

ENVIRONMENTAL ATTORNEYS AND THE MEDIA: GUIDELINES FOR EFFECTIVENESS

JOHN M. STANTON*

Abstract: It is often difficult for a public interest advocate to compete with wealthy interests that have vastly greater resources at their disposal and opposing policy preferences. In order to level this playing field, advocates can effectively employ media strategies that allow the public to participate in the public policy debate. This public awareness can often be very effective in influencing the course of the debate and sensitizing policy makers to the competing interests at stake. Accordingly, media tools and goals should be considered at the outset of strategy development, and should inform everything from a project's title to its budget. Public involvement, made possible through media coverage, can play a pivotal role in influencing policymaking proceedings in the judicial, executive, and legislative branches of government.

INTRODUCTION

Working with the media involves some of the most challenging and effective work for a public interest attorney. Currently, in Washington, where few public policy outcomes advance public health and environmental protection, there are still opportunities to make progress by devising and executing effective media strategies that bring vital attention to these issues. Attempts to implement public policy that repeals or threatens health safeguards and environmental protections are most successful when they escape media attention and public scrutiny. Therefore, the role of a media strategy is to thwart these efforts by bringing the public into the debate.

This Essay takes a clinical perspective on how to get media attention for an advocacy project. The advocate should think about media goals as a first principle and should include them in initial strategy deliberations. Media strategy should guide what the advocate does from the beginning of any matter. In some cases, it may be that media

* Vice President, National Environmental Trust. J.D., Georgetown University Law School, 1989. The author clerked for Judge Edward Beglin. The author also formerly served as Legislative Counsel at EPA, New Jersey Deputy Attorney General, and Environmental Counsel and Environment Committee Director at the National Conference of State Legislatures.

coverage is undesirable. For example, if an advocacy organization is involved in litigation and anticipates a loss, media coverage of the outcome may harm the organization's cause. Regardless of the desired attention, a coherent strategy to establish that end is required.

I. MEDIA ADVOCACY IN THE JUDICIAL BRANCH: A BALANCING ACT

Appropriate media strategies can be tailored for each branch of government. In the judicial branch, due largely to the legacy of the O.J. Simpson trial, there is increasing media coverage of litigation. High profile cases have become a popular media playground; as a result, overt media strategies are increasingly prevalent. Thus, even in a judicial branch setting, where decorum is at a premium, it is important to devise a media strategy that is considered as early as drafting the complaint.

Working with the judicial branch of government is unique because of the dictates of the Rules of Professional Conduct (Rules).¹ Attorneys are "Officers of the Court" and "Members of the Bar" and, as such, must follow specific, mandatory rules regarding their conduct.² These Rules may pose practical limitations.³

While a detailed examination of these constraints is outside the scope of this Essay, it is sufficient to state that the advocate must strike a balance between several competing interests. A lawyer has a duty to provide zealous, diligent representation to his client.⁴ However, a lawyer may not make extrajudicial statements that could threaten the impartiality of a judge or jury.⁵ Ultimately, the advocate must be aware of and comply with the limits imposed by the Rules.

¹ See generally MODEL RULES OF PROF'L CONDUCT (2005).

² See *id.*

³ See *id.*

⁴ *Id.* R. 1.3 cmt. 1 ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

⁵ See *id.* R. 3.6(a).

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement 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.

II. MEDIA ADVOCACY IN THE LEGISLATIVE AND EXECUTIVE BRANCHES: OPEN SEASON

Legislative and executive branch strategies are a completely different matter. Zealous media strategies may be very effective in these branches. There are three ways to prevail in Washington: deliver cash, votes, or pain. For public health and environmental advocates, effective use of the media is essential. These advocates rarely have the means to deliver significant campaign and political party contributions. Furthermore, they cannot deliver votes because public health and environmental issues do not get most voters to choose one candidate over another. Therefore, often the most effective way to secure the support of elected officials is through “pain”—embarrass the official into doing the right thing by calling attention to an indefensible position on a sensitive matter. Commonly, wealthy corporate interests are behind these “indefensible” positions, delivering both campaign contributions and support at the ballot box.

An example of this is a recent rulemaking that the White House Office of Management and Budget (OMB) proposed.⁶ OMB was seeking to finalize obscure regulations that would allow a “thumb-on-the-scale” approach during routine cost-benefit analysis of public health regulations.⁷ Cost-benefit ratios factor heavily in determining the ultimate fate of public health safeguards. OMB sought to finalize a rule providing that people over sixty years of age would be considered forty percent less “worthy” for monetary valuation purposes than younger people.⁸ The effect would have been dramatically less public “benefit” for the same industry cost associated with rulemakings. Because of the discriminatory nature of the rulemaking, it was crucial that the public be informed of the debate.

