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Corporate reputation- a US perspective

By Sally Ramage

There is a role for public communications during litigation involving corporations. The effects of instant communications in blogs, for example, emphasise the impact that legal activity can have on the reputation of corporate clients and therefore on their success and viability as businesses. This is one reason for external corporate lawyers should consider using public relations consultants during corporate litigations.

Litigation Communications

Litigation communications is the term given to a systematic effort to protect or enhance a client's reputation throughout the course of litigation. Ideally, public perceptions are affected in a way that both helps the case in court and has a positive impact on how audiences outside court perceive the client. A litigation communications strategy should begin before any charges are filed and should continue for as long as the after-effects of the case have any perceptible effect on the client's reputation. From a legal position, a communications strategy can affect whether or not charges are filed or indictments handed down, as well as the outcome of settlement negotiations and, ultimately, the outcome of a trial. From a non-legal standpoint, litigation communications can affect the perceptions of customers, business partners, investors, and employees. At issue are both short-term and long-term perceptions. The bottom-line impact is measurable. For corporations, sales and stock prices are at play. For individuals, careers and public reputations are at stake. In many cases, legal and non-legal goals will conflict. In certain circumstances, the actions needed to achieve favourable press coverage will not serve the client's legal position. For example, a litigant whose lawyers convene a press conference at the end of every day of trial testimony might garner favourable coverage during the trial, but the client and the lawyers are almost certain to anger the judge by doing so. Only when the communications adviser, the lawyer, and the client work together as a team can the client make a fully informed

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strategic decision to sacrifice one corporate interest at the expense of another. The communications adviser must be brought into the planning process at the earliest possible opportunity, and the collaboration must continue through every stage.

Litigation communications team

The purpose of the litigation communications team is to make such decisions at every juncture, whether one is trying to avoid an indictment or the filing of charges, negotiate a favourable settlement, or prevail at trial. In preparation for trial, a strategic communications offence can create a climate of opinion that, you hope, will affect the outcome in your favour. The risk is ethical. You may be seen as trying to seed the jury pool, which can enrage the judge and even result in sanctions. The risk of a purely defensive strategy, in which you keep quiet and respond only to statements and events to which you absolutely must respond, is that the public, and hence prospective jurors, may wind up presuming guilt or liability. The benefit of a defensive approach is that your cards are still close to your vest. You keep all of your options open, you have tipped off nothing to the other side, and you maintain the sometimes-critical element of surprise at trial. The litigation communications team must counsel the client about which alternatives are advisable, what risks are presented, and how the client can minimize the risk of each choice. The role of the litigation communications professional in providing valuable insights to that team. The biggest obstacle to fully integrating the legal and communications teams, of course, is the risk that confidential information shared with the communications professionals will be disclosed to the adversary. The good news is that there is significant case law holding that information shared with non-lawyer communications advisers can be protected by the client's attorney-client privilege. The bad news is that the collective legal precedent is by no means unambiguous: You cannot assume privilege. You must follow specific practices in order to ensure it -- practices that are as important a part of a comprehensive communications strategy as knowing what you are going to say publicly and to whom you are going to say it.

In the landmark case of *United States v Kovel* [1961], relating to consultations with a non-lawyer accountant, the 2nd U.S. Circuit Court of Appeals said that what is '*…vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service ... or if the advice sought is the accountant's rather than the lawyer's, no privilege exists.'*

The Kovel ruling compared the accountant to a "translator" in that "*accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases." In other words, because the lawyer's advice to the client is privileged and the "translations" are essential to the lawyer being able to advise the client, the translations should be privileged as well.* In other cases, privilege was denied. In *United States v Adlman* (second Circuit, 1995), an accounting firm's work was deemed indistinguishable from the entire standard, non-litigation accounting work the firm had done for the client. The court even noted that the accounting firm's invoices lumped together the firm's litigation and non-litigation services. In *Calvin Klein Trademark Trust v Wachner* [2000], the Southern District of New York held that a public relations firm's work was not privileged because the firm had not performed any work for the lawyer beyond what it might have done if hired directly by the client. However, in the same district, the court in *re Grand Jury Subpoenas* [2003] concluded that her criminal defence attorney would be *undermined seriously* if he were unable to advise his client on the effects of any public statements.

