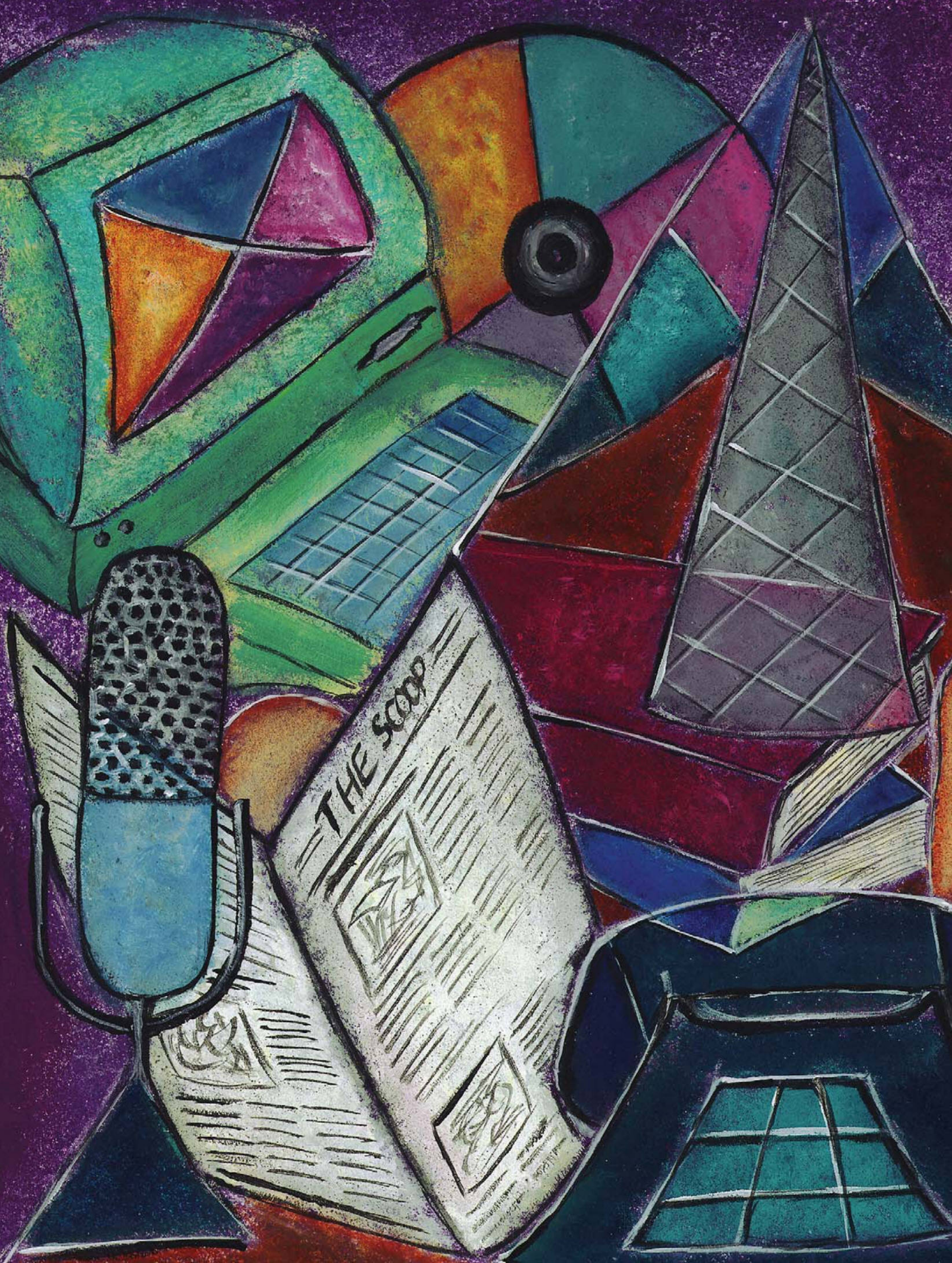
THE SCOOP

Winning in the Court of Public Opinion

By Steven A. Meyerowitz

Communicating with the news media and other audiences can be an important part of litigation strategy

It generally is well accepted by now that, in most instances, lawyers representing parties in high-profile civil lawsuits must at the very least think about communicating with the news media. Indeed, current best practice virtually requires that lawyers not just contemplate communication but actually engage in it. The days of ignoring reporters' phone calls, refusing to talk on the record or responding with an abrupt "no comment" are long gone.

