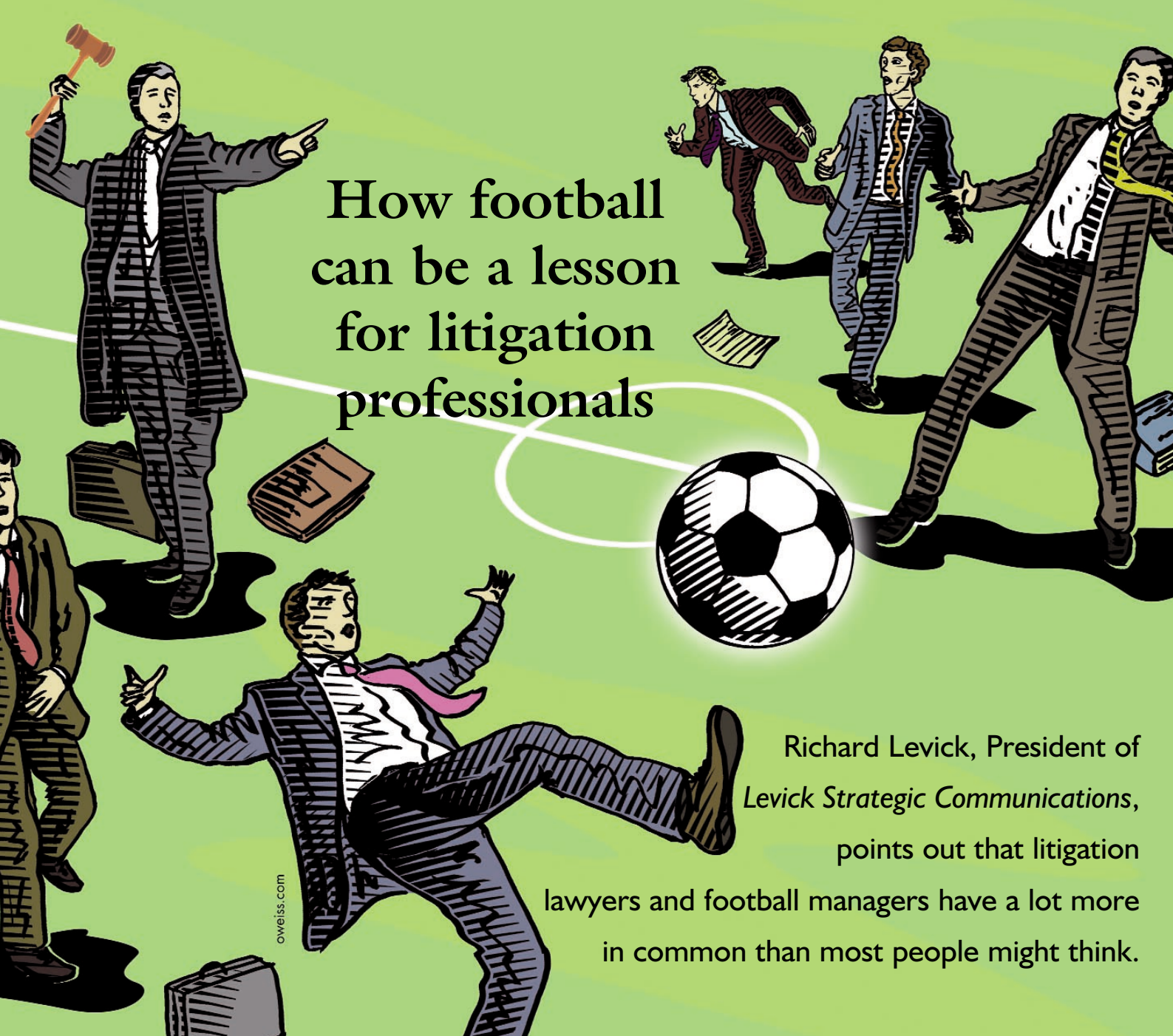


A metaphor and a reality...



How football can be a lesson for litigation professionals

Richard Levick, President of *Levick Strategic Communications*, points out that litigation lawyers and football managers have a lot more in common than most people might think.

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It is World Cup time for football fans everywhere – and therefore a very special time for lawyers, crisis communications professionals...in fact, anyone whose professional life involves law and especially litigation. Bear with me, please, and I'll explain this specific relevance of a great sport to what most readers of this publication do for a living.

