deekeling arndt/amo
strategic advisors

Litigation PR

Defending reputation in the public arena

About Deekeling Arndt/AMO

Since its foundation in 1995, Deekeling Arndt/AMO has been partner of choice for mission-critical cases and complex communication issues, covering the entire value chain: from transaction to transformation. Today, a total of 70 employees at offices in Düsseldorf, Frankfurt, and Berlin are working to support businesses and industries of all sizes. Deekeling Arndt/AMO specialises in handling complex opinion-building processes relating to the capital market, the political arena, the regulatory environment, public support, and competitive issues.

Deekeling Arndt/AMO has been part of the AMO network since 2016. According to the best-in-class principle, AMO brings together communications consultancies from all over the world and is the leading network internationally in strategic and capital market communications. With comprehensive expertise in local markets, deep industry knowledge and extensive international experience, AMO supports clients worldwide, particularly in the key financial centres of Europe, Asia and North America.

The leading consultancies in the respective markets join forces to contribute their extensive knowledge of each financial market and the various stakeholders in international projects, thus guaranteeing a consistently high level of communications advice. The expertise of the network partners ranges from transaction to transformation topics – from cross-border transactions and acute crisis situations, to regulatory matters, right up to restructuring and post-merger integration.

By collaborating with its partner agencies, the AMO network offers its customers worldwide an excellent and comprehensive range of advisory services. Founded in 2001, AMO has regularly been ranked among the top companies globally for M&A consulting. In 2018 alone, AMO's partner companies advised on almost 200 M&A transactions worth approximately € 240 billion.

The company's portfolio includes advisory services in:

In dubio contra reum

Defending reputation in the public arena

Whenever well-known companies or their representatives face litigation, they are joining a game that is certain to develop its own rules throughout the course of play. Opinion does not follow the principles of law. As soon as the public begins to form an opinion and possibly to prejudge companies, corporate proceedings develop their own unique dynamics.

Regardless of the actual outcome of litigation, defendants are at high risk of significant financial damage and a long-term loss of corporate reputation, even when court proceedings end with acquittals. Moral (pre-)judgement and the assumption that a crime has been committed remain, sometimes for years afterwards – unless they are actively challenged in the public arena.

Today, defendants need dedicated communications strategies. For public figures, they are a vital face-saving mechanism. For companies, financial considerations can be an additional reason for defending reputation.

In these times of increased litigation, public relations work in this area is usually referred to as Litigation PR.

Litigation PR manages external communications for companies or their employees before, during, and after legal dispute.

Deekeling Arndt/AMO has gained a wealth of advisory expertise in the field of litigation due to their work on several cases over the past few years. The results are presented in this paper, which provides an introduction to problems and risks of corporate trials, while also pointing to possible solutions and advisory support.

- **Firstly, this paper intends to offer an overview of corporate trials and to define the exact strategic objective of Litigation PR.**
- **Secondly, reasons for the rising importance of Litigation PR are given – initially by looking at the increasingly complicated regulatory environment, and then by analysing the scandalisation mechanisms of public media and public-opinion formation.**
- **Thirdly, solution approaches and possible PR strategies inherent in Deekeling Arndt/AMO's own consultancy approach will be presented, which provide companies with effective instruments to manage litigation emergencies.**

Reputational damage due to legal infringement

The necessity of Litigation PR

Over the past few years, Litigation PR has become increasingly important.

For companies, the inherent message is by no means a charming one: a growing demand for professional litigation advice is tantamount to an increase of companies finding themselves in legal battles, a trend that results from an increasingly complex regulatory environment. Today, the concept of compliance, which signifies that employees and executives are abiding by the law, is a vital factor in almost every major corporate strategy – Litigation PR is only needed when all compliance measures have failed to prevent legal infringement.

James F. Haggerty, author of *In The Court of Public Opinion***, which has since become one of the standard references for the industry, wrote about the necessity of Litigation PR:**

"Success in litigation involves twin goals: achieving victory in court and preserving reputation. Winning requires both."[1]

Litigation PR is necessary because public prejudgement stays in effect even after verdicts of acquittal: Advisors manage communications processes during litigation, in order to win a second, public rehabilitation of the accused.

