ronald Reagan's recent passing because as a young White House aide during his tenure, I recall some of the very same reporters who claimed to like President Reagan in fact despised him during his presidency. What changed? Time and the gradual demonstration of the success of his mission, namely the destruction of Soviet communism. By winning the approval of the masses over time, he neutralized the vitriol of the elites.

Redemption takes time and must include a demonstration of good deeds. Michael Milken's charitable interests, which pre-dated his indictment for securities fraud, were not widely recognized until he served prison time, developed prostate cancer, and devoted all of his time to goodwill endeavors, a process that took a few decades to take hold. Unpopular characters and institutions can mend fences; however, rarely can this be achieved by quickie public relations stunts, which are inevitably recognized as being cynical ploys — and can backfire.

## ***Don't Assume the Public Thinks Like You Do***

There are certain fundamental realities of public opinion that are hard to avoid. For one thing, the very same America that publicly claims to dislike trial lawyers is privately happy they're available to keep corporations in check. Furthermore, despite gripes from the business community about overzealous prosecutors — New York Attorney General Elliot Spitzer comes to mind — the public and the media believe these watchdogs are the good guys. Put differently, there is no risk whatsoever in this climate to anyone who would do a corporation ill.

## *Don't Get Locked in to One Strategy*

The concept of “strategy” is held in too high a regard for everyone’s good. Sure, a good strategy is important, but litigation and business landscapes change quickly and without notice, and so should strategies.

A client of ours came under fire once for allegedly manufacturing an unsafe product. The lawsuits and media exposés came flooding in. Our initial response consisted of a conventional public information campaign to correct hysterical misperceptions about the product’s safety. That is, until we found out that the activist group responsible for the attack was owned lock, stock and barrel by one of our client’s competitors who had been fanning the disinformation. Our approach then shifted to a legal and media strategy designed to draw attention away from the alleged hazards and toward the vicious political and business dynamics of the issue. Much of the effort’s ultimate success was due to our client’s flexibility and willingness to abandon a strategy that had won management approval earlier in the process.

And Microsoft fought back against the Justice Department on every front possible: a \$50 million fluffy advertising campaign; an all out lobbying effort in Washington; a sub-rosa campaign of activating pro-business groups to come to its defense. In the end, Microsoft was not broken up, just set back a little.

## *There Are Remedies*

Despite my Dutch Uncle admonitions, corporate defendants are acquitted and personal and company crises are resolved. In 1997, Marv Albert plead guilty to a misdemeanor assault charge after a mortifying trial, and resumed his career as a broadcaster. Wall Street economist, Lawrence Kudlow was forced to resign his lucrative job at Bear Stearns for cocaine abuse, and started over with much success as a business broadcaster on CNBC. Plenty of once high-flying business figures have restored their lives after serious troubles, the variables in their redemption including addressing their problems and being willing to abide a more modest lifestyle.

After initial missteps, Firestone recalled its tires, and began to rebuild. ValuJet, after a 1996 plane crash that killed 110 people in Florida, eventually regained trust by resolving what causes the crash, merging with another airline and rebuilding under its new name, AirTran. Even ImClone, the company at the center of the Martha Stewart scandal, has begun to emerge from hard times — despite its imprisoned founder — by proving that its once-scorned drug is effective after all.

Ours can be a forgiving marketplace, provided that the desire for redemption is met with realistic expectations and the willingness to reject the tidy chestnuts of damage-control in favor of flexible judgment.