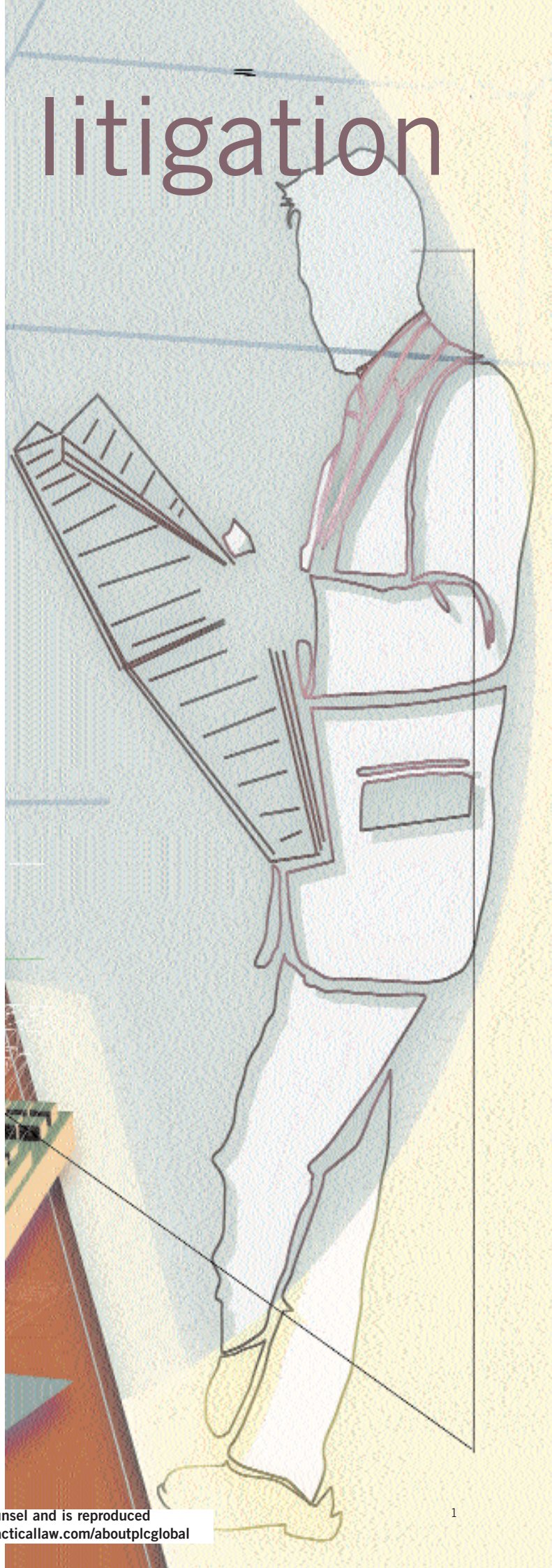
Managing litigation PR



Fighting battles in public is now a reality of commercial life. In the face of a potential dispute, a communications strategy needs to be as thought-through and disciplined as the litigation strategy. Moreover, integrating the two approaches maximises the company's chances of reaching a successful conclusion and ensures that the corporate reputation is afforded as much protection as possible. Chris HINZE and Jon McLEOD explain.

Disputes make for good stories and help sell newspapers and magazines. There is nothing like a good row between people, companies and governments to get journalists and analysts excited, sharpening their pencils and putting pen to paper.

But the interface between the media and legal worlds can be difficult. The laws of contempt deal harshly with those who seek to undermine the judicial process through publication of material that may distort or influence the outcome of a trial. However, the rules allowing fair reporting of courtroom events and the tendency on the part of the media to report legal issues and specific cases long before legal pro-

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ceedings have begun, mean that, for most commercial organisations, it is no longer a question of "if" but "when" the publicity surrounding a particular contentious issue will strike.

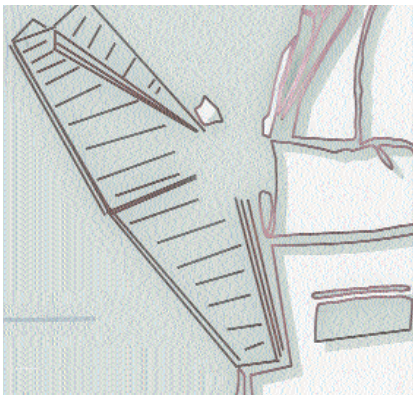
Smart organisations recognise the damage that disputes can do to their reputations. A strong, well-managed, and positive reputation is one of the best defences to possess. Those organisations that integrate risk awareness and management into all their operations are less likely to run foul of high-profile public disputes – their systems should have identified the risk early on and management taken steps to reduce or remove it altogether through sensible communication and negotiation.