Legally relevant accusations against companies or their representatives invariably carry a number of significant risks. The financial risk alone, e.g. through a sales shortfall caused by reputational loss, is incalculable, which is why companies have heightened interest in professional communications strategies during legal disputes.

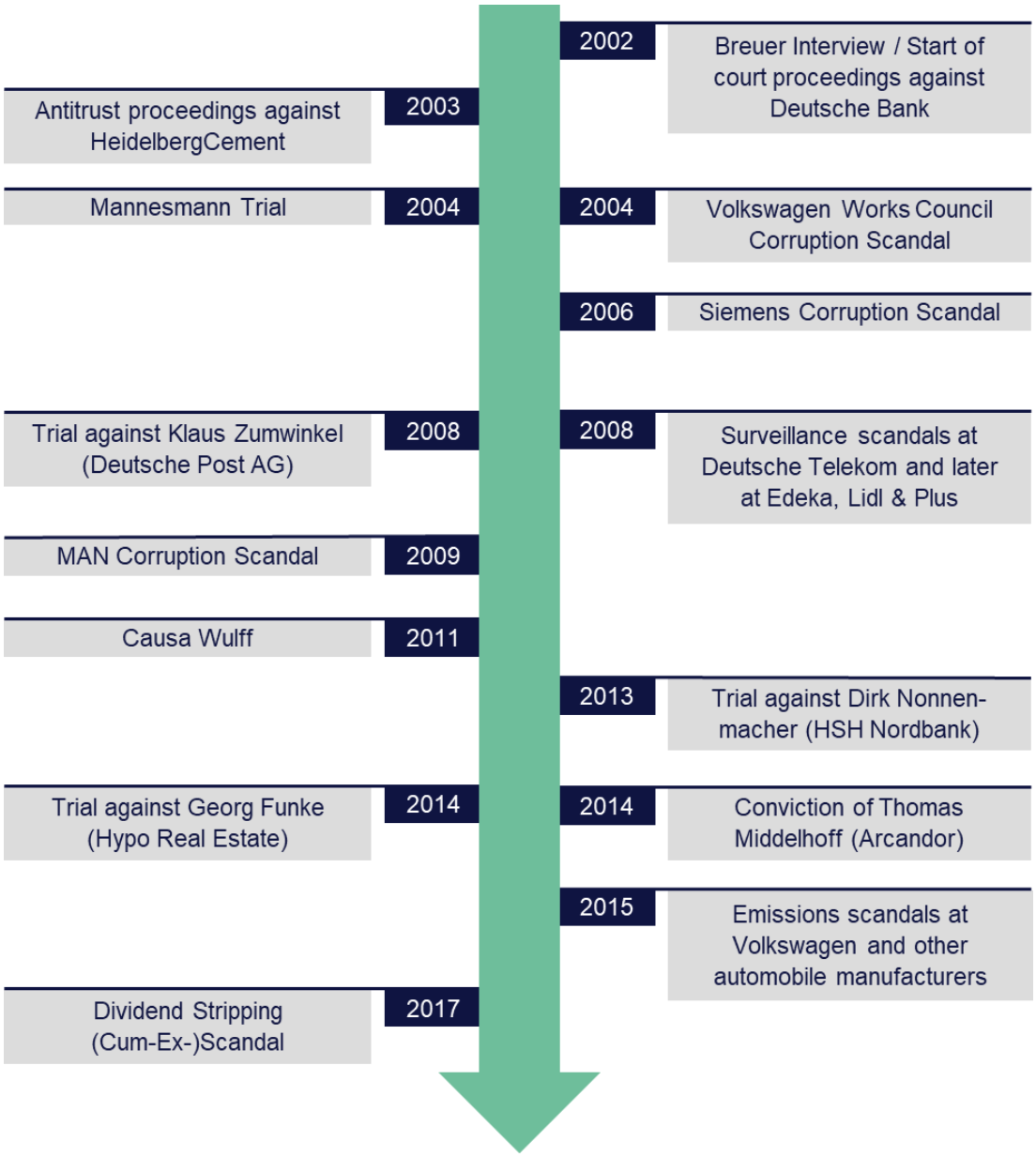
Most legal matters would never generate public interest at all. However, the more established and visible a company (or brand) is in the public arena, the more difficult it will be to minimise public interest and prevent a "public trial" taking place alongside court proceedings. Once journalists or interest groups have taken hold of a preferably scandalous topic, a "no comment" strategy is no longer a solution, except for in a few worst-case scenarios. To say nothing means losing what is left of one's interpretational sovereignty. At the very least, there will be a need for background conversations with the numerous players involved.