Privileged Communications

Privileged communications are those that are made in confidence for the purpose of obtaining legal advice from lawyers. That is, the working relationship with the communications advisers should be structured so that the substantive communications and advice from the PR consultants are intrinsic and necessary to the lawyer's counsel to the client. The devil remains in the details and a litigant must demonstrate that the communications were indeed made in confidence and intended to obtain legal advice from lawyers. From privilege court cases can be drawn up some general rules of best practice as follows:

(i)The communications firm -- preferably specializing in litigation communications -- should be hired specifically to assist with current or anticipated litigation and not for traditional public relations.

(ii)The litigation communications firm should be hired early in the legal process and be made part of the legal team. Waiting until near the end of the legal matter is not only debilitating and often fatal to the communications strategy, but it also undercuts the argument that the communications firm is a necessary part of the lawyer's provision of legal advice.

(iii)A separate communications firm should be hired or an altogether new contract should be drawn up with the client's current PR firm, thus creating a discrete engagement with discrete responsibilities.
(iv)The client should appoint the lawyer first; then, the lawyer should appoint the communications firm.
(v)The engagement should stipulate that the communications firm is being contracted to fulfil the function of facilitator and the facilitating function should be described in detail in the appointment contract agreement.

Conclusion
Notwithstanding all these efforts, there still may be a small category of information (for instance, particularly devastating information to be used on cross-examination) for which the lawyer believes that the risk of losing the tactical element of surprise at trial is so great that the information should not be shared with the communications professionals or anyone else outside the core trial team. The very fact that privilege in this context is an issue of such complexity and concern underscores the increasingly crucial role that communications professionals play in a variety of high-profile investigations and lawsuits. The more high-stakes the game, the more crucial the communications component -- and the more certain that lawyers, PR professionals, and clients must be to protect the confidentiality of these sensitive discussions. ENDS+

Lifting the corporate veil to investigate fraud in companies

By
Sally Ramage

The new Companies Act 2006 has the following provisions for company investigations:-Chapter 4 section 206- Exception for expenditure in connection with regulatory action or investigation:

'Membership, eligibility and discipline
14 The rules and practices of the body relating to—
(a) the admission and expulsion of members,
(b) the grant and withdrawal of eligibility for appointment as a statutory auditor, and
(c) the discipline it exercises over its members,
must be fair and reasonable and include adequate provision for appeals.
Investigation of complaints
15 (1) the body must have effective arrangements for the investigation of complaints against—
(a) persons who are eligible under its rules for appointment as a statutory auditor, and
(b) the body in respect of matters arising out of its functions as a supervisory body.
(2) The arrangements mentioned in sub-paragraph (1) may make provision for the whole or part of that function to be performed by and to be the responsibility of a body or person independent of the body itself.
Independent investigation for disciplinary purposes of public interest cases
16 (1) the body must—
(a) participate in arrangements within paragraph 24(1), and
(b) have rules and practices designed to ensure that, where the designated persons have decided that any particular disciplinary action should be taken against a member of the body following the conclusion of an investigation under such arrangements, that decision is to be treated as if it were a decision made by the body in disciplinary proceedings against the member.
(2) In sub-paragraph (1) "the designated persons" means the persons who, under the arrangements, have the function of deciding whether (and if so, what) disciplinary action should be taken against a member of the body in the light of an investigation carried out under the arrangements.
23 (1) the arrangements referred to in paragraph 13(1) are appropriate arrangements—
(a) for enabling the performance by members of the body of statutory audit functions in respect of major audits to be monitored by means