When a dispute looms, the responding communications strategy should seek to identify:

- The commercial needs of the business.
- Responsibility for the overall management of the issue.
- The risks and the benefits of "openness".
- The potential target audiences.
- The messages that they need to receive.
- The methods of communicating with them.
- Clearance procedures and ongoing review.
- External and internal resources.
- A timetable for delivery.
- Costs.

Commercial needs of the business. The communication and legal strategies stem from the commercial needs of the business. Commercial needs include:

- Opening up a particular market to general competition.
- Gaining access to a market that the organisation is – it believes – unfairly excluded from.
- Safeguarding profitability levels or creating a shield against claims that are unfair and unjustified given the levels of knowledge at the time that the alleged damage took place.
- Simple survival. A smaller company facing a patent infringement by a much larger and vastly better-funded competitor has to fight using every tactic it can find, in order to simply remain in existence.



Overall management. Somebody has to be in charge and take responsibility for ensuring that all aspects of the issue or dispute are co-ordinated and delivered together. It cannot be left to the individual parts of the company to fight their own aspects of the problem without there being close management and integration of their efforts. On some issues it may well be the general counsel who takes overall responsibility and reports to the board. On others it could just as easily be the public affairs director or a commercial board member. Agreement on balancing legal and communications goals must be secured.

Regardless of what their functional background is, it is vital that the person in the leadership role takes a "helicopter view" that enables them to see the advantages and disadvantages of the different approaches and tactics being laid out by the professionals involved from all sides. If the general counsel is in charge, he or she has to ensure that they are being truly objective, rather than constantly favouring a legal solution. Other solutions, which they may have less experience of – such as the use of the media to advance the case - may in fact be equally or more effective.

A steering group or committee made up of the functional experts involved in dealing with the issue should be assembled and meet regularly, either face-to-face or through conference calls, to ensure that all participants are kept informed of developments in their own and other areas. Such co-ordination can provide valuable opportunities for brainstorming appropriate strategies and create genuine productive debate over whether the commercial strategy is still appropriate and whether tactics need revisiting as a result. A method of achieving decisions and ratification of draft documents must be in place.

The risks and the benefits of openness. The risks for the company of proactively bringing a dispute into the public gaze early on include the fact that:

- It is likely that the company will start to find itself "judged" by the media and other commentators long before the full evidence of a case is ever heard.
- Stakeholder groups such as shareholders and employees, business partners and suppliers can raise questions that the company is not prepared to answer at that time.
- One particular issue that might be relatively trivial might be brought to the forefront of how the organisation is perceived.
- Settlement discussions may also become much more difficult and force the opponent to harden its position – or even stage a tactical withdrawal - as it becomes more important for it to "save face".

However, the company may simply have no choice. Your opponents have already briefed the media - stories are running about your company that are hitting the share price and causing your suppliers to question whether they should do busi-

Potential target audiences

There are numerous potential targets for your communications and each needs to be identified and then analysed as to the messages they are going to want to hear about you. They include:

- The media – broadcast, national and international, specialist trade, local and regional, internet-only. Coverage is sought to help reach other audiences and raise the overall awareness of the dispute.
- Shareholders – yours and your opponents – with a focus on the main institutional investors.
- Other potential defendants or organisations likely to be hit by the same issue with whom common cause can be made.
- Other potential plaintiffs – especially in class-action suits.
- Internal influencers – appropriate board members, employee representative groups, trade unions, subsidiaries.
- Suppliers, business and alliance partners – yours and your opponents'.
- Government – to solicit support or to potentially make neutral on the issue or case being dealt with.
- Politicians – where they have a close interest in what happens to your company and/or its employees or shareholders.
- Independent regulators – who might be expected to have a say in the outcome of a dispute or where there is a requirement for them to be notified of anything which will have a material financial impact on the business.
- Customers – the people from whom everyone in the organisation ultimately earns their living and who are becoming more sensitive to the reputation of a business.

ness with you. Difficult questions are being asked by recruits and employees about the company that they work for and long-standing efforts to create a corporate culture based on particular values are being undermined. Simply having "no comment" is no longer a practicable or credible option.

The advantages of greater openness, however, are numerous:

- It enables you to ensure that your voice is heard, your position is known and that you are seen to be unafraid to fight your battle.
- An open approach means you can publicly question why your opponent is not willing to do the same - clearly they must have something to hide.
- A robust approach can help force the pace of settlement discussions, giving your opponent a taste of how you intend to keep the dispute in the public arena as much as possible within the rules of court.

If the publicity reaches a consistently high level, it starts to dominate the perception of your opponent, damaging it in a number of ways across its stakeholder groups and, ultimately, bringing the attention of the board to an issue that might have normally stayed within the legal department, a subsidiary or a commercial group.