As a consequence, Litigation PR is most needed wherever a case of legal infringement is met with a particularly extensive or energetic media response. This also implies that the most important and difficult examples of Litigation PR often linger in public memory for years. Trials of "business celebrities" such as former Deutsche Bank CEO Josef Ackermann, former Deutsche Post CEO Klaus Zumwinkel or former FC Bayern München's President Uli Hoeness have been accompanied by extensive public observation and commentary. The

[1] Tobias Gostomzyk, *Litigation-PR als Zusammenspiel von Prozess- und Kommunikationsstrategie.* IHK Frankfurt am Main. https://www.frankfurt-main.ihk.de/recht/themen/verfahrensrecht/litigation_und_pr/index.html, accessed 18 June 2018.

sheer size of public response showed how important a specifically prepared communications strategy can prove in litigation cases.

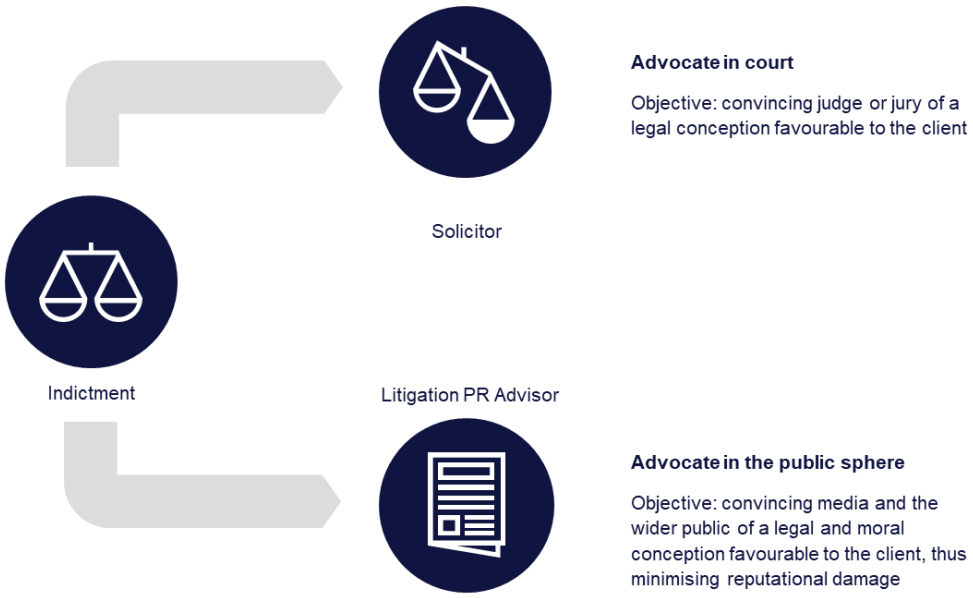
Cases of media-effective legal infringement by German companies since 2000



Advocacy in the public sphere

Objectives and limitations of Litigation PR

Litigation PR operates under fundamentally different prerequisites to those that govern proceedings in court. With regard to its objectives, however, the work of a Litigation PR advisor is similar to the work of a solicitor. Where the solicitor will try to convince judge or jury to decide in favour of the accused, Litigation PR will work to achieve the same with a wider public audience: the legal, and sometimes personal, opinion of a company or public figure engaging in legal battle is made clear to the public.



Since exclusive priority is always given to the defence mandate in court, Litigation PR advisors will be working in close cooperation with the solicitors, while also taking corporate strategies and financial interests of private individuals into account. Consequently, their work will go beyond the comparatively simple production of press statements. A profound understanding of court proceedings and the respective subject of legal dispute is indispensable, including expertise in the particularities of civil, criminal, and administrative law.

In addition, a good advisor will know if – and to what extent – media or public representatives will have the right to gain insight into current proceedings – whether, for example, media outlets will be allowed to cite from legal documents. This knowledge is of specific importance with respect to the momentum of online information: criminal justice reporting today is not limited to traditional mass media, but instead includes coverage via blogs or social media, all of which are increasingly spreading information from the court room.

