

A Clear and Present Danger:

THE GROWING COMMUNICATIONS CRISIS FOR U.S. BUSINESSES AND THEIR LAWYERS

By Richard S. Levick, Esq.



A GENERATION AGO, IT WAS CALLED the “Credibility Gap.” During the Vietnam War, a significant percentage of the American people – not just the discontent intelligentsia or urban “underclass” – simply lost faith in American authority. They didn’t believe anything they heard from government officials or military leaders.

To a certain extent, corporations got off easier than the politicians. True, the Left was castigating ITT and Dow Chemicals for alleged global conspiracies of one sort or another. But most Americans disillusioned with the Pentagon had no particular animus toward U.S. business. There were not then such pandemic threats to brand-name corporate reputations or looming investigations of internal corporate behavior. For every Lockheed tagged with a Foreign Corrupt Practices Act enforcement, a hundred other companies went their merry way.

Most important, in those days there was no so-called “litigation explosion.” Even had the American people viewed Palmolive as they viewed General Westmoreland, direct legal and financial exposure was not the inevitable consequence. ITT and Dow were much less likely to meet 12 peers in the hallowed halls of blind justice.

Today’s post-Enron Credibility Gap does, however, directly implicate corporations in a litigious environment where every new slippage in public confidence makes for an increasingly hostile jury pool.

The haunting fact is that slippage anywhere now affects the daily caseloads of American business everywhere. If the military betrays our confidence at Abu Ghraib, it contributes to a generalized distrust that has a potential impact on a product liability case in Portland, Oregon or an employment suit in Portland, Maine.

Latest Bad News

THIS FALL, DECISIONQUEST, the nation’s foremost trial consulting firm, co-sponsored a study with Reuters that measured the diminution of collective confidence in authority. The study shows precisely how such diminution is affecting business in a way that would have been unimaginable 30 years ago.

The time frame for the research was from 2000 to 2004, embracing the Florida election recount, the corporate scandals, and the Iraqi war. Of 1,100 respondents, 61% said they had lost faith in America’s leaders and institutions. It is an appalling statistic, but here is the real kicker for corporate America: Of that 61%, 90-95% said that, as a result of their disillusionment, they would likely find for individual plaintiffs in lawsuits against large organizations.

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The data has a few practical hints for lawyers selecting juries. Women report greater loss of trust: 66% versus 55% for men. Eighty-four percent of African-Americans report loss of faith, compared to 57% of whites. The numbers are cold comfort, however. If counsel picks an all-white male jury, there is still a 55-57% chance that the corporate defendant will be judged by men who have practically no confidence in corporate America.

Politically, the breakdown is more dramatic, with 78% of Democrats reporting diminished trust and only 39% of Republicans doing so. Of course, lawyers do not query political affiliations during voir dire, so one supposes that during jury selection, lawyers can only try to guess what a Republican looks like. But, then they have to hope plaintiff’s counsel does not disqualify the Eisenhower look-alike.

Regional differences confound even these political hints. The so-called plaintiffs' havens in Texas, Mississippi, and Central Illinois are often Republican. However, a populist distrust of global corporations, especially if the plaintiff is small-town and working class, mitigates any party-based advantage defendants might hope for.

Fighting Back

SUCH DATA – AND THE PROSPECT OF EVEN GREATER CRISES in confidence ahead if the Iraqi war worsens – begs the question: What is corporate America to do?

The crisis depicted in the DecisionQuest/Reuters survey is a socio-cultural mega-trend. Business leaders do not control socio-cultural mega-trends. Like most of humanity, they simply respond as best they can and hope the bottom line weathers the storm.

But if the world has changed, so too must the mindset of corporate leaders. They must assume an increasingly open posture in terms of their willingness to comment on difficult matters. Many C-Suite occupants have already begun to invest the time and money to institutionalize myriad communications strategies and tactics in order to rebuild public confidence.

An important next step, directly responsive to the findings of the DecisionQuest/Reuters survey, is specifically targeting prospective jurors – to rebuild public confidence with the very definite idea that members of that public will someday sit in judgment on corporate leaders. The idea is to disseminate messages that are simultaneously efficacious in courts of law and the court of public opinion.

However, this messaging requires a step most corporations have not yet taken – get the lawyers involved.

The Lawyer as Great Communicator

BECAUSE THIS PUBLIC CRISIS DIRECTLY INVOLVES THE JURY POOL, some corporations (DaimlerChrysler is a case in point)– now insist that their legal counsel be sensitive to media and public relations issues. These corporations expect lawyers to be able to anticipate and support, not undermine, outreach predicated on public candor.

To be sure, such corporations are compelled toward greater media sensitivity because their adversaries have been many steps ahead. Plaintiffs' counsel spends six to eight times more money on marketing and communications than defense lawyers do. Their media instincts are far better as well. They understand, for example, the value of pictures, of showcasing the most sympathetic parties to a case, such as a grandmother or child. They understand that what we see always trumps what we hear.