Openness can escalate an issue beyond national boundaries. Disputes over liability relating to asbestos, tobacco, mining diseases, human rights abuses and copyright – to name a few – can escalate from the national to the international level very quickly. The global nature of the media and the internet means that a problem that might normally have been considered local can now escalate in a matter of hours to being a worldwide issue. Organisations equipped to work on a global basis are able to use this to their advantage in pressing their case against those who are not.

When Andersen Legal's former Dutch associate Wouters Advocaten & Notarissen was appealing against a ruling by the Dutch courts against lawyers being able to associate with auditors, it brought in elements of EC competition law, forcing the case to the ECJ. The case was being tracked around the world by various bar associations and media attention was intense around key phases of the litigation. Andersen Legal produced briefing papers for the media on the critical issues involved that drew on arguments and research used in markets as wide apart as California and New South Wales. The publication of the briefing papers themselves was treated as a source of news items, creating opportunities for coverage where there were none previously.

When the ECJ heard oral arguments on the case, for example, the address given by Wouters' counsel was summarised into a news story and given to journalists around the world. In the days running up to the judgment reporters around the world were briefed on the case, possible out-

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comes and what that would mean for Wouters Advocaten and Andersen Legal. Such pre-briefing was essential as a way of managing expectations and providing journalists with sufficient insight to ensure that they understood the case and what the judgment meant in practical terms.

Not all aspects of a case need to be brought out into the open. Organisations need to decide which elements of their side of the dispute they want to emphasise. They may want to keep certain other aspects private. This approach enables the company to set the agenda for a public debate as much as possible on its own terms and can help avoid having the company's position and motivation being defined by its opponent.

The messages. Each of the target audiences (*see box "Potential target audiences"*) will have different needs for different types and pieces of information. Shareholders, for example, will require a certain emphasis that will not be the same as government or employees. This information needs to be provided in a way that reflects their different areas of interest. In addition, certain regulations, such as the Securities and Exchange Commission's regulation Fair Disclosure, require companies to make public certain aspects of their business in a fair and equitable manner (*see "Who's afraid of Regulation FD?", www.practicallaw.com/A20427*).

It helps to design a detailed spreadsheet outlining the who, what, when, where, why and how of messages so that a clear picture can be built up of how information is released, to and by whom and in what order. Other than where financial markets regulations make certain demands, it is generally preferable for internal audiences to have relevant and appropriate information first or at least simultaneously. It is generally not helpful for your own people and their representatives to find out material pieces of information in their daily newspaper. Your people can be your best champions and they are the ones who have to face the clients and customers of the business who may be asking questions about what is happening. Treat them with openness and respect and they will tend to rally round.

There are classic "story" themes that draw the greatest amount of attention and they can be presented by plaintiffs - especially in class actions - seeking to publicise their cause in a very effective manner. These themes can draw immense amounts of attention from the media and can be very hard to counter unless time and effort is put into developing a defensive position that has an equal or greater resonance. Classic story themes include:

- David v Goliath – one small individual or company taking on a larger one that seeks to bully its way to victory.

- Human v Faceless – either one or many people have suffered unfairly at the hands of a faceless corporation or government that refuses to acknowledge that it has done wrong or has been extremely slow in handling what appears to be perfectly reasonable requests for compensation or justice.

• Champion of the people – either side claims that its actions and litigation can be seen as being representative of the need to champion the public good. This can be very powerful in the antitrust arena where the claim of breaking a monopoly or opening a market to new or additional competitors can result in opponents having to justify their own working practices which may seem nonsensical or antiquated when looked at from the outside.

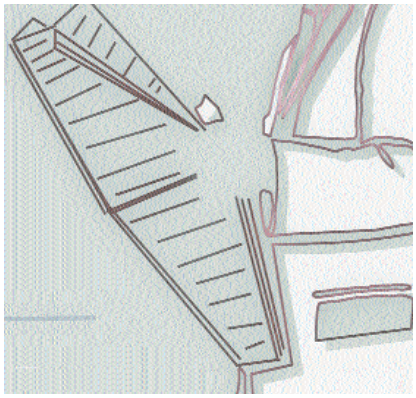
• Betrayed trust – cases where one side can claim to have acted fairly but has been let down or feels unfairly treated. Discrimination cases of all shapes and sizes fall most easily into this category.

The campaign by former Gurkha soldiers and their widows to achieve parity with their British Army comrades is a good example of a campaign focused around the concept of a betrayed trust. At the time of writing there is ongoing litigation based on the premise that the difference in pensions paid to British Army personnel and their widows on one hand and their Gurkha counterparts on the other amounts to racial discrimination.