For Litigation PR, the classic information exchange with press representatives is no longer the only challenge during a publicly visible trial. Advisors are increasingly engaging with influencers and multipliers on blogs and social media. Online platforms transmit information irrevocably and at unprecedented speed. Under German law, court proceedings must be held transparent and accessible to the public, which is governed under article 169 GVG (Gerichtsverfassungsgesetz).

While audio recordings and images from inside the court room are strictly forbidden, this rule does not extend to written notes – or live posting. Thus, platforms like Facebook and Twitter have created effective new instruments for public audiences to actively follow court proceedings. Depending on the subject matter, entire campaigns can be initiated within minutes. Today, effective Litigation PR thus involves the preparation of specific social media concepts integrated in the overall defence strategy.

Litigation PR advisors act as advocates in the public sphere. Their objective is to convince the media and wider public audience of a legal and moral conception that is favourable to the client.

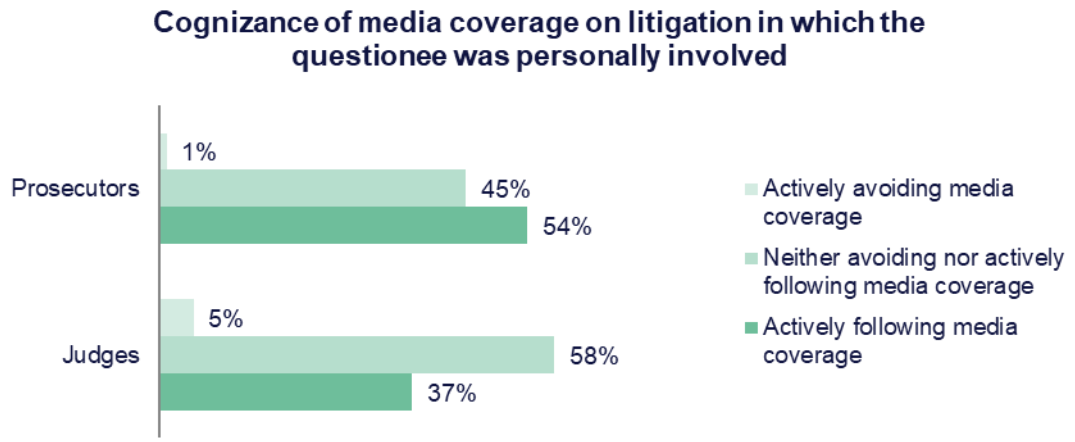
Thus, a core competency of Litigation PR is the protection of the client's reputation – which is not taken into account during court proceedings.

Direct and indirect influence

Effect mechanisms of Litigation PR inside the court room

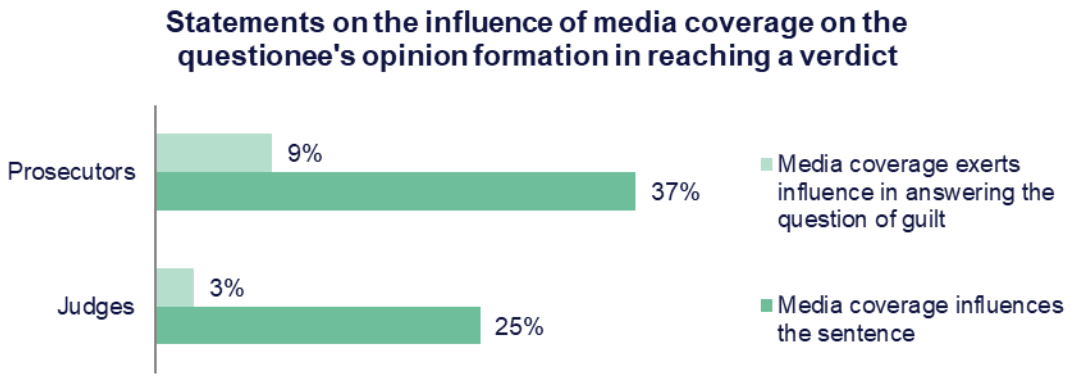
To influence the outcome of litigation is explicitly not, under any circumstances, a strategic objective of Litigation PR. However, there appears to be potential for successful communications in the public arena to have a positive effect on court proceedings: judges and prosecutors are themselves part of the general public, which is why their own judgement will naturally not be fully independent of public opinion.

