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DEALING WITH THE MEDIA IN IP CASES

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- What to do when the media calls from around the world
 - Managing PR in multinational litigation
 - Representative case studies in media relations:
 - The *Lindows* case and the www.mikerowesoft.com case
 - The *Monsanto* case and the CCH case
 - Anti-Spam efforts
 - What in-house counsel expect from their outside counsel
 - What does the media want and when to avoid the media
 - Foster your relations with individual reporters
 - The difference between “Good Lawyering” and “Good Publicizing”
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Why should a lawyer talk to a reporter? Why do reporters want to talk to lawyers?

I’m not sure about the answer to that first question -- I suppose, among other things, it’s good for you and your firm’s brand to be seen in the general interest media as a credible expert or, better yet, a smart lawyer on whatever issue is at hand – but I’m glad many lawyers do talk to us because lawyers, as a group, are a vital and important source of information for reporters.

What it is we’re looking for when we come calling?

That depends on how you run into us.

I’d say there’s three ways you’re going to encounter a reporter.

The first is pretty obvious: You’ve got a case at trial and sitting on the benches at the back of court, is a bunch of folks with notebooks who, as soon as you step outside the courtroom, are going to start poking microphones, cameras, and recorders in your face and ask you to re-litigate the case.

Second: You'll get a telephone call from a reporter who is working on a story and needs an expert to put a particular issue in context. In the world of IP lawyers, this is typically going to be from a reporter working on a domain name dispute story; a story about music downloading; a story about Internet libel; or a story about online criminal activity, such as child pornography. In this scenario, you may not be asked so much to set up the legal context of the day as asked to be the judge in the case, even though you may never have heard anything about it.

Finally, you may bump into one of us at an event like this. This is the best way to encounter us, particularly if it's the first time you're meeting an individual reporter. In our ideal world, we have a solid relationship with our sources before we ever need to quote them in print or rely on their help for their stories. In our ideal world, we're able to get to know our sources, figure out what it is they do, get the background on their personal stories and get a sense of their value to our job. Our job, by the way, is, in the most general sense, simply to tell an interesting story. Whether it's a Supreme Court trial or, as I was lucky enough to do recently, the story of a squirrel that the Canadian government wants to deport, what we as reporters must do is be interesting.

So that means sources to us are particularly valuable if they are interesting. We don't necessarily need our sources to be amongst the top of their game in their field. Particularly for television news but often just as much in print, we'd rather have sources who are also good at telling interesting stories than a dull, plodding pedant who may be the top-ranked professional in the business.

So that's why an informal introduction – well in advance of a reporter pulling out a notebook or a camera – is so valuable. It helps us get to know you and I'm almost certain that it helps lawyers and their firms get to know a reporter.

That's important because, just as with any relationship, trust is at the heart of a good source-reporter relationship. Those of you who deal with reporters regularly already know this. You need to trust that, if we put you into a story, we won't, first of all, misrepresent your views or, worse, get them wrong. You need to trust us that we won't make you look silly. This is particularly important, of course, in TV news, where we're going to see what you look like in addition to hearing what you have to say. On our side of the ledger, we need to trust our sources to be credible, to know that they won't make us look silly.

Trust is crucial, of course, for that most essential of conversations – the off-the-record chat. You should be aware and, being lawyers, I suspect many of you are, that there is no such thing as off-the-record. Everything you say to a reporter is on the record. I'm under no legal or any obligation to not report anything and everything you say to me even if I've promised not to quote you. Of course, in practice, reporters routinely honour requests from sources that they not be quoted or identified in the interests of preserving a relationship a reporter has with a source. But still, particularly when you're talking to a reporter for the first time, this is an important thing to remember: It's all on the record no matter what the reporter promises.

This is all a roundabout way of answering the question about what we want: We want long-term trustworthy relationships with our sources that go beyond the story of the day.

So how does all this shape up in real life?

Let's go back to those three scenarios and sketch out what it is the broadcast and print media want when you encounter them.

At the courthouse, we are there to cover the trial or the matter at hand. For this event, reporters are usually under some terrifically intense time deadlines and that will colour the relationship in this venue. Broadcast reporters may have to tell their viewers or listeners about the events in court within minutes of the judge leaving the courtroom. Print reporters may have

the luxury of a few hours before they must file their account of the day's events. Wire service reporters may, like broadcast reporters, also have minutes to file.

For that reason, we're most interested at this point in describing some basics about the event at hand. What is the name of the judge and how is it spelled? What is the name of the lawyer who did most of the speaking in court and how is that name spelled? What is the firm's name? What is the client's name? What court was it? Who are the litigants? Believe it or not, many reporters may get assigned to cover a trial and have no idea about this information before they show up in court. So that's my first request: Help us be a tour guide, if you will, at the very first. Don't run away when you see the microphones. It's OK to say no comment but please have the courtesy to tell us what your name is and how to spell it.