of inspections carried out under the arrangements, and
(b) for ensuring that the carrying out of such monitoring and inspections is done independently of the body.
(2) In this paragraph "major audit" and "statutory audit function" have the same meaning as in paragraph 13.
Arrangements for independent investigation for disciplinary purposes of public interest cases
206 Exception for expenditure in connection with regulatory action or investigation
Approval is not required under section 197, 198, 200 or 201 (requirement of members' approval for loans etc) for anything done by a company—
(a) to provide a director of the company or of its holding company with funds to meet expenditure incurred or to be incurred by him in defending himself—
(i) in an investigation by a regulatory authority, or
(ii) against action proposed to be taken by a regulatory authority,
in connection with any alleged negligence, default, breach of duty or breach of trust by him in relation to the company or an associated company, or
(b) to enable any such director to avoid incurring such expenditure.'

Guidance for Regulatory and Prosecuting Authorities

Of relevance also, is the 'Guidance for regulatory and prosecuting authorities: England, Wales and Northern Ireland', and for Scotland, which state:
'(1) The Secretary of State may issue guidance for the purpose of helping relevant regulatory and prosecuting authorities to determine how they should carry out their functions in cases where behaviour occurs that—
(a) appears to involve the commission of an offence under section 507 (offences in connection with auditor's report), and
(b) has been, is being or may be investigated pursuant to arrangements—
(i) under paragraph 15 of Schedule 10 (investigation of complaints against auditors and supervisory bodies), or
(ii) of a kind mentioned in paragraph 24 of that Schedule (independent investigation for disciplinary purposes of public interest cases).

509 Guidance for regulatory authorities: Scotland
(1) The Lord Advocate may issue guidance for the purpose of helping relevant regulatory authorities to determine how they should carry out their functions in cases where behaviour occurs that—
(a) appears to involve the commission of an offence under section 507 (offences in connection with auditor's report), and
(b) has been, is being or may be investigated pursuant to arrangements—
(i) under paragraph 15 of Schedule 10 (investigation of complaints against auditors and supervisory bodies), or
(ii) of a kind mentioned in paragraph 24 of that Schedule (independent investigation for disciplinary purposes of public interest cases).
(2) The Lord Advocate must consult the Secretary of State before issuing any such guidance.
(3) In this section "relevant regulatory authorities" means—
(a) supervisory bodies within the meaning of Part 42 of this Act,
(b) bodies to which the Secretary of State may make grants under section 16(1) of the Companies (Audit, Investigations and Community Enterprise) Act 2004 (c. 27) (bodies concerned with accounting standards etc)…'.

Legal Structures

It is as well to remind ourselves of the various legal structures used in business and a diagram serves this purpose well.

Sole trader, partnership, company structures

two basic categories	natural persons
	legal persons

natural persons	sole traders
	partnerships

legal persons	corporations sole
	corporation aggregate

normally — Companies Act 2006

possibilities

public	private
limited liability	unlimited liability
quoted	unquoted
shares	guarantee

in commercial reality	company limited by shares "ltd" or "plc"

Source: Sally Ramage, *Fraud Law Book 2,* (iUniverse, USA 2006)

A structure which has come to public attention recently is the special-purpose vehicle (SPV). The SPV is sometimes referred to as a 'bankruptcy-remote entity' whose operations are limited to the acquisition and financing of specific assets. The SPV is usually a subsidiary company with an asset/liability structure and legal status that makes its obligations secure even if the parent company goes bankrupt. Corporations use such the SPV structure to finance large projects so as not to put the entire firm at risk and they are also used to hide debts from the corporation's Balance Sheet in its Annual Accounts, as occurred in the infamous Enron fraud and bankruptcy where police discovered that SPVs which Enron used, allowed Enron to move enormous amounts of debt off its balance sheet, hiding the fact that it was at the edge of insolvency. In many of the United States jurisdictions, 'piercing the corporate veil' is difficult and expensive.
In the United Kingdom though, in exceptional circumstances, the identity of the person behind the corporate veil can be compelled as was done in the cases of *International Credit and Investment Co. (Overseas) Ltd v Adham*, The Times, February 10, 1997, when a letter written by a solicitor for his client was found by the court to be admissible against the client provided that it could be shown that it was written in pursuance of the client's instructions. In an earlier case *R v Downer* (1880) 14 Cox 486, CCR, the court decided that it was insufficient merely to show that a letter was written following a client interview. Other special circumstances that allow for the corporate veil to be pierced are those such as in the family law case *Ben Hashem v Ali Shayif* (2008) EWHC 2380 (Fam) to allow a company's assets, in which one or both spouses have a substantial interest, to be taken into account in ancillary relief calculations.