Dow Corning Corporation was forced into Chapter 11 and a settlement of US$3.2 billion as a result of claims made regarding silicone breast implants. According to Dow Corning's chairman and chief executive officer, Gary E. Anderson, the company faced more than 19,000 individual law suits relating to breast implants in 1995 when it entered Chapter 11. The cost of defending each of these law suits was estimated at US$1 million, making Chapter 11 the only realistic option open to the company while it consolidated cases, conducted the necessary research and prepared settlements.

Methods of communicating. We live in an online world. Advocacy and special-interest groups can easily build well-resourced web sites and can create very rapid means of communication with their target audiences through email and text messages. Chat rooms and viral email campaigns create online forums for discussion and co-ordination for direct action as well as giving a central "place" for opponents to gather.

However, this transparency and ease of mobilising allies can apply both ways. Corporate web sites can equally become depositories of very useful information to support litigation public relations. Subject to national rules of court, there is no reason why pleadings, evidence, briefing papers, press coverage, FAQs and other materials relevant to a dispute cannot be published on the web, to provide those who are interested in the dispute with as much information as they require. Such sites enable a degree of openness and transparency that was inconceivable even five years ago. There is equally no reason why chat rooms and other forums cannot be monitored and, when handled with appropriate care and sensitivity, used as a venue for productive debate and placement of rebuttal messages.



When Andersen was under attack over Enron, its website was receiving tens of thousands of visits per week from all around the world. Those visitors were seeking answers and wanted to hear Andersen's own point of view. The website rapidly became a focal point for information as the US Department of Justice litigation and break-up of Andersen played through to its conclusion.

It would be naïve to think that just because you publish something on your website that the communications job is done. Proactive communication is what generates results and there are a number of methods of reaching different audiences that are extremely powerful (it should be noted that each of these needs to comply with regulations governing the release of corporate information):

• One-to-one briefings and interviews with journalists and other commentators and regulators.

• Group briefings for the media, analysts and other interest groups.

• Open meetings/forums.

• Online chat forums/webcasts for internal and external audiences.

• Use of voicemail and internal emails.

• Text messaging.

• Photo stories.

Clearance procedures and ongoing review. Materials generated by the communications team should be reviewed by the wider group assembled to deal with the issue to ensure that they do not open the organisation up to uncomfortable levels of additional risk. Create a specialist team comprised of the right people to agree the material and then get on with it. Only those people who directly understand what is going on and have the necessary authority should be involved.

All aspects of the dispute need to be kept under regular review. Communications materials such as briefing papers need to be kept updated and amended to take into account developments in the dispute and, if appropriate, the wider world. For example, there may be other cases that reach judgment before yours on a similar issue – in which case their outcomes are worth factoring into your own communications.

Use of external and internal resources. A dispute can occupy immense amounts of time and can be a significant drain on internal communications resources, drawing them away from their day-to-day (and arguably more important) tasks. It can make very good sense to draw in external communications people who have experience of managing disputes

to provide counsel and delivery. It is equally important to ensure that any external communications advisers are not just left on their own. They need to be brought into the strategy setting process and be a core part of the team. Liaison points within the organisation should be set up to make sure that whatever is developed is seen by those within the company who can assess it for corporate consistency and brand values.

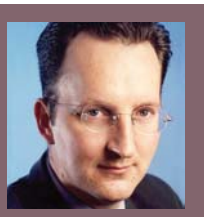
Internal resources also play an important role in helping handle the communications aspects of disputes – they are often better placed to handle various personalities and they have the depth of knowledge and expertise about the organisation as a whole. In addition, the internal people are the likely first port of call for enquiries from the outside world. For example, the internal public relations team is likely to be the first line of response to the media, which means they need to be briefed on how to handle them.

A timetable for delivery. The communications timetable and the legal timetable need to work hand-in-hand. A consolidated timetable, especially with very long-running litigation over a period of years, means that the communications team has the ability to keep an issue at the forefront in a planned, sensible manner designed to create the best commercial impact.

This approach forces the litigators to plan ahead. Communications people like to see the whole process and the picture that it presents and plan accordingly to manage its twists and turns. The communications team needs to be aware of the legal deadlines and critical dates to ensure that they can plan around them to maximise or minimise the impact. Briefing materials delivered too late or communications people caught unawares by a hearing or judgment date gives an impression to the outside world of a disorganised organisation that is struggling to cope with an issue.

Costs. Each element of the communications strategy, like the legal element, should be costed out. It may not be possible to give an exact figure, but it is important to identify at least the areas so that a commercial view can be taken on cost and effectiveness. In addition, it is quite likely that a large proportion of communications costs may be incurred before a dispute reaches the stage where a claim is issued or received, let alone settled or ruled upon.

It is recommended that the cost of external communication advice and the creation of the necessary materials is budgeted as part of the overall cost of the dispute alongside the legal and other necessary fees. This approach means that you are able to see the true financial cost of a dispute rather than having it scattered across a number of internal departmental budgets.



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