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# A World in Crisis: The Role of Public Relations

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# *The intersection of Litigation, Reputation & Brand Trust: The High Cost of Low Trust*

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Roy Shapira is a **law professor specializing in the intersection of reputation, litigation and regulation**. Shapira wrote his doctoral and master dissertation on law and reputation at Harvard Law School. He also taught a seminar on the topic at Harvard's Economics Department, earning seven teaching excellence awards. Since then, Shapira has been researching the topic at a research center at Booth School of Business (University of Chicago), and as an **associate professor at IDC**, where he currently **writes a book on law and reputation** for Cambridge University Press.

Alan Hilburg is a **pioneer of the disciplines of modern day litigation and crisis communications**. He managed the **Tylenol** crisis in 1982 and in 1985 was the first to align marketing communications with litigation.

He has been acknowledged as the **top crisis advisor in the world multiple times** with the *New York Times* calling him the "**Red Adair of corporate crisis management." T**he *Wall Street Journal* called him the "**earliest practitioner of litigation reputation management**"

He authored written two *New York Times* **best sellers** on leadership and received an **Academy Award** nomination for the first environmental documentary. Alan is an **adjunct professor** and lecturer at six universities in the U.S., Asia, Europe and Africa.

# Introduction

**Legal perspective:**

- The law affects our behavior not just directly, by imposing sanctions on misbehavior, but also indirectly, by shaping our reputation

- In the process of law enforcement actions, i.e. litigation, the legal system produces information (court documents, regulatory reports, etc. ). Such information may reach third parties

- The market (or stakeholders) tends to over-react, to certain misbehaviors and under-react to others

- The interactions between litigation and reputation follow fuzzy and counterintuitive dynamics. For example, litigation against a company may actually bolster the company's reputation.

Questions: How two powerful systems – law and reputation interact? How reputational sanctions work?

# Methodology

- Triangulated methodology on reputational sanctions in corporate setting:
  a) synthesizing insights from **various literatures** (information economics, social psychology, and communication science),
  b) Examining the fit of proposed theory with existing **case studies and statistical data**, such as "before" and "after" trial content analysis of media coverage (see how litigation affected the volume and tenor and media coverage, as a proxy for reputation)
  c) Gathering insights from **practitioner interviews**, court of law and court of public opinion (crisis management consultant, litigators, and business journalists)

# Reputation Sanction

- Legal scholars have largely neglected the question of how reputation matters because scholars find them to be messy. It's hard to capture in neat models

  - When news breaks about adverse action by a company, stakeholders update their beliefs about the company. The process of **belief-updating – the process of reputational sanctioning** – does not operate in a vacuum

  - The legal system will involve in and provide better information **(court documents, depositions, and regulatory reports)** to the public on which to base reputational judgments

# Reputation Sanction

- **Reputational sanction**
  - Reputation can be defined as the set of beliefs that stakeholders hold regarding the company's quality (Cynthia E., Devers et al. 2009)
  - Reputational sanction is the product of stakeholders updating beliefs and lowering expectations, and an inherently noisy process
  - Reputational sanctioning rests on the "how is it relevant to me." Stakeholders try to infer the degree of intentionality and controllability involved in the misconduct (Reuber & Fischer, 2010)
  - Karpoff (2012) showed that when companies get caught polluting the environment or bribing officials in developing countries (misbehavior against unspecified third parties), there is little to no reputational harm

# The implications of noisy reputation: market under- and over-deterrence

- Companies that care about their reputation face incentives to excessively avoid some worthy behaviors (reputational over-deterrence), and excessively engage in some bad behaviors (reputational under-deterrence)

- As a result, reputational force may distort primary behavior. Companies may pick projects based on their reputational value and not on their "real" value

- Determinants: a) the saliency of the company and issue at questions, b) type of harm done, c) the state of the overall economy (reputational sanctions follow a supra-cyclical pattern)

# How the legal system affects reputational sanctions

**Decisions and events in the court of law affect the court of public opinion, and vice versa**

| First opinion effect | Second-opinion effect |
|---|---|
| **Market** players are **slow** to react to corporate misconduct and the **legal system propels** them to react | **Market** players react almost **immediately** to corporate misconduct and the **legal system later propels them to reevaluate** their initial reaction |
| 7% (filing a lawsuit) vs **93% (whistleblowers, investigative reporters, financial reports)** | Stakeholders are the decision-makers; **market arbiters** (media, watchdogs, analysts) are the **first opinion givers** and **legal arbiters** are the **second-opinion givers** (fact-finding powers, expertise, and credibility) |