Relevant Case law

Case law that is still relevant includes the case of *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, CA.
The facts in this case were that DHN Food Distributors Ltd carried on a food distribution business and had two wholly-owned subsidiaries, all with the same directors. The subsidiaries were Bronze Investments Ltd, which owned the land used in the business, and DHN Food Transport Ltd, which owned the lorries. The local authority issued a compulsory purchase order over the land and paid compensation for the land value to Bronze Investments Ltd, but it refused to pay compensation disturbance to the business. The business was carried on by the

parent company and not Bronze Investments Ltd. The parent company was a separate legal entity and not subject to the compulsory possession order. Lord Denning lifted the corporate veil in the Court of Appeal on the basis that, on the facts of the case, the doctrine of corporate personality was applied artificially and unfairly. Lord Denning therefore treated the group as one entity for the purposes of that particular statute and the court's decision was that DHN Food Distributors Ltd should receive compensation for business disruption to its business.

In another case, *R v Omar* [2005] 1 Cr.App.R.(S.) 86, CA, the appellant was of cheating the Public Revenue following a Value Added Tax fraud conducted through what was originally a legitimate company, owned by the offender and his wife, and which owned several properties which had been purchased whilst operating as a legitimate business. The Court of Appeal decided that the judge in the lower court had been entitled to lift the corporate veil and to treat the benefit accruing during the period of the company's involvement in the fraud as a benefit of the offender, whether or not it was set up as a sham or was an existing legitimate company because the company had been used by the appellant for the purposes of fraud. Therefore this company was the appellant's alter *ego*, since the appellant ran the company and made all its decisions, including as to the purchase of properties. Once the corporate veil was lifted, there was no unfairness in treating the company's realisable assets as those of the offender.

The corporate veil was pierced in the case of *Kensington International Ltd v Congo* [2005)] EWHC 2684 (QBD (Comm). The court allowed the lifting of the corporate veil to determine to which third party debts were owed, where the oil company involved was ultimately acting for the Congolese Government and where there was a suspicion of a sham transaction.

Breach of restraint order under Proceeds of Crime Act 2002

by
Sally Ramage

In the case *R v M* [2008] EWCA Crim. 1901 the appellant lost his appeal case on the issue of whether the Crown Court has power to deal with an allegation of contempt of court consisting of a breach of its own restraint order. A breach of a restraint order can mean a prison sentence, even if, as was argued here, that this matter related to a civil case. The Court has power to send you to prison and to fine you if it finds that any of the allegations made against you are true and amount to a contempt of court. The Crown Court has power under to make a restraint order prohibiting any specified person from dealing with property. Such an order is akin to a freezing injunction. The court can make such other order as is appropriate to make the restraint order effective. When a confiscation order is not satisfied the Crown Court has power to appoint a receiver in respect of any realisable property, who may be the director of the Serious Organised Crimes Agency.

The fact that there is no express provision in the Criminal Procedure Rules for jurisdiction of the Crown Court does not mean that the jurisdiction does not exist. There is no dispute that the Crown Court retains its summary jurisdiction to deal with contempt of court in appropriate circumstances and before the introduction of the Criminal Procedure Rules, there were many aspects of Crown Court work which were not the subject of specific rules under the old Crown Court Rules. RSC 52 is not directly applicable in the Crown Court and if they were, the companion Practice Direction PD 52 paragraph 10 would apply, allowing the court to *'waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect.'*