Sports is an inexhaustible pool of easy metaphors for life and for work. Other sports also provide direct metaphors and instructive examples for businesses and professions of all sorts, but there's something special about football that goes beyond the proverbial 'work ethic' homilies and lessons that athletic competition popularly offers.

Consider how multifaceted the relevance of this game is, especially, as we note, for litigation. Football, more than any other sport, corrals world history's fiercest, most dangerous instinct – namely, the proclivity of nation states to invade and destroy each other – into a game played according to rules, with fatal or near-fatal casualties virtually never occurring.

Litigation does precisely that as well. Time was, private companies went to war to advance their business interests, as the narratives of the East India Company amply demonstrate. Now the global movers and shakers are arrayed instead in courtrooms. They litigate their way to power and money.

The near-global breadth of football makes it an additionally appropriate metaphor for the increasingly global nature of litigation. Other sports may be international, but football is global. But the salutary lessons of football, like the ones provided below, can be equally grasped by lawyers in Bolivia as in Croatia. (Oddly, it may only be in the United States and Australia where the impact of 'soccer' as a metaphor will be lost on a majority of sports fans.)

If the lessons of football bear directly on the dynamics of litigation, they may be even more relevant to the communications specialists who support one side or another in litigation, and who labour to preserve the 'brands' and reputations of their clients in the Court of Public Opinion - no matter what outcome obtains in courts of law. That's because football is itself a communications tool that powerful men and women use to advance their political and corporate interests via metaphors powerfully couched in visual pictures.

One example will suffice to better explain this communications potential of the football metaphor and to further

underscore why it's particularly appropriate to look to football for lessons on how to litigate and communicate. The example, drawn from Franklin Foer's admirable book, *How Soccer Explains the World* (HarperCollins, 2004), is rather timely because it is all about Silvio Berlusconi, who only recently fell from power.

Signor Berlusconi's power, while it lasted, was immense, protracted, and, in no small measure, predicated on the potential of football as a metaphor and as a direct communications weapon. The Berlusconi example should put the 'lessons' suggested below – about what lawyers and communicators can learn from football – into a particularly powerful context.

An Italian stallion

Just as in corporate litigation, Italian politics by 1990 had become a contestation of two powerful forces with more or less equal resources at their disposal. One was the Agnelli family, the old-money owners of Fiat. The other was the singular personage of Berlusconi, a self-made man whose vast holdings included, among other businesses, a media empire. The Agnellis controlled newspapers, but Berlusconi had his fingers all over the broadcast pie.

The Agnellis own a football club called Juventus, which would remain powerfully competitive even as Fiat declined. Berlusconi owns a football club called AC Milan, which would be the first such club to successfully challenge Juventus. In fact, Berlusconi did not become a truly national figure until he bought AC Milan in 1986.

The football field would obviously be the court of law determining if Juventus or AC Milan prevailed in any given 'litigation' on any given day. As Foer suggests, these litigations were often influenced by *ex parte* discussions of one sort or another with the officials. Referees are real public figures in Italy, and both Agnelli and Berlusconi would pursue various stratagems to affect the outcome. Berlusconi, as a TV magnate, was particularly successful in these efforts.

Even more potently, Berlusconi lavished generous attention on reporters. Short of direct bribery, journalists covering games were treated by the AC Milan organisation like visiting royalty. The media could indirectly affect the outcome of a game by lambasting referees for unfavorable calls. The media could hound these men into early retirement or forced exile.

It does not presumably strain our metaphor too far to

remind ourselves that the media indirectly affects the outcome of litigation by influencing the arbiters of that game as well, jurors if not judges. Referees come in all packages.

But Berlusconi took his football metaphor further. AC Milan became a route to ultimate political power as well because Berlusconi was also shrewd enough to 'brand' his club and 'differentiate' it from Juventus. The Agnelli style is patrician, behind-the-scenes, and discreet. Berlusconi's style is as understated as a paparazzo's camera flashing in your face.

AC Milan became the working class soccer brand. Not surprisingly, it wasn't lost on Berlusconi that there are a lot more working class voters in Italy than there are patri- cians. And Berlusconi understood Juvenal, the great ancient who famously exclaimed that the people want only bread and circuses. AC Milan players were flown into the stadium in helicopters as rock music and Wagner alternately blared out a welcome at the beginning of each game.