As a matter of fact, today the media are only a part of the litigation communications process. Heather Wilson, a Los Angeles-based vice president of the public relations firm Weber Shandwick, recommends "communicating with all stakeholders, not just the media." That includes everyone who might be interested in the lawsuit or its outcome, from employees, shareholders and investors to customers, stock analysts and community leaders. Attorneys have come to realize that winning in the court of public opinion (or among the client's workers or local government officials) can be just as crucial as winning in the courtroom.

Toward that end, there are a number of strategies that lawyers can use to manage communications around litigation properly.

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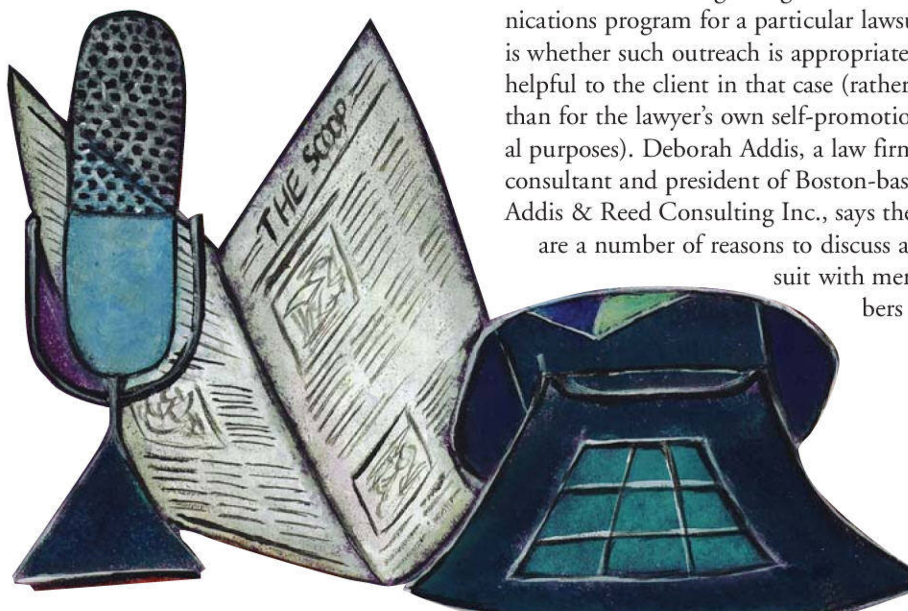
Reasons to Reach Out

One of the first questions lawyers have to ask when considering a litigation communications program for a particular lawsuit is whether such outreach is appropriate or helpful to the client in that case (rather than for the lawyer's own self-promotional purposes). Deborah Addis, a law firm consultant and president of Boston-based Addis & Reed Consulting Inc., says there are a number of reasons to discuss a suit with members of the media (and other interested parties), including to protect the client's reputation, to "get out in front of bad press" (which might occur after a losing verdict, in anticipation of an appeal) or to stimulate some type of reaction from the public or even the government that might be helpful to the case or that would serve the "public good."



John Hellerman, a co-founder and partner in the Washington, D.C., office of Hellerman Baretz Communications, a strategic communications firm that focuses on law firm clients, points out that other reasons for going to the media might be as diverse as trying to "make the story as boring as possible so people turn off to it" or acting early to shape rather than react to media interest. It can put lawyers and their clients in a difficult

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position if the other side is "out there" and expressing its message with no well-defined countervailing ideas and perspectives.

Initial Steps

Once a lawyer decides outreach to the media is important, the lawyer has to develop a plan for the media (which also should be applicable to communicating with other groups). According to Kevin Aschenbrenner, a senior account supervisor with Jaffe Associates Inc., in Victoria, British Columbia, who has been representing U.S. lawyers for more than a decade, the first step is to "talk with the client at the outset to see whether or not you can do media in the case and to establish what the client is and is not comfortable with." The client should have absolute veto power over whether to go forward and in what fashion. The client may decide, for instance, that it will handle the general media but the lawyer can communicate with the legal press.

