

Remarks of James F. Haggerty

**Law, Politics and the Media Lecture Series
The Institute for the Study of the Judiciary, Politics and the Media
Syracuse University
April 6, 2009**

Thank you, Mark.

Let me start by saying that it is a great pleasure to be here. I'm happy to present on a field that exists somewhere between the practice of law and traditional public relations: Litigation Communications, or Litigation Public Relations, as it is also known.

The great challenge here is that I could speak for hours on this stuff. There are so many facets to what I do, so many "war stories," so many jumping-off points for our discussion. And if I've learned anything from my 20 years of doing this type of work, it's that it's far easier to make your argument in 10,000 words than in 1,000. Or 100. And that, really, is one of the underpinnings of the work that I do.

In this media age, when we're all awash in information about issues and arguments and policy, how do you discuss a lawsuit with thousands of pages of legal arguments, hundreds of issues and more than a million documents produced during discovery? And how do you do so in the proverbial ten words or less?

I'm especially thrilled to be speaking before this group, by the way, because the work that you do here relates directly to what I do every day. As a media consultant, there are two levels to what I do. There is the nuts-and-bolts level, working – as all PR people do – to ensure that information is presented to the public in the best manner possible to serve my client's interests. Positioning issues and arguments. Forming perceptions. Changing perceptions. "Spin" is the oft-used pejorative – but I must tell you, bending the truth has little to do with what I do. No matter how good a Spin-Doctor you are, you bend the truth too much, it breaks.

What we're really doing in the litigation communication field is taking the voluminous information that is part and parcel of any lawsuit or legal crisis and putting it into a form that can be understood and used by various public

audiences – including the media – to form perceptions about the case, and the cause. In a way that influences both the party’s reputation and – quite often – the course and conduct of the litigation itself.

So that’s the nuts-and-bolts level. But there’s a higher level, which in many ways informs the decisions you make and the “tactics” you use when you are in the trenches. This is closer to the work you do here, understanding and appreciating the effect of politics, media and public perception on the judicial process. Quite frankly, I believe it is what separates the good practitioners of this work from the great ones, this understanding of the way all of the extrajudicial forces comes together to affect the legal process.

And look, I’ll make no bones about it: I believe that the court of public opinion is as important to finding that elusive concept “justice” as anything that goes on in the courtroom.

Now as John Travolta said in the movie *Pulp Fiction*: “That’s a bold statement.” And it is. But in many, many cases, it’s absolutely true. And I hope that – good advocate that I am – by the time I’m done with my discussion, you’ll agree.

I think there are a lot of misconceptions about the work that I do. A lot of folks think we spend all our time writing press releases, arranging press conferences, arguing on *Nancy Grace* about the guilt or innocence of the accused, scheduling appearances for our clients on *60 Minutes*. And there’s some of that. But that’s only part of what we do, and a smaller part than you might think.

Most of what we do is much more nuanced: advising on the public implications of legal issues or litigation. How everything a litigant does or says, or the way a litigant acts, affects the perception of these issues -- to the benefit or the detriment of both the case and the client’s reputation.

I’ll give you just one example, and this comes courtesy of a friend of mine who is a top lawyer and has been involved in many high-profile cases.

He put it like this:

If your teenage daughter comes home one night, late, on a school night, and you ask “Where have you been?” and she says “No comment”... well, you’re going to make some assumptions about what’s going on.

And if she walks in and says: “Well, let me get back to you. What’s your deadline?” you’re going to form a different set of assumptions.

But if her response is: “Look, I made a mistake, I’m sorry. I think I know how to prevent it from happening again.” Those two sentences are going to change the whole tenor of the conflict.

It sounds simple, and it is. But doing it well in the course of a billion-dollar lawsuit – well that’s where the art and science of litigation communications comes in. It’s like Willie Mays playing the outfield: a lot of hard work goes into making it look so easy.

Now, Mark mentioned in addition to my public relations firm, I’m occasionally back practicing law these days, called upon as an attorney in various kinds of litigation as an offshoot of my litigation communications work. Which is either a great milestone or, alternately, a sad day for the profession. I imagine some esteemed attorneys are probably pretty repulsed by the fact. But, as we say in New York, “It is what it is.”

