LJN'S
Product Liability
Law & Strategy®

LAW JOURNAL NEWSLETTERS

An ALM Publication

Volume 28, Number 12 • June 2010

PRACTICE TIP

The Rules of the Court of Public Opinion

Publicity of Products Liability Litigation

By Jennifer Smith Finnegan and Leah Loeb

In which court is your latest product liability case pending? The answer may be not only a court of law, but also the court of public opinion. Media trials are certainly nothing new (think the Lindbergh Baby kidnapping trial in 1935). Yet the abundance of media outlets and the 24/7 news cycle they have created, both driving and feeding America's insatiable appetite for up-to-the minute news and gossip — network and cable television, newspapers, blogs, social networking and social media sites, texting, radio, and magazines — make it necessary to be prepared to try high-profile cases in the media as well as in court.

Product liability lawsuits tend to fall into this category of cases: They often involve sympathetic plaintiffs, with significant injuries, who allege that widely used products are unsafe or that the companies that make them have ignored the safety and welfare of consumers. Many plaintiffs' lawyers work closely with journalists and also create Web sites dedicated to their claims. Stories about product liability disputes quickly reach vast audiences, including consumers of your clients' products, your clients' investors, lenders, vendors, employees, and competitors — not to mention judges and prospective jurors. Responding "no comment" to media inquiries can leave those audiences with an incorrect or damaging view of the case, your client and its products.

Indeed, declining comment is more often than not perceived as a sign of weakness, evasion, or an outright admission of liability. As a result, your client may ultimately prevail in the court of law, but may lose in the court of public opinion. This loss and the damage it can cause to your client's reputation, revenue or stock price can prove to be potentially more devastating than any possible judgment in the lawsuit would have been.

Therefore, it is important to be able to represent your client in the court of public opinion while complying with your ethical and professional responsibilities. In so doing, you should be mindful of the following ethical rules and practical considerations.

Ethical Constraints on Extrajudicial Comments

Rule 3.6 of the ABA Model Rules of Professional Conduct prohibits a lawyer participating in an investigation or litigation from offering extrajudicial statements that the lawyer "knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

While the rule most often arises in criminal cases, it applies to civil cases as well. Most states' rules of professional conduct are modeled after the ABA rule, which reflects the standard first articulated by the United States Supreme Court in the landmark case of *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

In *Sheppard*, the Court vacated a jury verdict that convicted Dr. Sam Sheppard of the brutal murder of his pregnant wife because the media circus violated his due process right to a fair trial. (Dr. Sheppard was then re-tried and acquitted — but not until he had already served 10 years in prison.) The Supreme Court stated that the trial court could have proscribed lawyers' out-of-court statements that may have prejudiced the proceedings. The Court's observation 44 years ago rings ever more true today: "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial court must take strong measures to ensure that the balance is never weighed against the accused." However, judicial measures to address prejudicial publicity — gag orders, delaying trial, changes in venue, and instructions to jurors — often cannot erase the message that has already been disseminated.

Moreover, courts tend to be reluctant to prohibit or sanction attorneys' speech without a strong showing of a substantial likelihood of material prejudice, particularly in civil litigation involving matters of public interest or safety, such as high-profile product liability cases. *See, e.g.*, Model Rule 3.6 cmt. 1 and 6; *Ruggieri v. Johns-Manville Prods. Corp.*, 503 F. Supp. 1036 (D. R.I. 1980) (refusing to sanction plaintiff's lawyer for comments on national television that the president of an asbestos company kept secret that the company knew about the dangers of asbestos since 1935); *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008) (reversing multiple sanctions imposed by the trial court on the Attorney General for publicly attacking the credibility of defendants in a product liability suit because there was no evidence that the Attorney General knew or should have known that the comments could prejudice the defendants).

Nonetheless, in addressing media attention to a lawsuit, lawyers remain bound to honor the prohibitions of their state's version of Model Rule 3.6 and face potential sanction by the court or the bar for failure to do so. Thus, it is important to be aware of some notable safe harbor provisions contained in Model Rule 3.6 that outline when lawyers are

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affirmatively permitted to make public, extrajudicial comments about their case.

Safe Harbor Provisions

First, Model Rule 3.6(b) provides that lawyers may discuss the general nature of the claims, the litigation schedule, and other "information on the record"; request assistance from the public in gathering evidence; or warn the public of potential danger.