Assuming the court has not issued any gag order and there is no limitation on the parties' ability to talk to the media contained in any settlement agreement or otherwise, the next step is to decide what to say. Heather Wilson of Weber Shandwick believes statements made to the media "must align with the legal strategy" and lawyers representing the client have to "sign off on everything." From that, lawyers and their advisers can create "talking points" to be delivered to the media. Plaintiffs, for instance, might discuss their accusations, the alleged wrongdoing and the damages they claim to have suffered.

In this regard, it's also important to try to think about what the other side might say to the media and how its representatives might answer questions. Addis says she believes that if a lawyer's opponent is talking to the media, "it's a bad thing if you are not talking. Refusing to respond or saying 'no comment' can make it look as if you're in the wrong." Addis notes that it's often possible to say something essentially equivalent to "no comment," such as why it's inappropriate to speak about a case at the time the press is inquiring or reiterating the client's position as set forth in documents already filed with the court.

Then it's important to choose the person to be the contact for the media. Addis stresses that it should be "one person, not a group of people," and the contact should be someone who is "comfortable dealing with the press, who knows the case and understands ethical issues and can discuss what should be said but who also knows what should not be said." According to Addis, in most instances the contact should be a lawyer — and probably not a junior lawyer — rather than a member of the law firm's staff, who might be seen as "a step away from the source" and might make reporters wonder whether the lawyer is "hiding out." In some situations, a staff member such as the firm's marketing representative or executive director can speak with the press to provide background information on the suit, the client or the law firm.

Hellerman observes that the particular media outlet is a factor that should help to determine the person chosen as the spokesperson. For example, he says, one individual might be appropriate for a print interview, but another might be more telegenic and therefore a better choice for a television interview. All lawyers and staff members should know who the contact person is and should be directed to send all media inquiries to that person; they should not speak to the press themselves.

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Getting the media interested could backfire if it comes up with damaging information the lawyer isn't aware of.

In many cases, a lawyer will be working with public relations counsel on behalf of the client. Assuming privilege issues can be resolved and the consultant is covered by the attorney-client privilege, Jaffe Associates' Kevin Aschenbrenner recommends "bringing the publicist in as soon as possible, possibly even before or soon after the filing of the case." The attorneys should brief the publicist on the reasons the case was filed, the key issues involved in the dispute and why it's an important case. If the first time the PR rep hears about a case is after a decision is rendered, the rep "will have to spend time trying to understand it." That can delay communications with the media, which might mean the opportunity for coverage is lost.

Avoiding the Pitfalls

There certainly are downsides to dealing with the media, which can be encapsulated in the clichés "live by the sword, die by the sword" and "playing with fire." Along those lines, Addis points out that getting the media interested in a lawsuit could have unexpected — and quite negative — consequences. "The press could sniff around and come up with damaging information that the lawyer may not even have," she says.

Another risk, according to Weber Shandwick's Heather Wilson, is that being "too aggressive" or appearing to be "too hungry for attention" might make it seem as if a lawyer is trying the case in the media rather than simply trying to get a message out. That can be hurtful to the case itself, perhaps turning off a jury or, as Aschenbrenner notes, "ticking off the judge."

Hellerman also emphasizes that it's important to be "very careful" when involved in an action that raises issues about the client's industry. That is "not a time for any one" member of the industry to start speaking, Hellerman advises. The focus "should be on the industry," and sometimes it simply is "not right to be a part of the conversation."

Lawyers have to recognize that not every effort to reach out to the media will result in coverage. Aschenbrenner says lawyers shouldn't "expect to see an article the next day." But this doesn't mean that attempts are for naught. Keeping in touch with reporters respectfully, without badgering them, makes it "more likely they will call when the case breaks," he says. "They will recognize you are a good source of help."

There is no reason to try to get media coverage for routine matters, even though in particular instances (such as an employment discrimination lawsuit) it may be important to talk to other interest groups (such as employees). The bottom line is that communications about litigation have to be well thought out. As more and more lawyers are discovering with more and more litigation, there has to be communication in some form and directed at least to some (or multiple) interested groups, including, in many cases, the media. ✪

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