But I suppose it’s also great evidence of the integration of all of the issues at the heart of this class, the work of your Institute, and my work as well. Legal issues, media, politics and public policy are merging – and it is the lawyer’s responsibility to ensure that his or her client’s interests are protected in the court of public opinion as well as in the court of law. Lawyers and clients are quickly beginning to realize this.

Another example: I spoke to a very prominent trial lawyer – one of the most prominent in the nation, routinely listed among the best courtroom presenters in the nation – who told me he was recently hired for a trial not for his skills in the courtroom, but for his skill at managing the media during the course of the trial. The attorneys trying the case felt they were going to get creamed in the press as the case went to trial, and they needed a member of the team who knew how to manage the media frenzy – for fear of the effect it would have on the judge and jury.

And we’re seeing more evidence that – even during the course of a trial, when the jury is not even supposed to be reading the newspaper or watching CNN, or surfing the ‘Net – media and public perception issues are having a great impact on the course of legal disputes. Consider the article that appeared just a few weeks ago in *The New York Times* – and I’ll quote:

Last week, a juror in a big federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet, directly violating the judge’s instructions and centuries of legal rules. But when the judge questioned the rest of the jury, he got an even bigger shock.

Eight other jurors had been doing the same thing. The federal judge, William J. Zloch, had no choice but to declare a mistrial, a waste of eight weeks of work by federal prosecutors and defense lawyers.

Clearly, this goes on all the time. I’ve had lawyers tell me they assume that everything that appears in the media – and let’s include blogs, “social media” and the Internet in those categories – everything that is being written about a case, even during the course of a trial, is being read by jurors.

And I've got news for you: judges read the paper as well, and certainly their clerks do.

In fact, I'm working on a case right now where, for scheduling purposes, there will be a big gap – several weeks, at least – between the presentation of the plaintiffs' case and the presentation of the defense. So, in effect, the plaintiffs get to present their case and the allegations are going to hang out there for weeks or months before the defense even gets a chance to respond. This creates perception problems that the defense is going to have a hard time overcoming. And it relates not just to the corporate defendant's overall "reputation," – although that is always a consideration, particularly with companies, and particularly with public companies – but to way the judge perceives the case and the way the other side perceives their chances as the litigation move forward. So we need to figure out, before the first evidence is presented in court, how to present our side of the argument to the media and other public audiences so that the well isn't totally poisoned before we even get the chance to present our case in court. It's a huge communications challenge.

And this is a bench trial, not a jury trial. But, as I said, Judges and their clerks read the newspaper – or, in this age, the internet --- just as juries do. Anyone who tells you that judges are immune from these influences is, quite frankly, either misinformed or lying. They may be a little better at protecting themselves, but they're certainly not immune.

And that's an important point because it is a fact that somewhere between 95 and 98 percent of case settle before trial. Think about that. 95 percent. 98 percent. Most of what you will do – as lawyers, and reporters, as litigation communications consultants or even when some of you are judges – won't come close to the "traditional" trial by jury in the *Law and Order* sense. Rather, the cases will be fought out before a judge in pretrial hearings and motions, at the settlement table, and in the media before the case ever comes to resolution at trial.

Another layer friend of mine, Bill Ohlemeyer, who is now at Boise Schiller & Flexner, but had been head of litigation for Altria Group, had a great quote several years ago: "The Appeals Court is where the law catches up with the headlines." Which is true. The problem is, the vast majority of cases never make it that far, and winning or losing becomes solely a matter of public perception.

Thus it is increasingly the lawyer's job – often working with consultants like myself – to attend to public aspects of the case to ensure the proper defense of their clients. Let me read you a quote by Justice Kennedy, in a 1991 case called *Gentile v. State Bar of Nevada*

An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences

of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

Now *Gentile* dealt with a criminal case, but it is equally applicable to civil cases as well. And it is even more germane now, with the proliferation of media, than it was in 1991. In the media age, an attorney who is not tending to these broader elements of their client's case is probably doing that client a grave disservice.

That doesn't mean calling a press conference at the drop of a hat. Or issue press releases *ad nauseum*. Rather, it means paying attention to the public perception aspects of your case just as you do every other aspect. It is understanding the impact of your case publicly, and alternately understanding how your public actions can influence the course of the litigation itself.

Let me give you another example, and this one's from a case I worked on several years ago. I had just gotten back from lunch and I received a phone call from a man I didn't know. He was the manager of a California office of a major foreign corporation. His English wasn't great, so I was having trouble understanding him. But he said he was referred by a friend of mine who was the lawyer for his company.

