Taming the Town Crier: Litigation and the Media[†]

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I.
Introduction

The press and the legal profession have long maintained a complicated relationship. The legal profession relies on the press to accurately report developments that shape the lives of everyday citizens, while the press often fills its news pages and packs its programming with coverage of high-profile trials and drawn-out legal dramas. Bloggers, too, have entered the fray, posting legal tidbits on popular web sites such as *The Wall Street Journal*'s Law Blog[1] and Above the Law.[2] In cities, towns, and villages across the United States, litigators and trial attorneys often turn to their local newspapers and television stations to shape public perception about their cases, a strategy that can create risk as well as reward. In this Article, we discuss the interaction between the press and the legal profession, and this interaction's impact on the public. In this regard, we also offer some tips and best practices.

Part I provides a brief overview of how the news media influences the civil litigation system. Part II cites some telling examples of press coverage that add to the perception that large verdicts and jaw-dropping settlements are par for the course in civil litigation. Part III discusses the British Petroleum (BP) disaster in the Gulf of Mexico and what that that company's failure to tame the "town crier" can teach the legal profession. Finally, in Part IV, we offer tips and best practices on how to effectively deal with the media juggernaut.

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[1] Wall St. J. L. Blog, http://blogs.wsj.com/law (last visited Feb. 25, 2012).

[2] Above the Law, www.abovethelaw.com (last visited Feb. 26, 2012).

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II.
The News Media and Its Impact on Civil Litigation

Nearly a decade ago, two scholars, Jennifer K. Robbennolt and Christina A. Studebaker, studied the relationship between news media reporting and civil litigation. Their report[3] concluded that "news reporting of civil litigation presents a systematically distorted picture of civil litigation and that this reporting can influence perceptions and outcomes of civil litigation in various ways."[4]

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[3] Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 L. & Hum. Behav. 5 (2003).

[4] *Id.*

But that was not their only conclusion. Drawing on a variety of sources, Robbennolt and Studebaker observed that most citizens turn to the news media for information about the court system, granting the press an outsized role in shaping the citizenry's perception of the Third Branch.[5] The result, according to Robbennolt and Studebaker, was that Americans had a skewed view of civil litigation, driven largely by the news media's tendency to focus its coverage on cases where plaintiffs obtained large verdicts.[6] Stated bluntly, "[t]he picture of civil litigation that one is likely to draw from the information available in the media is that of a system characterized by frequent litigation, frivolous lawsuits, greedy plaintiffs, and high damage awards."[7]

Listed below are some additional—and remarkable—conclusions reached by Robbennolt and Studebaker:

- Although at the time only about 8% of jury awards were greater than $1 million and punitive damages were included in approximately 6% of civil cases that result in a monetary award, "many people believe that large money damages and punitive damages are common."[8]
- "[A] substantial minority of participants in a jury decision making study believed that damage awards greater than $1 million are routine, with 11% . . . estimating that 50% or more of plaintiffs receive jury awards of more than $1 million."[9]
- "[S]everal studies have found a positive relationship between perceptions of the frequency of large damage awards and damage award decisions."[10]
- In criminal trials, "prejudicial publicity tends to negatively influence perceptions of the defendant as well as pretrial and posttrial judgments of guilt."[11]
- An experiment found that judges and jurors were more likely to judge a defendant liable when they had been exposed to "proplaintiff" information than when they had not, even when they had been told to disregard it in their decision making.[12]

These findings underscore the critical impact that the news media's skewed coverage of civil litigation can have on trials.

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[5] *See id.* at 6.

[6] *See id.* at 9.

[7] *Id.*

[8] *Id.* at 11.

[9] *Id.*

[10] *Id.* at 15.

[11] *Id.* at 17.

[12] *Id.* at 18.