# Case Studies

| Johnson's cyanide-laced Tylenol | Audi's self-accelerating car | Odwalla's contaminated juice |
|---|---|---|
| External product-tampering on the retailer level | Audi's car did not accelerate by themselves; the accusers mistook the gas pedals for the brakes (investigation) | Odwalla had good image, as a reputational buffer. Market under-reacted to its breakdowns in quality control |
| Market **over-reaction** | Market **over-reaction** | Market **under-reaction** |
| | Several flaws in reputational sanctioning (misinformed stakeholders, allegation –driven media) | Asymmetric information and judgment biases may lead stakeholders to under-react |

**The market badly misjudged what happened and how it happened**

**Legal system generate new information that propelled market players to revise their initial reaction to the news and help stakeholders de-bias their judgments**



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# Conclusion

- 25% of business content is about companies' interactions with legal system. A communicator needs o think about the context (legal system involved, i.e. a testimony with saucy quotes, an internal email exposed) when prepare the story

- Legal system affects reputation and the legal outcome of the case are often not correlated with the reputational outcomes: a company may lose the legal battle but win in the court of public opinion, or vice versa

- Lawyers are incentivized to maximize certain things, that may stand in contrast with good reputation. Communicators should have a say in the company's legal strategy

# LITIGATION COMMUNICATION

# Introduction

**Communication perspective:**

- Litigation communications has evolved from the application of Marsee vs. U.S. Tobacco case in 1985 (Milberger, et al, 2006) where it was deployed as a media relation component of the trial strategy

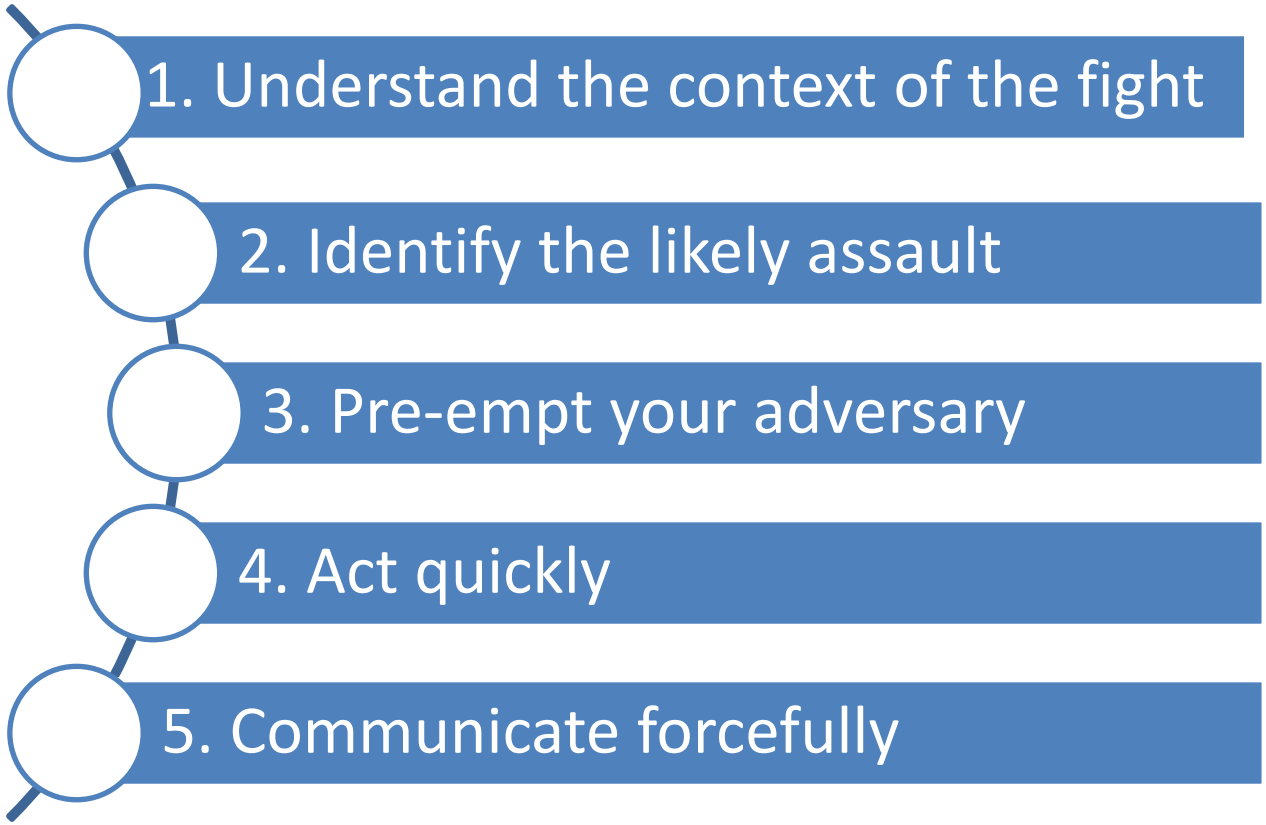
- In litigation, for example, a multi-national is sued for civil or criminal liability. There is an immediate assumption of guilt and loss of trust with stakeholders (market over-reaction)