It was quite a show, and the messaging was all about power: Berlusconi himself as a winner at a time when the Italian economy was floundering and football fans were bearing the brunt of the malaise. Football was a metaphor for winning and, as with all great metaphor, the line between the symbol and what was being symbolised grew blurred.

The lesson for lawyers is clear. Winning the game isn't enough. You have to win it so the fans at home will buy your client's product.

The lesson for the communications professionals who support a litigant is equally clear. Speak to the values of the jurors in the Court of Public Opinion. Put on a great show, even if that show is no more than a single 'picture' that they will never forget. Win that battle in the Court of Public Opinion and your client's defeat in a court of law, if a defeat it is, may turn out to be just a cost of doing business.

Some directors, C-suite executives, and general counsel lament the fact that defence lawyers have trouble understanding the power of visual imagery to affect their corporate brands – a fact not lost on the plaintiffs' counsel, regulators, and non-government organisations (NGOs) who more typically use an effective panoply of communications arts to attack or challenge those brands.

Berlusconi's football metaphor was so powerful that he not only ruled Italy for a decade or so, but legislated immu-

nity for himself to potential criminal allegations and passed laws against – repeat, against – transparency compliance laws that would have inconvenienced his own companies. The populace didn't even blink. Eat your heart out, Ken Lay!

Well, all good things must come to an end. Berlusconi was in power too long and the football metaphor could not retain enough juice to get him past rising energy costs, stagnant growth, and support for an unpopular war in Iraq. Even so, he lost by the thinnest margin.

War games

Such direct connections of football to power – not just political power, but the power to brand, to differentiate, to sway public tribunals – take us beyond metaphor. Again, football itself becomes a direct communications tool: the medium as motivating message.

At the same time, the game becomes an all the more resonant source of strategic and tactical best practices. Any game that so effectively mirrors power must have a lot to tell us about how to win. Exhaustive analysis of the best coaching minds that have commandeered football games through the years would yield a virtually limitless list of such best practices.

Here are just a few to start with:

- **The great teams like Brazil win on their off days.** It's called 'finding a way to win' even if your goalie is significantly slower than usual or your top scorer is not in physically top form. Translate that into the language of litigation communications, and the 'off day' equates with a reporter covering the case who is going to be hostile whatever you say or do, or plaintiffs' counsel who knows how to direct the media.

What residual resources, either human or technological, can you bring to bear to make up for a deficit? Do not limit your communications campaign to simple on-the-record statements or duelling press releases. Media tactics in litigation are myriad and endless – third-party spokespersons, independent but favorable surveys, blog control, 'black bag' investigations, think tank commentaries, strategic leaks – the list goes on.

Meet with your communications team early in the stages of the litigation, build trust and consider all options. Have them available if and when you need them. As



lawyers, do not try to convince everybody in the room you're smarter. Make a pact with the communications counsellors: if they don't practice law, you won't practice media. Keep the goalies in the goal mouth.

- **A driving personality catapults the team toward success.** Yet that spells danger as well, both on and off the field. On the field, the opposition may have figured out a way to neutralise your top player. Off the field, the driving ego of a Berlusconi may cause so much noise as to distract the team or energise the opposition. In litigation, the personality of a strong CEO might be the single-most important reason why the company has captured first-place in its market but, at the moment of greatest legal exposure, that strident personality becomes an irresistible target for media opinion-makers.

The defendant's most important pre-determinant for media success is the ego of the defendant and defence counsel. Large egos are often indispensable for successful entrepreneurs. "If I did it my way to get here, why can't I continue to do it my way now that I am in trouble?" The answer is that, with the all-probing media lens now focused on the defendant, the communications game has to be played differently. The defendant is no longer the power broker, the judge and the jury are – the jury pool the virtual power broker.

An 'open kimono' strategy is now compelled and communications professionals must take equal seats at the table with both defendants and their lawyers. In some cases, media counselors need access to privileged information in order to make a strategic determination based on actual fact patterns. Absent such disclosure, sophisticated reporters quickly realise they've been lied to, or they will at least sniff the arrogance wafting through. Either way, the media battle is lost, notwithstanding the merits of the case.