III.
Blaring Headlines and Eye-Popping Verdicts

Seemingly on rare occasions will an individual have to read the text of a newspaper article to find out about a sizable jury verdict. In most situations, the reader need only glance at the headline. The following is a compendium of headlines drawn from newspapers published throughout the United States trumpeting big verdicts:

- "$2.7M FOR DEATH ON THE RAILS"[13]
- "$7M FOR TRAIN HIT"[14]
- "DRUNK RIDES GRAVY TRAIN—$2.3M FOR LOSING LEG IN SUBWAY"[15]
- "COP'S GOOD $HOT—$4.5M FOR MISHAP"[16]
- "Judge orders Lorillard to keep $270m on hand to pay judgment; Tobacco company appealing award"[17]
- "Injured woman wins $66m verdict against Cybex"[18]
- "Ex-Cargill worker gets $2.49 million"[19]
- "Iowa exec who alleged sexual harassment gets $500,000 settlement"[20]
- "Jury awards $33 million in van crash"[21]
- "Jury says SAP must pay Oracle $1.3 billion; Copyright infringement found in use of software"[22]

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[13] William J. Gorta, *$2.7 Million for Death on the Rails*, N.Y. Post, July 31, 2010, at 5.

[14] Tom Namako, *$7M for Train Hit*, N.Y. Post, Mar. 10, 2009, at 15.

[15] Tom Namako & Dareh Gregorian, *Drunk Rides Gravy Train—$2.3M for Losing Leg in Subway*, N.Y. Post, Feb. 18, 2009, at 5.

[16] Alex Ginsberg, *Cop's Good $hot—$4.5M for Mishap*, N.Y. Post, Nov. 27, 2008, at 3.

[17] Travis Andersen, *Judge Orders Lorillard to Keep $270m on Hand to Pay Judgment; Tobacco Company Appealing Award*, Boston Globe, Jan. 6, 2011, at 3.

[18] *Injured Woman Wins $66m Verdict Against Cybex*, Boston Globe, Dec. 9, 2010, at 11.

[19] Jeff Eckhoff, *Ex-Cargill Worker Gets $2.49 Million*, Des Moines Reg., Mar. 3, 2011, at B12.

[20] Jeff Eckhoff, *Iowa Exec Who Alleged Sexual Harassment Gets $500,000 Settlement*, Des Moines Reg., Aug. 8, 2010, at A1.

[21] Grant Schulte, *Jury Awards $33 Million in Van Crash*, Des Moines Reg., Mar. 20, 2010, at B1.

[22] James Temple & Benny Evangelista, *Jury Says SAP Must Pay Oracle $1.3 Billion; Copyright Infringement Found in Use of Software*, S.F. Chron., Nov. 24, 2010, at A1.

These headlines, and the news content that appears under them, appear to confirm Robbennolt and Studebaker's core conclusions. In their study, they argued that "media reports tend to focus on the concrete events of trials, with little systematic consideration of aggregate information."[23] The article that bore the headline "DRUNK RIDES GRAVY TRAIN—$2.3M FOR LOSING LEG IN SUBWAY," illuminates this finding.

The article chronicles "several concrete" events in the trial, culminating in the jury's multi-million dollar verdict. According to the article, the plaintiff, who was in his early twenties, was drinking with friends at a bar.[24] By the time he arrived at the subway station, he had a blood-alcohol level of .18—more than double the legal limit if he had been driving.[25] The plaintiff admitted that he was so intoxicated "he didn't remember anything about the 1:50 a.m. accident—including how he ended up on the tracks—but the jury still found he didn't bear the majority of the blame."[26] The writer went on to note that the jury found the plaintiff "35 percent responsible," but did not discuss in any significant detail the notion of comparative fault and how liability is apportioned in a typical tort case.[27]

Nor did the article mention the fact that expert testimony was the crux of the plaintiff's case. On appeal, the mid-level appellate court observed that the jury found the transit authority liable "on the basis of a mathematical formula that used a purported average reaction time as a factor in calculating whether the defendant's train operator could have stopped the train to avoid running over an intoxicated [plaintiff]."[28] Without the mention of expert testimony, and the jury's reliance on it as the basis of their verdict, the reader is left with the impression that the jury made a decision without any rational basis. This impression only adds to the widely-held perception that the civil justice system is broken.