Beyond that, the questions from reporters at court will tend to reflect the medium they are working in.

Cameras and recording devices, of course, are routinely prohibited from being used in any courtroom setting. That's not usually a problem for print reporters who can scribble down passages from your presentations to the court for use later in their stories. But it's a big problem for TV reporters. So when you get outside the courtroom, TV reporters are typically going to ask you to repeat some of the key arguments you made inside the court. Again, on behalf of TV reporters everywhere, we ask for your patience. We're not idiots. We heard what you said in court. We just need you to say it again in a place where our cameras can record it.

Print reporters will often wait out this electronic scrum on the steps of the courthouse. They got your quotes during the trial. What they're keen on after the fact is getting your sense of how you think it went at trial; what larger point your client was trying to make with the court proceeding; and, most importantly, what, in your opinion, were the key moments or key arguments in the trial.

I hope this is obvious, but in case it isn't: We will be asking all sides similar questions. On television news, in particular, this is important because if you decide to dodge or hide from reporters, we may show pictures of you on the news that night trying to hide from us. Your opponent may however be PR whiz and hold a press conference to present his or her case in the most favourable terms. Regardless of the legal merits of your case, the pictures of one lawyer and his client hustling past reporters into a waiting limo while the opposition patiently explains his or her point, tells a viewer a great deal.

One other key point: Many lawyers will defer questions outside the court to their clients or someone else. If you didn't say anything in court, that's fine. But if you were addressing the judge, we're going to want to speak to you. What you said and did in front of the judge makes you a primary source for this story and that means we're probably going to pester you.

So: on the courthouse steps, everybody is looking for some basic facts. What just happened? What are your names? What does it mean?

In other encounters, you may get a phone call from a reporter. I think for the kind of IP issues general interest media are interested in, this is likely going to be the most common encounter. We may call when we get wind that an IP dispute – be it over a domain name, illegal downloads, or some other alleged trademark or copyright infringement – has started. At this point, we'll be lucky if we have a legal brief or a complaint to rely on. Usually what we have is a phone call from the defendant saying, Corporation so-and-so says they're going to sue me for something the defendant allegedly did. First, we're going to try to talk to both sides in the matter. After that, we need some colour commentary and we start phoning up IP lawyers. At this stage, we're likely trying to get a sense of who's right and who's wrong. Which side here has a better case? What laws are going to be tested in this dispute? Is this case going to be significant from a jurisprudence point-of-view? In other words, is this case the first of its kind. If you're the lawyer

representing someone in the case, we're going to ask similar questions but we may ask slightly different questions that might poke at the motives for your client or the process that led up the point where a legal action seems imminent.

In any event: What we want at this point is some evidence that there is an interesting story here. There are all kinds of IP disputes every day but the ones that make the papers are ones that would tend to have a broad public interest. That interest could be financial. For example, one of the companies I cover for the Globe is Mosaid Technologies of Kanata, a semiconductor maker. It believes that it is impossible to manufacture dynamic random access memory chips without using its patented technology. This is a company with less than \$50-million who is suing Samsung of Korea, which has about \$5-billion a year in DRAM sales. Mosaid's ability to successfully prosecute its IP claims will have a huge impact on its financials and, hence, its stock price. Other stories are interesting because they involve a lot of people. Music downloading is a great case here. Parents want to know if their kids are doing something illegal online, something which the world's record companies may one day ask mom and dad to pay for in a big way.

Other cases are quirky or unique on their own – the MikeRoweSoft case would be one of those.

In all of these cases, a lawyer who can help us beyond the narrow legal issues is invaluable. Help us set the case in a broader public context.

Finally, to networking and building relationships. The ultimate goal for reporters in establishing relationships when there is no story at hand is to be able to turn to you when we need your for a quote either on the courthouse steps or on the phone as a guide to a case that's happening elsewhere. Every reporter will go about this differently and it will depend on the personality of the reporter and their interest in IP issues as it affects their work. But I think all reporters who try to build relationships are trying to assess credibility and reliability. Part of that means getting a sense of what motivates a lawyer. There are many lawyers who are crusaders, for example, and it's important I get a sense of their agendas before I plop them into a story. Others may be more interested in a building a solid client list for their firm and that may colour their ability or willingness to a credible source.

Whatever it is: I can't stress enough how valuable this idea of relationship-building is. Those reporters that take the time to work on building relationships are going to be better reporters. They're going to get the jump on their competition; they're going to have fresh and interesting angles to their stories. They're going to get tips and scoops ahead of the pack.

For those of you who are taking the time – time for which I'm sure you're not able to bill anyone for – thank you. And for the rest of you, next time you're in Toronto, let's have lunch and start working on that relationship.

I look forward to answering your questions.