The most important study in this respect was provided by media researcher Hans Mathias Kepplinger in 2009, who had carried out a self-evaluation survey with 447 judges and 271 prosecutors.[2]



In total, 99% of prosecutors and 95% of judges stated that they were either actively following or at least not avoiding media coverage on cases in which they were actively involved. At the same time – and this is decisive from the defendant's perspective – 37% of prosecutors and 25% of judges admitted that media coverage did, in fact, have an influence on their own opinion formation in reaching the eventual verdict.

[2] Hans Mathias Kepplinger & Thomas Zerback. *Der Einfluss der Medien auf Richter und Staatsanwälte: Art, Ausmaß und Entstehung reziproker Effekte.* Publizistik (2009) 54: 216.



While in most cases media reporting will have no impact on the assessment of the question of guilt, a positive public opinion can indeed be of significance for the severity of the eventual sentence. On the other hand, however, Kepplinger's study also implies that negative media coverage – when left unchallenged by active external communications – can result in a less favourable sentence.

This being so, the basic principle of not elevating results in court to an explicit or even implicit objective of Litigation PR still holds true: judges as well as prosecutors can often sense when they are being "spoken to" via public media, and they do not welcome this. Under no circumstances – and this almost goes without saying – should court representatives be criticised publicly. Instead, respect for court proceedings demands that Litigation PR concentrate on its core competencies in public discourse.

If external communications work is successful, the desired positive effect in court can be generated automatically.

Litigation PR can have a positive side-effect on court decisions. The effect should, however, never be elevated to a strategic goal of the communications process.

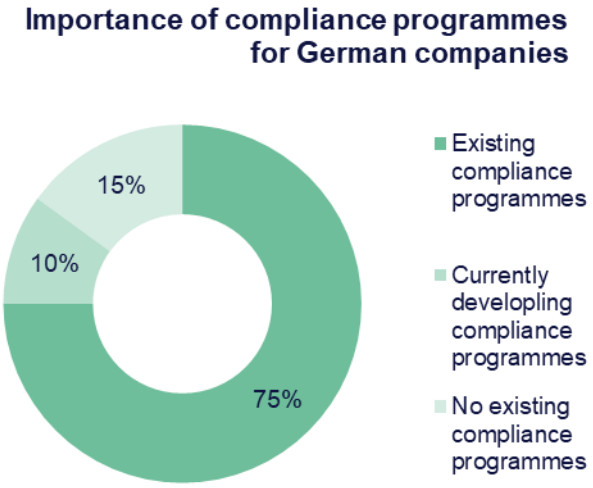
Compliance requirements

Methods for preventing litigation

Legal and social expectations placed on companies have increased both in number and intensity over the past few years. Perhaps the most telling indicator of this is the increasing importance of compliance programmes throughout the German business community.

Compliance signifies the adherence to rules within the company, be it to internal guidelines, social expectations, or legal requirements.

Today, the concept is widely established. Three out of four German companies with more than 500 employees already have dedicated compliance strategies.[3] A total of 82% of companies that have such programmes have made their respective provisions only within the last ten years. Only 18% had incorporated compliance measures before 2008.[4]



Fundamentally, compliance represents a form of early prevention against litigation. Often, however, compliance programmes are triggered after the company (or, more desirably, a competitor) has been involved in a legal battle, vividly bringing to mind legal requirements and the risks of present corporate practice.

New / increased legal requirements i. a.

- Significantly strengthened legislation on corruption
- Increasing requirements through environmental regulation
- EU Market Abuse Directive / MiFID I und MiFID II
- Act on the Adequacy of the Management Board's Compensation

Increased social expectation

- German Corporate Governance Codex (DCGK)
  - Diversity, esp. in the constitution of supervisory committees
  - Professionalisation and independence of supervisory committees
- Increasing demands regarding sustainability and corporate ethics / corporate social responsibility

[3] *Wirtschaftskriminalität 2018: Mehrwert von Compliance – forensische Erfahrungen.* PWC in cooperation with the Martin-Luther-University of Halle-Wittenberg.
[4] *Existing Practice in Compliance 2016*. Ernest & Young.

