LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

How To Avoid Prematurely Publicizing A Case Outcome

By **Elizabeth Ortega** (March 21, 2022, 1:44 PM EDT)


Elizabeth Ortega

A law firm marketer launches a social media release too soon and accidentally violates an embargo on a court judgment. Under deadline pressure, the marketer's supervisor doesn't notice the blunder in time to stop the release a day early. Both attorneys on the case pay scant attention to this office chore they're obligated to oversee.

Premature posts to the law firm's social media accounts, consisting of a one-paragraph summary of the ruling, with no link to it, are yanked off within five hours. But it's too late. The news is out with the instantaneous speed of the internet. The firm has 14,000 Twitter followers and 7,000 LinkedIn followers; retweets are uncountable.

This violation occurred mid-February in London and the offenders are called barristers, not attorneys, but the phenomenon in Counsel General v. Secretary of State for Business, Energy and Industrial Strategy (No 2) is anything but unique. If it can happen to a leading barristers' chambers like Matrix Chambers, it can happen to anyone.

As Master of the Rolls Sir Geoffrey Vos wrote for the Royal Courts of Justice, "it seems, anecdotally at least, that violations of the embargo on publicising either the content or the substance of draft judgments are becoming more frequent."

Surely U.S. judges would say much the same about confidentiality breaches in their home courts. The U.S. may not have judgment embargoes per se as in the U.K. system, but it has plenty of sealing orders and even the occasional gag to prevent parties from going public in real time about sensitive information such as trade secrets.

Testifying soon after the Matrix situation came to light, a senior practice manager offered profuse apologies and vowed to "take steps internally to make sure this error is never repeated." The specter of a contempt proceeding loomed but the court didn't go there. It was intent on educating, not disciplining, the organized bar generally, using this situation as a case in point.

"The purpose of this judgment is not to castigate those whose inadvertent oversights gave rise to the breaches in this case, but to send a clear message to all those who receive embargoed judgments in advance of hand-down that the embargo must be respected," the court said. "In future, those who break embargoes can expect to find themselves the subject of contempt proceedings."

How do these violations arise? Do the competitive tenor of law practices today have anything to do with these miscalculations?

In their rush to engage digitally and attract the limelight, lawyers and communicators alike run the risk of compromising confidentiality. As communicators earn their keep by counseling lawyers to be visible, and as lawyers respond to heavy pressure to network, to be rainmakers and to still deliver first-rate representation that outshines the competition, something often gives.

Meanwhile, mistakes are not easily forgiven or forgotten and are not what you want to be top of mind for. Just ask corporate counsel who expect greater-than-excellent service.

The minimum requirement is for their lawyers to invest in their line of business internally and externally, to not only counsel but anticipate problems and trends. Otherwise, there's a list of alternative legal service providers who are developing burgeoning practice areas, mixing talent, blending rates and further extending technological advances. The competition is ready and keen for a chance to perform on a large scale.

Plainly, clients have a plethora of viable and sound options thanks to economic shifts, technological advances and regulatory expansion. Never has the tension been so great between the pure practice of law and the need to competently handle the business tasks associated with honoring deadlines and directives about communications, privilege and privacy.

As law firm leaders manage the daily realities of their business, their focal point remains fixed: working to more effectively serve the needs of clients. Running a law firm that can successfully compete in this era requires preparing contingency plans for risks and opportunities. Here are some guidelines to address and mitigate media pitfalls.

When faced with a crisis, apologize, acknowledge and act.

Accept and own the mistake. Attend swiftly and authentically to the situation by clarifying to stakeholders what happened simply and accurately. Then move to turn the challenge into an opportunity. Adopt preventative measures and invest in ongoing programs and policies with one shared purpose: privacy.

Stay nimble.

When implementing a media plan for a case, consider the strategy and issue at hand and ensure they are a good fit. If it doesn't quite hit the mark, remain nimble and adaptable. Remember to consult and verify the specific set of details and facts that are ripe for dissemination to better serve the client's best interests. Confirming the information will clarify and advance wider understanding and impact of the matter. The revelation should benefit a greater good.

Limit the number of eyes on a case.

When working on a media plan, operate on a need-to-know, need-to-see basis. The default should be that most lawyers and support personnel do not need to review working drafts of a document. Unfinished work products should not be transmitted from teammate to teammate. There should be one designated leader and a core group for transmitting documents to the lawyer or lawyers on the case.

Be a stickler for information care.

The ruling from the Royal Courts of Justice is a lesson to marketers, attorneys and other support personnel that they must institute, amend and maintain tight information security systems. Bulletproof the digital media content calendar with relevant reminders, including when breaking updates are expected.

Remain hypervigilant, especially when a coveted time-sensitive post unfolds. Streamline the process by consulting and securing approval from the core internal team involved before and after dissemination.

If an external communications team is involved, it is to be consulted if and when unplanned developments call for revisions to the master strategy. The traditional confidentiality agreement between law firms and communications service providers should cover this privileged work product.

It's crucial to pay full attention to these details and appreciate the usefulness of redundant backup protocols, proper precautions or double checks to ensure that any potential mistakes come to attention. And just in case, have a plan to address unfavorable attention.

Timing is everything.

Do not let a massive star die without a bang. Get the timing right by assessing and determining the legal strategy and how it will unfold in the public court of opinion. The timing of a release has to be in sync with the legal strategy so as to amplify the communications plan. All of these pieces work in tandem.

Crucially, keep in mind that it's often up to the client — i.e., corporate counsel, business executives, board members, etc. — not the client's outside counsel or communications representatives, to decide when the time is right to issue a press release to explain a ruling or other outcome to the public.

The role of communicators and outside lawyers is to assist and counsel their client by outlining pros and cons and setting out precautions. The client, in turn, can grasp the magnitude and risks associated with the dissemination of facts from an informed standpoint.

In the cited case, the Royal Courts of Justice called for "proper precautions and double-checks … in barristers' Chambers and solicitors offices to ensure that errors come to attention before the embargo is breached." How much security is sufficient? That's up to the individual law firm, communication counselors, its resources and management style.

The court's judgment can be read as suggesting it's better to overdo than to meet a minimal standard. The purpose, after all, isn't to evade punishment, but to do everything humanly possible to keep a release from ever launching prematurely again.

On a daily basis, communicators, lawyers and corporate professionals grapple with decisions about whether to disclose relevant updates. A careful pause and reflection about the difference between poor timing and good timing betokens sound leadership.

Elizabeth Ortega is principal of ECO Strategic Communications and co-founder of The International Academy of Financial Crime Litigators.