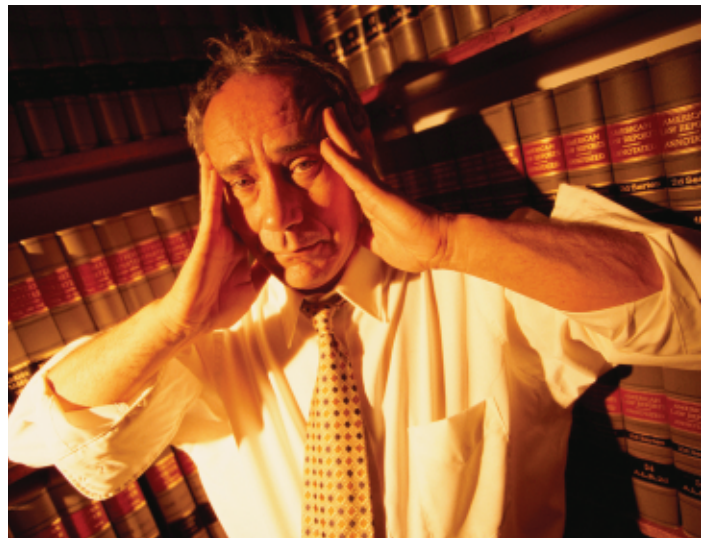
In contrast, defense lawyers often rely on corporate executives to make a business case for their side of any dispute. Not

just plaintiffs' lawyers, other adversaries, like the government, have developed advanced media skills as well. The government also has a highly sophisticated reliance on visuals – for instance, the “perp walks” timed for maximum exposure on the evening news – designed to win cases or leverage negotiating positions.

Only the defense bar has neglected to play the decisive game. That being the case, what sort of results would one logically expect the DecisionQuest/Reuters survey to produce? Why should anyone be expected to have confidence in authority figures who are, simply, media no-shows?

Today's new Credibility Gap thus requires a different mindset on the part of defense lawyers as well as their C-Suite clients. It requires training in media relations and public communications. It requires lawyers to rethink their role, and to start rethinking this role as early as law school. Lawyers need not be strategic communications experts, but they can no longer ignore this dimension of client interest.

As case managers, lawyers are often not willing to work as team members in the evolution of a communications strategy. They peremptorily veto the experience-tested advice of media professionals. The consequence is no communications program whatsoever at the very moment when one is most needed.



Contributing to this disconnect, lawyers look at media relations and assume that it's just common sense. There are no weighty tomes. No three years of graduate study dedicated to esoteric media precedent. No convoluted rulings to navigate on a daily basis. It is something everyone can do if they're just a little sensible. Of course, if media relations were just common sense, we wouldn't have so many sensible people, including lawyers, who feel they get burned by reporters every time they talk to one.

It is a lot more than press releases. It is relationships as well as skill. It is knowing the *60 Minutes* cameraman well enough

to persuade him *not* to shoot your client during an unflattering moment. It is all about resources, including enough online wherewithal to ensure that reporters conducting web searches will find your side of the story more frequently than your opponent's (and, as a result of that higher volume, invest more confidence in your position).

It is about understanding technology enough to know if the cost benefits justify beaming satellite video to America's 900 television stations so that the company's position runs on dozens of evening news programs. It is about knowing when a special video news release ("VNR") will build momentum for the client's position. Or knowing which reporter is the right reporter to get the story first.

It is not solely common sense; strategic communications touches on enough contingencies to necessitate a partnership of equals between lawyers and communications professionals.

The Practical Agenda

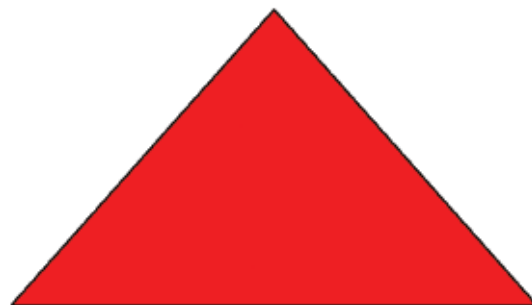
ONCE SUCH A "REAL TEAM" IS IN PLACE, influencing the media – and in turn, other audiences – becomes, not just possible, but *likely*.

Seldom if ever, though, do defense lawyer/communications teams control the media agenda to such an extent. At best, they influence it. The maximum level of influence requires a three-part strategy:

- (1) **Media Relations.** Traditional media work is fueled by reporter relationships; a solid understanding of what must be said, by whom, and when; and story placements to disseminate key messages. Here, the communications professionals need to have the main say in identifying the publications of record. These are the media outlets likely to inspire and influence subsequent stories by other journalists. In highly sophisticated campaigns, it can also include grassroots communications where groups of activists can be used to apply pressure at key points.
- (2) **Multimedia.** Media think tanks have shown that a decisive percentage of television news stories result from interested parties providing the stories. Tobacco and automobile companies, among others, often make their own news videos – the aforementioned VNRs complete with interviews, background, and news footage. They provide the stories as ready-to-run package to all U.S. news programs, which frequently air them as part of the evening news and often do the same with radio. Why shouldn't other companies?
- (3) **Web Optimization.** Virtually all journalists use the web to research stories that have already been written on the topic they're covering. They are looking to

confirm or adjust their own conclusions, and to identify the broader trends underlying the newsy events. The more often a particular "take" on a story comes up at the top of search engines, the more it tends to become the prevailing interpretation.

Media Relations



Multimedia

Web Optimization

It is a triple-threat media impact. Once the client controls all three legs of this triangle, the client is more likely to control the message and the story. Once the client is influencing the story, the client has a significantly better chance of influencing the outcome of a case and its own reputation – but that is only possible when lawyers recognize the role they must play in allowing and encouraging communications professionals to do their jobs. Lawyers cannot just set the limits of litigation communications. They cannot just be naysayers. They must help evolve a balanced strategy.

To be sure, no single victory, neither a dismissal in a court of law, nor the winning of public support for the business side of a particular controversy, will dispel the mistrust that the DecisionQuest/Reuters survey spells out so disturbingly. Enough has happened, in Houston and in Fallujah, at CBS and on Pennsylvania Avenue, to make a short-term recovery impossible.

Only a renewed sense of purpose, and a new appreciation for the value and power of a sophisticated, integrated media team, can reverse the tide – one message point at a time, one corporate brand at a time.

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