The corruption scandal at Siemens in 2006, for example, not only resulted in numerous lawsuits filed against the corporation – accompanied by several billion euros in fines and legal costs: within two years Siemens also raised the number of employees responsible for compliance from 86 to 490. In the aftermath of the scandal, 95% of all German companies with more than 500 employees declared their intention to strengthen internal compliance guidelines.[5]

Cases of corruption or unlawfully accepted personal advantage are frequently the subject of Litigation PR work, because they produce content which is warmly welcomed by media outlets. However, infringements of confidentiality regulations, antitrust regulations, or environmental regulations also provoke vigorous public response. With the most recent revelations about Facebook and its relationship to Cambridge Analytica, data privacy will likely be the next area to see extensive new legislation.

Compliance programmes are mechanisms of prevention against litigation. At the same time, their increasing importance reflects an increasingly strict regulatory environment for companies today.

Litigation PR assists companies where compliance measures fail to prevent legal infringement. In doing so, it can additionally provide the foundation for a renewed, functioning compliance culture.

[5] Wirtschaftswoche (with reference to Droege & Comp): https://www.wiwo.de/finanzen/korruption-geschenke-was-ist-erlaubt-was-ist-tabu/5452296.html, accessed 18 June 2018.

Scandal reporting in public media

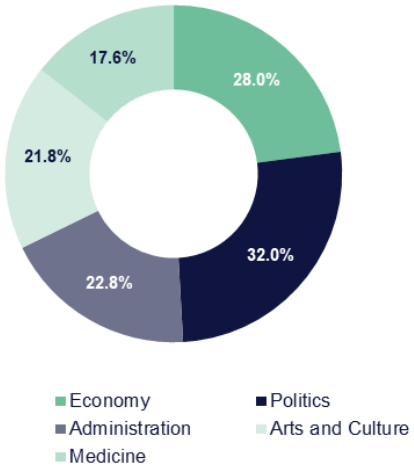
Litigation PR as a means of counter-communication

While compliance requirements increase, at the same time media interest in *violations* of these requirements has risen disproportionately in recent years: the more public outrage a trial is likely to generate, the more extensive its media coverage will be.

In other words, while the danger of legal transgression in companies has become more and more acute, at the same time the interest in finding and reporting such scandals is still growing rapidly.

In Germany, the frequency of targeted scandal reporting has been increasing since the 1970s. By 1990, the number of media scandals had already tripled, and the global financial crisis acted as a further catalyst in the process: between 2010 and 2015, the average number of scandalised topics per year was four times higher than it had been during the 1950s.[6]

Scandalised persons by area of society



Indignation can be a useful crowd puller for creating interest in media products. The potential outreach of a scandal multiplies with prior status and prominence of the accused. Extent and audacity of the suspected violation are similarly important. This equation also offers an explanation as to why public figures from the world of business, politics, and administration are disproportionately more often "scandalised" than, say, artists or medical practitioners.[7]

With this in mind, it appears all the more important to counterpoint and, where possible, minimise scandals early on in the communications process. Using the right key messages, journalists can be won over to the defending party's opinion. They will, after all, have an interest in contributing to public discourse by providing alternative points of view.

Drastically increasing compliance requirements create an unprecedented risk of legal infringement. Handled without care, such transgressions can evolve into fully mediatised scandals.

Litigation PR responds to an emerging or functioning scandal using its own countering narrative, contrasting sharply with mechanisms of scandalisation and thus contributing to a fairer public judgement on the defendant.

[6] Hans Mathias Kepplinger, *Medien und Skandale*. Wiesbaden: Springer Fachmedien, 2018.
[7] Inga Oelrichs, "Strukturmerkmale der Skandalberichterstattung" in: *Mediated Scandals: Gründe, Genese und Folgeeffekte von medialer Skandalberichterstattung*. Köln: Halem, 2016.

Developing defence strategies

Preconditions, tactics, and the dos & don’ts of Litigation PR

Concrete defence strategies for the public arena always depend on possibilities and preconditions of the individual case. Moreover, any strategy will have to remain flexible enough to be altered and adjusted, as most litigation processes take several years in a dynamically changing environment.