- **Great teams know how to shift momentum, and they also know how to resist momentum.** When the other side scores, the setback does not redefine the game. A great team makes an adjustment and moves on. Litigators don't let damaging testimony seal defeat. Communications experts don't fold their hands because of one or two days of negative coverage and embarrassing headlines. Yet too often companies are so afraid of the

initial exposure, they won't disclose damaging information early in order to hopefully avoid all news coverage. All they accomplish is to dramatically pique reporters' interest and significantly extend the volume of coverage. Reporters sniff prevarications like piranhas sniff blood.

It's called the rule of sacrifice. Lawyers and companies often feel they need to win every innings of every game. Fear of short-term loss must not dominate the decision-making. If you wait to comply with what the regulator or judge rules, you lose the opportunity to build long-term trust in the marketplace. Corporations that have made sacrifices during crises, from Johnson & Johnson to British Petroleum, do so with long-term market gains in mind. Governments always require a sacrifice because they need cover with their own constituents. They're not going to go away until you feed that need.

- **The defence does not just guard its weak flank.** If the other side scores on the left, the team does not weaken its right to protect the exposed position. That's called panic. Sideline to sideline impermeability is the only acceptable objective. Litigators continue to rehearse their salient strengths even as they plug the gaps exposed in their case strategy. Media experts continue to promote the client's prominent assets even as they build a new arsenal of messages to guard the brand where it's weakest.

Which is the client's weak side? Which is the strong side? Are both fortified? Too often, defence lawyers mistake simple research and due diligence with in-depth investigation. You and your client may need to 'switch the witch' with information not found in any library or website link. Can your 'black bag' operations team get information quickly enough to enable immediate decisions? Can you develop useful information that won't pass the rules of evidence in a court of law, but are fair usage for reporters? Do not plan to only be on the defence. Think about an offensive strategy as well.

At the very least, know that plaintiffs, regulators, and NGOs play hard ball. Their strategy often relies on Friday night leaks to which the defence has little opportunity to respond. You may decide not to go on the offense, but understand that a 'neutral' media strategy is typically filled with holes and liabilities.

- **Kicking the ball into your own net may happen to the best teams sometimes, but not often.** Such on-the-field miscues are usually the consequence of miscommunication and insufficient off-the-field planning. In litigation, it happens internally and externally. The other side sits back and simply lets you beat yourself. When companies just say ‘no comment’ to allegations in the Court of Public Opinion, they are often, in effect, kicking the ball into their own nets.

‘No comment’ may be the correct legal strategy. Sometimes, it may even be the right media strategy. However, lawyers must first have a conversation with their clients in order to vet two predictable costs. First, when you say ‘no comment,’ you cede the entire field to your opponents. Theirs is the only voice the reporters will hear and, as a result, their viewpoint becomes the whole story and, in short order, the historical record. It is all the audience will believe.

The second cost is the rule of ‘Villain-Victim-Vindicator.’ Every play has those three roles. Defendants who do not tell their own stories become villains by default. Once typecast as villain, it’s hard to play victim and even harder to play hero.

- **The consummate football player doesn’t have to see the teammate he’s passing to.** He knows that teammate will be there when the ball arrives because everybody knows everybody else’s moves. They know where their own teammates are and they know where their teammates will be. Litigators and communications advisors should be equally seamless. They have practiced together. They have rehearsed together. When the lawyer files a motion, he or she knows what the public message is going to be. When the media advisor develops a message, he or she knows that it will fully support the legal strategy.

Your legal and communications teams need to practice together. But first things first – make sure they know they’re on the same team! Have them media-trained. Far from academic, such training allows spokespersons to refine their messages into powerful sound bytes. It includes role-playing – often on videotape – to hone the delivery of those messages until they’re impermeable.

During many lawsuits, in-house communications professionals do not even know their legal counterparts. The faceless legal arbiters become very intimidating as a result. If, as lawyers, you have not developed a close and trusting relationship before the onset of a crisis, you may misread their cowering acquiescence as confident agreement.

- **Running hard doesn’t win football games.** Commentators may praise a striker for really trying, but in the end that hardly matters. The next day’s news will report success or failure, not effort. In litigation, the client pays for results. The communications specialist does not succeed by writing a countless ‘message points.’ He or she succeeds by making the right call with the right message, period.