Second, Model Rule 3.6(c) provides that "a lawyer may make a statement that 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." This safe harbor is important because it allows defendants to mitigate negative publicity initiated by the plaintiff or other third parties.

Other Ethical Rules

Other ethical rules and factors to consider are: the duty to protect clients' confidential information (ABA Model Rule 1.6); the duty to refrain from revealing information protected by the attorney-client privilege; the duty to be truthful to third parties in the course of representing a client (ABA Model Rule 4.1); and the duty to avoid any act involving moral turpitude, dishonesty, misrepresentation, or deceit (ABA Model Rule 8.4(c)).

Practical Considerations For Going Public

With these ethical guideposts in mind, the following are some practical tips on how to practice in the court of public opinion:

Consult with your client and/or media relations expert. It is essential to discuss public disclosure and possible news coverage with your client as early as possible. Because journalists may call you for comment on the day a case is filed — or even before it is filed — it is optimal to have a plan on how you will address media inquiries before litigation begins.

Work closely with the public relations professionals to understand the company's media relations needs and policies. If your client is a large company, it may already have a public relations department or media relations consultant. Items for your discussion with your client and its media relations specialists include:

- Whether the company has designated a spokesperson to whom all inquiries should be directed;
- What messages and language best serve the company's interests, without jeopardizing the legal case;
- Who your company's audiences are and how best to convey the company's message uniformly to them, whether consumers, investors, lenders, vendors, or employees;
- How to develop search-engine strategies to mitigate the long-term impact of media coverage; and
- How to accommodate the need for speed and for cooperation between the lawyers, client, and public relations specialists to quickly disseminate the right message.

Encourage your client to retain a consultant. If your client is faced with a high-visibility matter (or is likely to be) and does not already have an in-house or outside public relations consultant capable of handling crisis and image management, you should encourage it to retain a consultant with real expertise and avoid the temptation to manage on its own.

Learn how to say "no comment" without repercussions. Even if you must answer "no comment" to media inquiries, you should do so in a way that minimizes the negative assumptions associated with these red flag words. Engage with reporters to make sure they understand why you are unable to comment at that time and, if appropriate, provide a positive statement that they can use. Here are some examples:

- I'd like to comment, but first I need to read the complaint and discuss it with my client;
- I am restrained by the attorney-client privilege from answering your question at this time, but I can tell you that … [fill in the blank with a fact about the company, the product, or the status of the proceeding that is in the public record];
- I understand you have tight deadlines, but I can't comment just yet because I need time to gather information in order to answer your questions properly. Can we speak again soon when I hope to be able to provide a more complete and accurate response?

Develop a clear message based upon facts, not arguments. Your goal in engaging with the media is to deliver a persuasive, fact-based summary of your client's case. Your statement should help ensure that a clear and informed message about the lawsuit reaches the public. The message can be disseminated by responding to reporters' questions, setting up media briefings, holding a press conference, and/or creating a webpage to post your client's point of view. Prior to speaking with journalists, prepare as you would for trial or appellate argument.

It is crucial that your message is based on facts — not advocacy or argument — and that it comports with ethics rules. Be careful not to reveal trial strategy, confidential information, or attorney-client communications. Do not engage in speculation and do not rely on information that is likely to be inadmissible. Refer to comment 5 of ABA Model Rule 3.6 for other kinds of sensitive statements that might run afoul of the rule, including commentary on the character, credibility, or reputation of your adversary.

Develop relationships with the media. Try to develop collegial relationships with journalists. If necessary, explain court procedures and process. Be mindful of deadlines and respond accordingly. As a courtesy, provide journalists with documents that are in the public record, if they so request. Use plain English and avoid journalism's terms of art — "on background" or "on the record" — when establishing ground rules for an interview.

Recognize that unless you have a prior agreement, anything you say may appear in tomorrow's paper. A reporter with whom you have established rapport may be more generous with time to respond, the tenor of the story, and sharing information and perspective about your case.

Conclusion

Your next case — or the one you are litigating now — may become the subject of public scrutiny. Prepare accordingly. With a firm understanding of the ethical rules and practical considerations we have discussed above, you can create a landscape that is more beneficial to your client in the all important court of public opinion.