In principle, there are two scenarios for a Litigation PR strategy, both of which will inevitably be mirrored in the legal defence strategy.

1. The defendants, at least in principle, accept accusations to be true. Their priorities now lie on the limitation, or diversion, of (reputational) damage. Prominent examples are the Siemens’ corruption scandal in 2006 or, more currently, Facebook’s problems with Cambridge Analytica.
2. The defendants do not accept the accusations at all and protest their innocence, arguing for full acquittal. A prominent example is the former President of the Federal Republic of Germany, Christian Wulff.

In both cases, however, a number of dos & don’ts will apply.

Dos	Don’ts
• **Cooperate with legal representatives, congruence with their defence strategy in court**	• **Finger-point**
• **Win credibility with hard facts**	• **Present circumstances as complex and complicated: even when they are, simplicity is imperative for messages to be heard.**
• **Prepare one coherent communications concept, represented by a dedicated communicator**	• **Have conflicting arguments or legal positions between several defendants**
• **Balance legal positions whenever there are several defendants**	• **Make precipitious statements**
• **Ensure quick reactivity and accessibility for press representatives**	• **Have no-comment strategies: remaining silent would only be the last resort of damage containment.**
• **Active storytelling: creating precedents early on in the communications process**	• **Place exclusive focus on legal documents**
	• **Be overly confident or show a lack of humility towards court proceedings**

If, moreover, there is a basic admission of guilt, three fundamental principles of crisis communications should be complied with: the seriousness of accusations must be admitted, consequences need to be credibly announced, and full transparency must be promised.

Should, however, the defendants' plea and the solicitors' defence strategy aim for a verdict of "not guilty", circumstances are more favourable for the accused. In general, this scenario will open up new, albeit complicated potential to develop a countering narrative.

Could the trial itself be unjustified? Are accusations raised by stakeholders following personal interests who perhaps risk inflicting damage on the company's workforce or its customers? In whose interest did the defendants act? What merit and commitment had they previously brought into the company, perhaps contradicting any moral prejudgement?

The last two questions in particular can be essential in ensuring that the public does not accuse the defendant of having base motives, thus significantly reducing the risk of scandalisation at an early stage in the process.

After the strategy has been agreed upon, the advisor will set the mechanisms of counter-communication in motion, using an established toolkit for external communications. While cases of publicly visible litigation nonetheless remain highly complex and dynamic processes, with the right strategic approach Litigation PR can provide the tools to handle critical situations and complex communications issues.

- **SWOT analyses**
- **Press statements**
- **Pre-planned briefings and interviews (no live interviews)**
- **Key messages / Q&As**
- **Background conversations with press representatives**
- **Media monitoring**

Litigation PR adheres to a number of dos & don'ts. For concrete implementation of the respective defence strategy, advisors frequently resort to the established toolbox of external communications.

Takeaways

Litigation PR manages external communications for companies or their employees before, during, and after legal dispute.

Litigation PR advisors act as advocates in the public sphere. Their objective is to convince the media and wider public audience of a legal and moral conception favourable to the client.

Thus, a core competency of Litigation PR is the protection of the client's reputation – which is not taken into account during court proceedings.

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Contacts for Litigation PR and Compliance Communications

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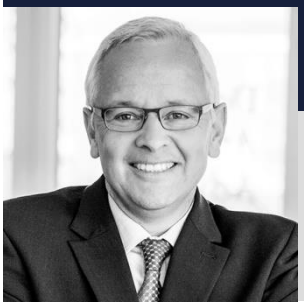

- Litigation PR
- Corporate Communications

Extensive experience in companies within the energy industry, most recently as Head of Corporate Communication at RWE; since 2014 at Deekeling Arndt/AMO

Susanne Arndt (Managing Partner)

- Strategic advice and process coaching
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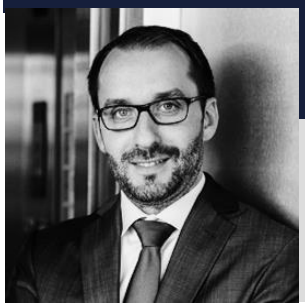
Stephan Rammelt (Managing Director)



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