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How Law And PR Can Work Together In High-Profile Cases

Law360, New York (April 10, 2014, 1:21 PM ET) -- The vast majority of criminal and civil cases go largely unnoted in the public sphere, but those that attract scrutiny from print, broadcast and social media outlets present unique challenges. It can happen when high-profile individuals or prominent institutions stand accused of criminal activities; when government investigations intersect with a charged political topic; or when the nature of an alleged crime touches a raw nerve among specific stakeholders.

In such cases, attorneys can no longer assume that they are acting within a hermetically sealed justice system. It would be a gross exaggeration to suggest, "Vox populi, vox Dei." Equally, it would be a mistake to ignore the power of public opinion in shaping legal outcomes and protecting the client's long-term interests outside of the courthouse doors.

Given this reality, it has become increasingly common in recent years for parties, as well as their law firms and in-house counsel to engage public relations professionals on high-profile cases. In theory, it's an odd marriage of professions. Lawyers prefer discretion; PR pros like to talk.

Recently, our two firms found ourselves working on the same case — the court-martial of a brigadier general in the United States Army, which was the first court-martial of a general officer in several decades. The case was high-visibility and high-stakes.

We knew from the start that there was no way to build a firewall between public discourse and the courtroom proceedings. Our client, Brigadier General Jeffrey Sinclair, stood falsely accused of sexual assault. A former deputy commander of the elite 82nd Airborne Division, Sinclair was the first general officer to face court-martial in decades. Given the heated debate over sexual assault in the military, his case played itself out on the front pages and on network newscasts long before it came to trial.

By the time either of our firms was hired, initial coverage had unfairly and inaccurately labeled our client, a highly decorated war hero, as a sex-obsessed rapist.

The interests of lawyers and PR professionals converged when we found ourselves on the same side of the issue and both had one primary concern: the exoneration of our client.

More on the case later; first, some general observations about the cooperation of public relations professionals and attorneys.

First, the most urgent priority is minimizing the client's legal exposure. But the client's long-range concerns don't start and end in the courtroom. High-profile institutions and individuals need to preserve their ability to function long after any particular case is over. For companies, that means safeguarding relationships with customers, employees and business partners; for individuals, it's about ensuring the ability to earn a living or walk down the street without concern for personal safety or embarrassment.

Second, changes in the way that information is reported and shared have upended traditional ways of approaching legal cases. The advent of 24/7 cable news outlets along with the proliferation of social media channels have created an enormous appetite for breaking news, and have empowered anyone on Twitter or Facebook to spread misinformation or shape opinion. It has become considerably more difficult in recent years to insulate the courtroom from the outside world. Sometimes, it is better to turn these developments to the client's advantage.

Third, an integrated public relations professional within the legal trial team can provide an additional perspective that will assist inside the courtroom. The public relations professional can serve as a sounding board for factual arguments and strategies, and provide insight as to how the jury or the court may respond. In this sense, the public relations professional, with his or her insight into public reaction to information, serves in a role similar to that of a jury consultant.

Fourth, crucially for counsel, attorneys must be mindful of their professional obligations in communicating with the press. Model Rule of Professional Conduct 3.6 addresses trial publicity and imposes restrictions on lawyers participating in a matter from making public comments that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The model rule, however, provides several safe harbors, permitting commentary that, among other things, "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."

Moreover, Model Rule of Professional Conduct 8.4(a) states that it is prohibited for an attorney to "knowingly assist or induce another" to violate the Rules of Professional Conduct; an attorney cannot engage a public relations firm to do that which the attorney could not do. It is important to note that the professional rules do not prohibit extrajudicial statements, but lawyers must understand the details of the rules governing trial publicity, as well as any orders entered in a particular proceeding governing out-of-court statements.

General Sinclair was charged in 2012 with two counts of sexual assault against a subordinate officer with whom he had engaged in an extramarital relationship for almost three years, along with lesser violations of military law.
In some ways, the Sinclair trial stood out as the exception, not the rule. We understood that the Army as an institution was under tremendous pressure to prosecute sexual assault allegations, no matter how weak an individual case might be. In this sense, the Army was actually not much different from a county prosecutor's office fearing backlash at the polls or a regulatory agency under pressure from voters, legislators and an activist press.

In this case, the evidence strongly suggested that the accuser fabricated the assault claim to earn immunity from prosecution for her own adultery and fraternization charges, as extramarital affairs are a

two-way crime in the military. Indeed, the accuser's contemporaneous diaries, voice memos, texts and emails sharply contradicted both her central claim as well as numerous other points in her sworn testimony and statements to prosecutors and investigators. It was no surprise when we later discovered that Army officials harbored serious doubts about her truthfulness, but pressed ahead with dubious charges out of concern over political backlash.

Normally, public relations professionals work with attorneys to minimize a client's exposure and correct inaccuracies in coverage. In this case, we advised the client that transparency was the better route.

To level the playing field and correct the vast inaccuracies circulating in the public sphere, we adopted a policy of disclosure. That meant sharing key pieces of evidence that were in the public record with leading print outlets; granting frequent media access to defense attorneys; relaying elements of pretrial strategy; and, above all, keeping journalists focused on the evidence. We helped reporters sort out a confusing mass of charges and allegations to see through to the fundamental sequence of events.

During the trial itself, we also staged media availabilities with the legal team and provided journalists access to the court documents they heard discussed in trial. Our approach sharply contrasted with the Army's insistence on secrecy and opacity.

Ultimately, the Army dropped the sexual assault and related sex-crimes charges because their case unraveled in the courtroom. Through a vigorous legal strategy, the defense produced evidence of unlawful command influence, demonstrating that the commanding general who had previously denied an offer to plead submitted by General Sinclair was improperly influenced by political considerations. The defense further focused on the key documentary evidence, as well as the tarnished credibility of the primary accuser, to debunk the most serious charges in the case.

When General Sinclair was permitted to plead to lesser charges, including adultery and exchanging inappropriate emails with three other officers, the defense's legal efforts achieved our objectives. Further, although the court did not and was not required to provide reasons for the sentence of a reprimand and a $20,000 fine, the defense had urged the court to examine the evidence and see the case for what it really was and not be distracted by the prosecution's overcharging.

We didn't win because of good public relations, we won on the merits. But our success in turning public opinion paved the way to a favorable resolution. This media strategy enabled the defense, as Justice Anthony Kennedy put it years ago in his opinion in Gentile v. State Bar, to "demonstrate in the court of public opinion that the client does not deserve to be tried." [1]

In the opening days of the trial, following the court's finding that unlawful command influence had infected the proceedings, The New York Times ran a dramatic, front-page article entitled "How a Military Sexual Assault Case Foundered." The article called the Sinclair case a "black eye" for the Army, but it actually provided the Army officers who were responsible for recommending and making plea decisions more wiggle room. It was out of that environment that the lawyers successfully asserted the defense's evidentiary and legal theories to achieve victory.

The confluence of a vigorous legal defense with a sophisticated press strategy helped exonerate a decorated Army officer both within the courtroom and in the court of public opinion. While obviously not every case calls for an independent public relations campaign, when the issues, individuals or institutions have generated significant media coverage, collaboration between the lawyers and the public relations professionals can be highly effective in protecting all of the client's interests.

—By Lathrop B. Nelson III, Montgomery McCracken Walker & Rhoads LLP, and Josh Zeitz, MWW

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Nelson and Montgomery McCracken represented General Sinclair in the court-martial United States v. Sinclair. Zeitz and MWW served as public relations consultants.

[1] 501 U.S. 1030, 1043 (1991) (opinion of Kennedy, J.)