Public health advocates launched a media strategy to bring the public into the debate. The strategy included advertisements in Capitol Hill periodicals depicting senior citizens wearing “sale tags” reading “For Sale—40% off.” Consequently, Congress became sensitized to the issue and prohibited OMB from finalizing the “Senior Death Discount” devaluation rulemaking.

By generating unflattering attention, a highly cost-effective media strategy effected a correction in public policy. OMB could not defend a

⁶ See Draft 2005 Report to Congress on the Costs & Benefits of Federal Regulations, 70 Fed. Reg. 14,735 (Mar. 23, 2005) (requesting comments).

⁷ See *id.*

⁸ See *id.*

rule that advanced the notion that grandparents are less valuable than their grandchildren, despite overwhelming business community and Bush administration support. Absent a compelling media strategy, it would have been nearly impossible for public health interests to prevail on a very obscure valuation issue in the area of cost-benefit analysis.

III. BASIC MEDIA STRATEGIES: PAID AND EARNED

Generally speaking, there are two dominant types of media: paid and earned. Paid media consists of buying advertising space and running professionally produced advertisements. Paid media's role should be very limited because it is resource-intensive. It almost always requires costly, professional assistance in order to be effective. Paid media is appropriate in limited instances, predominantly for political statements. For example, if, after working with the chairman of a legislative committee, legislation is going to be marked up or revised in committee, it might be appropriate to run an advertisement in a specialty newspaper like *Congress Daily*, or *Roll Call* on the day of the markup. The placement can pay a compliment or make a statement about the importance of the legislative development. Nonetheless, as a general matter, paid media is a luxury in a world of limited resources. Part of this is due to the "saturation effect." A viewer usually needs to see an advertisement repeatedly before it will have any enduring effect, and public interests rarely have sufficient resources to accomplish this level of repetition.

However, there are times when it is necessary and appropriate to purchase advertising. For instance, after the war in Iraq commenced, the Bush administration tried to use an Iraq supplemental appropriations bill to repeal protections for military personnel concerning exposure to toxic chemicals at military installations.⁹ The National Environmental Trust ran compelling advertisements in *Congress Daily* and the offending legislative provisions were pulled.¹⁰ In another case, the Iraq supplemental appropriations bill was used to try to repeal protections in the Marine Mammal Protection Act,¹¹ which prohibits sonic boom testing in the ocean.¹² After targeted advertising, the provisions were similarly pulled from the bill.

⁹ See National Defense Authorization Act for Fiscal Year 2004, H.R. 1588, 108th Cong. (2003).

¹⁰ See CONGRESS DAILY, May 13–15 2003.

¹¹ See generally Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421(h) (2000).

¹² Marc Kaufman, *Navy Sonar May Give Whales the 'Bends'*, WASH. POST, Oct. 9, 2003, at A3.

Earned media differs from paid media because it requires the advocate to convince a publication or program to produce and run a given story. But for the advocate's efforts, the story would not have come to light and made it to the press. The task for the advocate is often difficult, however, in convincing a correspondent and their publication that something is of sufficient public importance and interest to merit coverage.

An advocate can "earn media" through a variety of means; however, they all entail convincing a reporter that the issue is important and that the public cares about its resolution. For instance, most data generated by the government is not generally accessible to the media or the public. To compensate for this shortcoming, an advocate can issue a report or white paper that analyzes and interprets the government data and presents it in a user-friendly format. Providing this value-added information to just one reporter may convince the reporter that it is newsworthy, and may generate coverage of the issue.

Another way to earn coverage is to reveal information before someone else does. For instance, an advocate can use the Freedom of Information Act to obtain documents that are provided to a reporter on an exclusive basis.¹³ The advocate then works with the reporter to develop and break the story. Often this means that the advocate is the primary researcher and does a significant amount of work. The obvious goal of these efforts is front-page placement with maximum public education and constituency pressure. As stated earlier, it is often this public awareness that has a sanitizing effect on the conduct of government officials, forcing them to retreat to more defensible policy positions.

In the world of earned media, there is the "gold standard" and the "reality standard." Advocates often seek coverage in top-tier opinionmaker media outlets such as the *Washington Post*, *New York Times*, and *NewsHour with Jim Lehrer*. However, depending on the target audience, this may be the least effective strategy. For lawmakers in very conservative or rural parts of the country, this type of coverage may be irrelevant. Instead, the best strategy may be to concentrate in secondary media markets—such as a Kansas City newspaper—where your target audience is sensitive to local press attention and constituency perceptions.

Good reporter relationships are essential to any earned media strategy. To develop these relationships, the advocate must treat re-

¹³ See generally *id.*

porters like the most valuable clients. The advocate must drop everything when they call and do anything possible to service the reporter's needs and make the reporter's job easier. Often, three or four hours are spent doing work at the behest of a reporter. However, this service mentality is necessary in order to be successful. By building individual relationships, the advocate can, in time, develop a robust list of media professionals who will rely on the advocate, and to whom the advocate can turn when media coverage is needed.