Indeed, the inherent problem with these headlines—and their underlying content—is that they convey the message that large awards necessarily stick, fueling the perception that plaintiffs almost always prevail in civil litigation—and make out big. The typical reader likely has no idea that irrational jury awards are frequently reversed on appeal or reduced by the trial judge shortly after an enormous verdict is rendered. This fact is often either left unsaid or treated with short shrift. Typically, the article will contain a dry quote from the losing lawyer, who mentions the possibility of an appeal in some fashion.

For example, an article printed in the *San Francisco Chronicle* reporting a jury award of $1.36 million won by a man who sued a cigarette manufacturer dedicated two sentences to the tobacco-company attorney: "Defense lawyer Randall Haimovici said the companies

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[23] Robbennolt & Studebaker, *supra* note 3, at 7.

[24] *See* Namako & Gregorian, *supra* note 15, at 5.

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] Dibble v. New York City Transit Auth., 903 N.Y.S.2d 376, 377 (App. Div. 2010).

would appeal. The negligence verdict shows that jurors agreed 'we didn't do anything wrong by using asbestos in filters back in the 1950s,' he said."[29] Similarly, the *New York Post* article reporting on the $2.3 million jury verdict in favor of the drunken man who was struck by a subway train contained a single sentence about the losing side: "A spokesman for NYC Transit, Paul Fleuranges, said lawyers are reviewing the Feb. 9 verdict."[30]

In fact, and as discussed above, the defense lawyers in the drunken subway rider litigation *did* review the verdict, appealed it, and won a complete reversal.[31] However, news of the appellate court's reversal of the award—and subsequent dismissal of the suit—did not appear in the pages of the *New York Post* until more than a year after the damning news of the trial court verdict was published.[32] Thus, for the majority of the reading public, news of a drunken man's almost fatal encounter with a subway train, and resulting $2.3 million tort award, further cemented in their minds the notion that civil litigation is a wellspring of cash for plaintiffs and their counsel.

In this regard, consider the following article, also published in the *New York Post*. With a headline of "STUNNING BLOW FOR KING OF MALPRACTICE CASES,"[33] this article profiled a medical malpractice attorney who rejected an $8 million settlement offer and then lost at trial. The article noted that the medical malpractice attorney had won more than eighty-four verdicts since 1979, without indicating whether any of these eighty-four verdicts had been modified or vacated post-trial or on appeal. The attorney was quoted as follows: "'I have turned down 34 times amounts of $8 million or more,' but they'd always settled or gone to verdict for more than that amount, he said."[34] This article certainly gives the reader the impression that big verdicts are the norm and "no-cause" decisions are the exception.

Indeed, an unscientific survey of major publications leads to the conclusion that "no-cause" decisions are rarely reported. This failure to report makes sense. A losing plaintiff's lawyer is certainly not likely to alert the local newspaper of a loss, or hold a press conference discussing the merits of a case when the jury found there were none. Similarly, a courthouse reporter, already battling negative readership trends in the newspaper industry, is not likely to write about a successful defense motion for summary judgment.

To the contrary, a courthouse reporter will likely zero in on a denial of a motion for summary judgment, especially if it is coupled with a snappy quote from the presiding judge, which was the case in a *New York Times* article published on April 7, 2010:[35]

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[29] Bob Egelko, *Ex-Smoker Wins Asbestos-Filter Suit*, S.F. Chron., Mar. 11, 2011, at C2.

[30] Namako & Gregorian, *supra* note 15.

[31] *See Dibble*, 903 N.Y.S.2d at 382.

[32] Dareh Gregorian & Tom Namako, *'Legless' Drunk's $2M Win Tossed*, N.Y. Post, June 23, 2010, at 2.

[33] Dareh Gregorian, *Stunning Blow for King of Malpractice Cases*, N.Y. Post, June 23, 2009, at 7.