Don’t confuse the existence of a crisis or litigation communications plan with true preparedness. In and of themselves, crisis plans are virtually useless. They only make people feel prepared. There are just too many undefined variables to calculate ahead of time into template form. Communications professionals earn their keep because of their judgment, not their boilerplate.

In litigation, communications preparedness starts with the head. If the general counsel or CEO make it known that it is important, their commitment will set a palpable standard. Too often, though, rampant disorganisation vitiates the efforts of even the most successful companies during a crisis or litigation situation.

Your crisis and litigation team needs to be small, powerful, and multidisciplinary. It needs legal, PR, perhaps IR, and maybe government relations or other appropriately specialised expertise. The decisions they render must be implemented. Plaintiffs’ attorneys need only decide to act; corporations seem to need some level of consensus as well. With the media, however, delays kill messages. Audiences believe what they read first.

- **Football teams understand their markets.** Manchester United sells to different parts of the global football market in different ways. It’s the audience that determines the promotional strategy. In a global market like football, those determinations are sometimes nuanced and sometimes obvious. In the Court of Public Opinion, corporate priorities define the audience – is it the con-

sumer, the stock analyst, the regulator? – which, in turn, defines the message and how it's delivered.

Is the client primarily concerned with its stock value at a given point in time, in anticipation, perhaps, of a public offering? Or is the client willing to drop a few points while sealing an agreement with a regulator? Understanding the audience doesn't just change the message of the day. It determines the whole thrust of the communications strategy, from the media outlets you target to how the client company follows up on and disseminates every media appearance.

In litigation, teams often fail because of arrogance. Sometimes it's the client who is arrogant. Sometimes it's the lawyer

An audience-driven strategy may, for example, determine that, because the analysts are the priority, there is a lower threshold for 'news' than for reporters – which, in turn, means that the information posted on the website or blog may be much different from the information that journalists will predictably pick up on. Or, a regional audience strategy could determine that some local reporter is chosen to get the news first. Maybe the internal audience is the priority and communiqués are distributed to employees more aggressively than might otherwise be the case. Think tanks and academics might be the primary auditors. Whom you want to reach, and why you want to reach them, determines the approach.

- **Goalies don't go on the attack.** Conversely, your high scorers don't hover at their own net. Teams know who does what, how well they do it, and they deploy forces accordingly. In litigation, public relations experts don't depose witnesses, obviously. Less obvious, lawyers – even lawyers who may be effective spokespersons in the media – should not be the architects of media relations plans. Lawyers understand precedent, the past, and they're risk-averse. Such conditioning obviates the gains that can be made through media outreach. Their conditioning may even preclude going forward with a proactive media strategy in the first place.

Are team members doing what they're supposed to be doing? Are the right people deployed in the right places – your lawyers for legal advice, your communications professionals for communications advice? Each member of the team has an indispensable talent that fits somewhere into the litigation management jigsaw puzzle. It's essential to define each talent and to insist that each talent have an audible voice in determining next steps.

- **Great football players don't necessarily belong on great football teams.** Tyler Twelven is not on the US World Cup team, despite being a prolific scorer, because, at least for the moment, the fit is not right. Some teams have foundered because whatever they gained by having a particular star on the field could not compensate for the disarray his force of personality created.

There is no one size that fits all in litigation PR. Beware of communications professionals who arrive with boilerplate solutions. Expect the PR team leader to begin the engagement with a lot more questions than answers. Expect those questions to probe for corporate goals and long-term priorities. If they're not thinking long-term, the fit cannot be right.

Best practices are obviously always about success. But they're also about teamwork, about winning for the team. Translate 'team' as 'client' and you see why football is a perennial blueprint for legal service and communications professionalism of World Cup quality.

In litigation, teams often fail because of arrogance. Sometimes it's the client who is arrogant. Sometimes it's the lawyer. The syndrome is particularly chronic on the defence side – much to the glee of plaintiffs' counsel who are usually busy seeding jury pools with pungent, to-the-point media efforts on and off the record.

With defeat, the defence sometimes blames the media for misinforming an unsophisticated public. Well, you can always blame the referees and accomplish little in the process. But the actual game starts long before the opening whistle.

Don't let the other side continue to establish its game plan unchecked – with a litigation-communications strategy – while you're still sitting in the locker room. **AC**

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