IV. CASE STUDIES IN GENERATING COVERAGE

A. *The Cold Start*

About ten years ago, it became evident that electricity generating power plants were underregulated and disproportionately responsible for air pollution in the country.¹⁴ In addition, further advances in reducing adverse public health impacts from air pollution could be accomplished most cost-effectively through the reduction of power plant pollution. Public opinion research conducted internally by the National Environmental Trust indicated that a strong majority of Americans had no idea where their electricity came from, and harbored deep misperceptions about how electricity was generated. In sum, the public and the press were unaware of the most basic information surrounding electricity generation. Therefore, one of the challenges to making progress on reducing emissions was to begin a media education process on the fundamentals of power plants and electricity generation.

To accomplish this, the National Environmental Trust put out a guide for reporters, editorial boards, and policy makers that contained all of the basic facts concerning electricity production.¹⁵ In order to be credible, every assertion had to be meticulously footnoted and referenced.¹⁶ The media cannot accept information that cannot be cross-checked, verified, and corroborated.

Therefore, on a complex issue like electricity generation, the National Environmental Trust needed to start at ground zero. The Trust assembled a very detailed desk-reference manual addressing every aspect of the issue. The next step was background briefings and one-on-

¹⁴ See Steven Ferrey, *Inverting Choice of Law in the Wired Universe: Thermodynamics, Mass, and Energy*, 45 WM. & MARY L. REV. 1839, 1842 n.3 (2004).

¹⁵ See CLEAR THE AIR, NAT'L ENVTL. TRUST, CLEANING UP AIR POLLUTION FROM AMERICA'S POWER PLANTS: THE FACTS (2002), available at <http://www.net.org/proactive/newsroom/release.vtml?id=27196>.

¹⁶ See *id.* at 82–85.

one meetings to further educate key reporters. The goal of the outreach was to create an educated media that could file stories quickly when breaking news about the electricity sector developed. Because of the complicated subject matter, the key to generating favorable media coverage was educated reporters who could question what they were told so as to avoid being misled by administration officials.¹⁷

B. *Compelling Graphics*

In smaller, secondary media markets, where editors are often starved for local news, it may be a picture or graphic that drives coverage. The compelling picture causes an editor to say “that’s great—now file a story to go with it.” Surprisingly, however, the opposite is not often true. Editors do not say, “That is an important public policy issue of concern, so find a picture to go with it.” The picture or graphic actually drives the story, with the localized nature of the portrayal making all the difference.

There are different ways of generating graphic content for media outlets. The easiest is to have some type of standardized “prop” that can be transported to different media markets and used repeatedly in press conferences. For instance, when the National Environmental Trust was dramatizing deaths caused by air pollution, the trust created a fifteen-foot tombstone. The goal is to generate a standard, local press conference template, and replicate it repeatedly during a media tour. Over the course of a summer, for example, this type of strategy can generate hundreds of local news stories.

C. *The Right Local Messenger*

Often, the messenger, but not the message, matters most. Different media markets require different spokespeople for a message to resonate. For instance, many elected officials in the Rocky Mountain West continue to be unconvinced of the need to address global warming. In order to reach this audience, the advocate must have a meaningful local impact conveyed by a credible local messenger. The strategy the National Environmental Trust employed was to focus on summer drought due to decreased winter snowpack, directly attributable to global warming. The vehicle to convey the message was a report released by district

¹⁷ See Editorial, *White House Prevarications*, WASH. POST, Dec. 27, 2005, at A24; Editorial, *Quacking About Climate*, WASH. POST, Dec. 14, 2005, at A28.

water managers.¹⁸ Combining the right messenger with an important local impact generated significant earned media coverage that local elected officials could not ignore.

V. EDITORIAL BOARD OUTREACH

Another effective way for the advocate to convey a message is to generate editorial page coverage favoring his position. Once successful in getting regional and national newspapers to cover the issue, the advocate is ready to approach editorial boards. Editorial boards will be more inclined to speak on an issue that has recently been in the press. Additionally, many people in government are particularly interested in and influenced by their local papers' position on an issue.

CONCLUSION

Consider media goals at the outset of any legal strategy development. This is true whether you are filing a complaint or trying to move legislation. Media strategy should inform everything from the project's title to the budget. Know the boundaries of your arena and pay special attention to any applicable rules of professional responsibility. Guard your credibility, because reporter relationships are built on trust. Only use paid media in rare instances. And finally, when in doubt, hire a media professional to help guide your strategic choices.

¹⁸ See generally STEPHEN SAUNDERS & MAUREEN MAXWELL, ROCKY MOUNTAIN CLIMATE ORG., LESS SNOW, LESS WATER: CLIMATE DISRUPTION IN THE WEST (2005), *available at* <http://www.cleartheair.org/waterinthewest/pdfs/waterinthewest.pdf>.