- In commercial litigation, plaintiffs usually push the boundaries of their allegations in an attempt to affect the potential trier of fact, the jury, the judge, as well as the public, to see the case in the plaintiffs' context

Questions:
How current litigation communication work? What communicators need to be aware in the adjudication process with media scrutiny?

# Defending reputation in litigation

**Five ways:**




Source: Garcia & Ewing (2008). *Defending corporate reputation from litigation threats*, Strategy & Leadership.

Photo: Bull, trailer (CBS)

# Model of Juror Decision-Making

- The **ideal juror** is dispassionately listen to the trial evidence to render a verdict based on rational and prejudice-free thought processes
- **Real juror** is not the blank slate and various cognitive factors affect juror's abilities to process complex and lengthy trial information

| | **Explanation-based approach** |
|---|---|
| 1 | Story model -- jurors' cognitive behavior (Pennington & Hastie, 1981, 1986, 1988, 1993) |
| 2 | Heuristic-systematic model |
| | Juror as an active decision-maker who interprets, evaluates and elaborates on their trial information<br>**Story model provides an empirical framework** (Schuller & Yarmey, 2001) |

Source: Winter & Greene (2007). *Juror Decision-making, Chapter 28, Handbook of Applied Cognition (2nd ed.)*

# Case Studies

**Case A : Sabadia vs. Holland and Knight** (US, 2012)

**Challenge:**

Plaintiff is accusing the defendant of complicity in the fraud initiated by another client of the defendant on the plaintiff (basically a Ponzi scheme where Plaintiff lost $42million). Defendant's lawyer represented both Plaintiff and the Ponzi schemer

**Strategy:**

1) Identify a jury pool that reflected the trust in the lawyer that Plaintiff gave
2) Create a metaphor that depicted the case for the jury

> "Think of someone robbing your house. They use a ladder to climb up to your second floor window to gain entry into your house to rob you. The guy holding the ladder (the law firm) is as guilty as the guy going through the window."

**Evaluation:** ensuring case victory for the client

# Case Studies

**Case B : 48 Tobacco Trials** (US, 1980s-1990s)

**Challenge:**

Deep emotional opposition to smoking, cigarettes and smokeless tobacco

**Strategy:**

1) meet with all key media influencers to accentuate their prejudices and their personal feelings to create guilt that will encourage their willingness to listen neutrally to both sides of the story

2) emphasize the essential role of personal responsibility in smoking use

**Evaluation:**

- Winning the case
- Insulating the case from public health community criticism of the tobacco industry

# Strategic approach in litigation communication practice

- Recognize that a trial and litigation while having specific rules of engagement in the court room (litigation 'life cycle'-- pre-trial, trial and post-trial)

- In litigation, the seller is the attorney and the buyer is the outcome decider (the trier of fact…judge or jury). Three key factors that go into the 'buyer's decision': 1) trust 2) affinity 3) likeability (particularly in jury trials, the jury wants 'their' lawyer to mirror their favorite TV/movie role model)

- Essential to:
  1. Utilize the pre-trial as early as possible to precondition key influencers to 'get them to neutral'
  2. Utilize the pre-trial window to build relationships of trust of those who will be covering the trial
  3. Engage with trial team to align trial story



Photo: Bull, trailer (CBS)

# Recommendations

**Scholarship:**

- Add legal perspectives (i.e. mandatory disclosure requirements, whistleblower laws, litigation) to communication studies
- Consider legal events (i.e. filing a lawsuit, a release of regulatory investigation report, etc.) into issue or crisis evaluation/measurement

**Practice:**

- Consider to include legal system into overall reputation/crisis management
- Monitor both 1st (court of public opinion) and 2nd (court of law) opinions and include 2nd opinion into communication (story) in shaping corporate messages during issue and crisis management
- Communicators have the obligation to engage certain understanding of the litigation process and court rules. For example, advice to top management in fighting accusations (i.e. refrain from lying when denying accusation)
- Building trust with stakeholders in the whole trial process. Explicitly and constantly repeat the story

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