[34] *Id.*

[35] *See* Duff Wilson, *Novartis Bias Suit to Begin*, N.Y. Times, Apr. 7, 2010, at B1.

> A class-action lawsuit alleging that Novartis Pharmaceuticals practiced sex discrimination against female employees is set to go to trial on Wednesday in federal court in New York.
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> The complaint seeks more than $200 million in damages on behalf of more than 5,600 female sales employees.
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> . . .
>
> Judge Gerard E. Lynch, who was then on the United States District Court, certified the Novartis class action in 2007. Judge Lynch is now a federal appellate judge. In October, District Judge Colleen McMahon denied Novartis's motion for partial summary judgment.
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> "The fact is, a massive amount of paper has been wasted by defendant in a quixotic quest to keep much of the plaintiffs' case from the jury," Judge McMahon wrote. "Plaintiffs have demanded a jury, and a jury they shall have."[36]

Such coverage perpetuates the myth, promoted by many in the plaintiffs' bar, that the bulk of civil litigation is a David and Goliath battle in which average Americans battle corporate titans. Clearly, Robbennolt and Studebaker were on to something.

IV.
The BP Public Relations Disaster

The bumbling by BP in the wake of its massive oil spill in the Gulf of Mexico is a case study of what happens when decision-makers fail to tamp down a media firestorm. Indeed, BP's failure to "tame the town crier" made it the focus of criticism and bad press.

The most famous public relations mistake was a remark from BP's former chief executive officer, Tony Hayward, more than a month into the spill when he told the press he was looking forward to having his life back. This callous comment—repeated over and over again on the news networks to the point where it became seared in the minds of viewers—was particularly outrageous to the public because eleven workers lost their lives in the explosion.

But you did not have to watch the news networks to learn about Hayward's gaffe. His remark was printed in dozens of newspapers across the country. A LEXIS search of major U.S. newspapers for the keywords "Hayward," "life back" and BP returned more than 300 results, the content still scathing nearly one year later. For example an opinion article printed in *The Boston Globe* in April 2011 skewered BP for its "public-relations fiascos," dryly noting that "former CEO Tony Hayward wasn't the only one who wanted his life back."[37]

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[36] *Id.* at B1, B4.

[37] Juliette Kayyem, Editorial Opinion, *The Game Changer; One Year Ago Today, Politics Collided with Disaster Recovery*, Boston Globe, Apr. 24, 2011, at 10.

One should also consider that remarks such Hayward's become viral in this digital age. Hayward's slip of the tongue became instant fodder for bloggers and must-see viewing on YouTube. As of March 2012, a video clip of Hayward telling a reporter that he would like his life back had been watched more than 165,000 times and prompted dozens of viewers to post comments.[38]

Hayward's whining, coupled with a glaring absence of visual compassion from BP's top executives in the midst of the disaster, was the driving force behind the PR firestorm. A June 11, 2010, report from the *Associated Press* noted that Hayward's gaffe was only the tip of the iceberg when it came to BP's mismanagement of the media juggernaut:

> Executives have quibbled about the existence of undersea plumes of oil, downplayed the potential damage early in the crisis and made far-too-optimistic predictions for when the spill could be stopped. BP's steadiest public presence has been the ever-present live TV shot of the untamed gusher.[39]

The AP article went on to note that even Hayward's British accent was a liability when it came to crisis response:

> Former Shell chairman John Hofmeister said it might have been more appropriate for U.S. executives of the company to take the heat. Hayward is an Englishman, and BP is based in Britain.
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> "I think it was a mistake for Tony Hayward to come and put his physical presence in the U.S.," Hofmeister said. "The U.S. has its own culture and traditions. Foreign companies can come and do business there, but they are not necessarily welcomed."[40]

The article contained a quote from a public relations executive who observed that the smarter move would have been to have BP officials who were based in the United States on the ground in the midst of the crisis doing everything they could to help with the cleanup. "'All crises are personal,' said Richard Levick, who runs a public relations firm, Levick Strategic Communications, that advises companies. 'Action and sacrifice [are] absolutely critical.'"[41]

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[38] *See BP CEO Tony Hayward: 'I'd Like My Life Back'* (Today Show video May 31, 2010), *available at* http://www.youtube.com/watch?v=MTdKa9eWNFw.