And he said: "Mr. Haggerty we have a problem here, and there's a news crew who wants to interview me about it."

"Where are they?" I asked.

"They're standing right next to me."

Now remember, at this point I have no idea who this man is, who the company is, who the news crew is, or what the problem is.

But I do know that, if the company responds poorly in this situation – if it's "a hand-over-the-camera lens" moment – then whatever their problem is, it'll get a whole lot worse. The facts won't change, but your going to change the way the public perceives those facts. A bad response will raise the antenna of media, of prosecutors, of regulators, or local politicians – and in this day and age, of bloggers and other "New Media" outlets.

So I have this man I don't know on the phone, with a news crew I don't know next to him, wanting to interview him about a problem – presumably a legal problem – I know nothing about.

So I tell the man: Put me on hold, bring the news crew to a conference room, see if they want coffee or water or something, then get back on the phone and we'll see what we can do.

Now as he was doing this, my lawyer friend called, with the company's general counsel on the line. They told me the facts: an employee of this company had committed suicide two days after settling an employment discrimination claim against the company.

A horrible set of facts, and there's not a whole lot you can do to make it better. But there's a lot you can do to make it worse. And one of those things would be to forcibly eject the news crew, or even have an untrained spokesperson on camera -- particularly one who is not skilled at speaking English.

So we told the news crew that the facility manager wouldn't appear on camera, but we'd had a short written statement for them to use in about 5 minutes.

Of course, the lawyers didn't want to say anything. Just say "No Comment," was the initial response. But it is axiomatic that nothing makes you look more guilty than a tense "no comment in a sensitive situation." It is the verbal equivalent of the "hand over the camera lens."

So I said: "Can we offer our condolences?"

"Well, yes."

"Can we say we're saddened by this tragedy?"

"Yes."

"Say we're still gathering information about exactly what happened?"

"Yes."

"Even say it is illegal in California to publicly comment on an employees work record?"

"Sure."

"So let's do that."

They were convinced. Our statement didn't say much, but it said the right things. And more importantly, it gave the news crew a piece of paper they could flash on the screen as part of their story, which got them out of the conference room.

Again, like the story of the 14-year old who comes home late, a well-chosen response takes a potentially disastrous situation and makes it manageable. And we're not divulging legal strategy, we're not trying to poison the jury pool, we're not doing anything unethical. We're just telling the truth.

Which brings me to my final point, a question I often get: "Doesn't the work you do skew the legal system in favor of those who know how to spin the media to their advantage?"

It's a fair question. Many observers worry that, in using outside influences, justice suffers. Or, to put it more bluntly: Vicious, amoral spin doctors use their "black magic" to tilt the scales of justice unfairly, twisting and bending the rule of law to meet their own nefarious ends. Using media and other public audiences in legal disputes allows the waves of public passion that swell in the wake of a media barrage to engulf the reasoned, dispassionate dispensation of justice.

In fact, I believe the exact opposite is true: Properly using these channels of communication can actually level the playing field, eliminating many of the advantages that money, ideology, influence, and class have long brought to our legal system. Particularly as new technologies offer a scalability of the message that ensures even the faintest voices will be heard.

And let's remember that our legal system has always been anchored in the practical realities of the world in which we live. Some of the best legal theorists in history were realists as well. It was Justice Oliver Wendell Holmes who once said:

"Theory is the dinner jacket you take off before changing a flat tire."

Grand theories of justice are the foundation of our system, but let's not pretend that extrajudicial realities have not, over the years, framed the judicial structure.

And there's no doubt that over the past two decades, media and other public audiences have taken their place among all of the other real-world factors that influence the course of the law. Indeed, media and other public influences may now be among the most important of these factors.

That's that can be scary. The rise of media and other public opinion influence circumvents many of the other real-world elements that have long held sway over our judicial system. For centuries, the course of litigation was guided by those who had the influence to properly frame the arguments and the resources to fight the battle and fight it well. The party with the greater resources usually won, while the poor, unrepresented or politically marginal usually lost. With this new ability to appeal to a broader public audience when addressing legal matters, parties to a legal dispute are able to short-circuit much of that traditional influence. To those that have traditionally benefited, it is a scary thing. But ultimately, I'm not too sure it's that bad a thing for legal system... or for justice.

And with that, I'll be happy to take your questions.

###