[39] Erin McClam & Harry R. Weber, *BP's Failures Made Worse by PR Mistakes*, MSNBC, June 11, 2010, http://www.msnbc.msn.com/id/37647218/ns/business-world_business/t/bps-failures-made-worse-pr-mistakes/ (reprint of Associated Press article).

[40] *Id.*

[41] *Id.*

However, rather than personalize the crisis or show a commitment to reduce the damage, BP compounded its mistakes by barring reporters from the oil-slicked beaches. Refusing access to the press became its own story, creating the impression that BP was trying to cover up the disaster by shielding it from public view. In June of 2010, ABC News posted a video on YouTube capturing a BP worker hassling a reporter who was observing the cleanup effort on a beach. In the video, the BP worker can be heard off-screen instructing the reporter not to speak with anyone. Spliced into the video is a segment in which the reporter discusses the encounter with a New York-based anchor, who in turn opines that BP's efforts to muzzle the press constitute a "pervasive paranoia."[42]

Had BP gotten "in front" of the disaster and not attempted to squelch press coverage, BP might have "tamed the town crier" by helping to shape coverage of the disaster. Instead of allowing the storyline to be that of an aloof CEO from England and a PR team's unsuccessful efforts to impose a media blackout, BP could have created a narrative of responsiveness and compassion. BP could have created this narrative by inviting coverage of the cleanup efforts, having on-the-ground press conferences by top managers with a firm grasp of the facts. Instead, BP only made matters worse by trotting out their hapless CEO who complained that the disaster marked a stressful time in his life.

These missteps also can provide lessons for lawyers on how to alter the misperception that news coverage can create of the civil litigation process—not only through individual articles of particular jury verdicts but also the aggregate coverage of the judicial system. By taking the time to educate reporters on the important aspects of a particular case and their relation to the larger legal system, counsel can slowly take steps to affect the coverage received and—in the long run—the perceptions of potential jurors.

V.
Best Practices

We present, in no particular order, some tips on how to deal with the press in the context of litigation. We think these best practices will help to control the message:

- If you are contacted by a reporter, ask him or her to submit a list of written questions. Doing so will give you time to strategize with your client and formulate a comprehensive response.
- Do not denigrate the media. Comments such as "I'm not going to try this case in the press" may irritate reporters and their editors, causing unfavorable coverage.

[42] *See The Conversation: Press Hassled on Gulf Coast?* (ABC News video June 10, 2010), *available at* http://www.youtube.com/watch?v=VtimqwLxB0Q.

- Take the time to explain the mechanics of trial and motion practice to the reporter. For example, explaining the notion of comparative fault may lead the reporter to take a harder look at the plaintiff's allegations and conduct, especially in the context of a tort suit.
- Avoid taking a position that could come back to haunt you during the litigation or trial; for example, do not say "My client categorically denies that he was in the park at 10 p.m." A court could take judicial notice of the statement, and your adversary could use it to impeach your client. ("Mr. Smith, you testified at deposition that you were in the park at 10 p.m.—isn't it true that your lawyer told *The Daily Planet* that you were not in the park at 10 p.m.?").

VI.
Conclusion

With the advent of digital media, blogging, and the twenty-four-hour news cycle, it is more important than ever to recognize the impact of the news media on civil litigation. Practitioners can easily fall prey to a media firestorm if they do not effectively "tame the town crier" with strategic communication and sound planning. They can also shape news coverage and provide context to civil disputes by explaining the dynamics of the adversarial system and offering insight into legal concepts often ignored by the press. The practitioner who keeps these considerations in mind will help restore balance to the public's perception of civil litigation.