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Characterized by Conciliation: Here's How Business Can Use Apology to Diffuse Litigation

BY MICHAEL B. RAINEY, KIT CHAN, & JUDITH BEGIN

In Part I last month, the authors dissected the nature of apology, why it works, and how it can be dangerous to your case. This month, they use high-profile examples to discuss how a conciliatory approach can affect reputation and stature.

* * *

Let's look at one entity's conciliatory handling of a crisis.

In 1981, Johnson & Johnson's sales from all varieties of Tylenol were estimated at more than $400 million, and expected to reach $500 million by 1983. But on Sept. 29, 1982, the first of seven deaths occurred in the Chicago area, all attributed to tainted bottles of Tylenol.

• PART II OF II •

After the deaths, the nonaspirin drug's share of the $1.2 billion painkiller market fell from to 7%, from 35%. In one poll, a majority of Tylenol users said they probably would never return to the capsules. "Tylenol's 'Miracle' Comeback," *Time* (Oct. 17, 1983). A year after the poisonings, public confidence was restored.

In 1984, *Time* magazine hypothesized that James Burke's handling of the crisis would be studied in business schools for a long time to come. Burke, who was Johnson & Johnson's board chairman, went against his colleagues' advice and the FBI's "threats." He decided to spend whatever millions it would cost to recall 31 million bottles of Tylenol capsules from stores, hospitals, and all medication providers.

U.S. Food and Drug Administration officials feared that the recall would cause a panic. The FBI argued such an expensive action would demonstrate to potential terrorists that they could bring a $5.9 billion corporation to its knees.

ADR SKILLS

But Burke prevailed, and his move proved to be decisive in a remarkable and unparalleled regaining of public confidence in his company's product.

By accepting responsibility, acting aggressively, and by apologizing on behalf of the company, Burke and Johnson & Johnson recaptured 29% of the nonaspirin brand market. Now, the company dominates the market. There was a significant cost in the recall, re-marketing, and coupon promotions to the customers. But the brand's recovery, and the burnishing of the corporate name, was well worth the cost.

SUCCESS AND EMPATHY

History is replete with successful and not-so-successful corporate campaigns to recover from crisis. Some entailed apologies, some sympathetic approaches, and some were empathetic. What each of the successful campaigns had in common was the conciliatory nature.

Compare the Audi 5000 debacle versus the 1990 Lexus LS 400 brake light recall. Audi took an adversarial stance. Mention Audi and many cannot remember anything other than the bad press about the vehicles' unintended acceleration.

In contrast, Lexus immediately took the initiative by accepting responsibility, notifying owners of the new, high-end brand of the problem, then taking every necessary step to make sure the problem was resolved expeditiously. Owners were greeted at the dealers, given a loaner, and their vehicle was repaired, cleaned, and returned in record time.

Further high-profile examples of crisis handling are the Suzuki Samurai (not so successful), the Pacific Southwest Airlines 1978 midair collision over San Diego (so-so); American Airlines Flight 191 crash in Chicago in 1979 (terrible), and Delta's Flight 191, which crashed while on approach to the Dallas-Fort Worth International Airport in 1985 (highly successful).

THE MEDICAL ARENA

Malpractice suits often are identified as the nemesis of our current healthcare system. The prevailing sentiment in today's society is that there are many frivolous malpractice suits that place an unnecessary burden on the health care system in the form of large compensations, attorneys' fees, litigation and court costs, and malpractice insurance. Jeffrey Bloom, "A Study to End the Frivolous Malpractice Lawsuit Myth," (June 1, 2006)(available at www.medicalnewstoday.com/youropinions.php?opinionid=10002).

Yet in a Harvard study, "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," the authors concluded the majority of malpractice suits that were reviewed indeed were meritorious. 354(19) *New England J. Medicine* 2024 (May 11, 2006)(available at www.hsph.harvard.edu/faculty/michelle-mello/files/litigation.pdf). The Harvard group reviewed random malpractice cases from a pool of more than 1,400 cases by four malpractice insurance companies. The findings indicated meritorious cases outnumbered non-meritorious cases by a 2-to-1 ratio. See

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Bloom, supra.

A report from the Institute of Medicine, a part of the National Academy of Sciences, estimates as many as 98,000 people die in the hospitals annually due to medical errors. See www.iom.edu/CMS/8089/5575/4117.aspx; see also Michael Woods, "Healing Words: The Power of Apology in Medicine," 56 (2004)(available from doctorsintouch.com).

If one accepts the premise that the majority of U.S. malpractice suits are valid, the next logical step is to examine the driving factors causing those patients to file suit against their physician. Literature suggests the top three reasons for patients or their family members filing suit are (1) a lack of explanation of what happened, (2) the perception that no one takes responsibility for their actions, and (3) the demand that someone take measures to mitigate the offensive situation.

In his 1992 study, Gerald Hickson concluded 24% of the malpractice suits brought forth following perinatal injuries were motivated by suspicions or recognition of a cover-up. Michael Woods, "Healing Words," supra, at 24, referring to G.B. Hickson, et al., "Patient Complaints and Malpractice Risk," 287(22) J.A.M.A. 2951-2957 (June 12, 2002). This means a quarter of the suits were not based on accusations of negligence or incompetence but rather a *perceived* pattern of deceit or dishonesty.

As a result of the recognition of apology's role in medical adverse outcomes, there has been a nationwide push to acknowledge and promote the use of apology in health care. The Sorry Works Coalition (www.sorryworks.net) is a group that encourages medical personnel to voluntarily embrace the use of apology in adverse outcomes.

The coalition aims to educate medical personnel and the public, as well as lobby for governing bodies to not equate an apology as an admission of guilt. To date, there are 24 states that have passed apology laws—statutes that "allow doctors and health care providers to apologize and offer expressions of grief without their words being used against them in court." See www.sorryworks.net/media25.phtml.

THE LEXINGTON EXPERIMENT

A landmark experiment of providing full disclosure in healthcare incidents was performed by the Veterans Affairs Medical Center in Lexington, Ky. In 1987, the center implemented a policy in dealing with adverse outcomes as an attempt to decrease both the number of malpractice claims and the amount of judgments to be paid out.

The new policy adopted a concept to "maintain a humanistic, care-giving attitude with those who had been harmed, rather than respond in a defensive and adversarial manner." The hospital administration decided on a policy of disclosure, going so far as revealing all the details of its investigation to patients and family members affected by errors or negligence, even if, the policy stated, they otherwise would not have known a mishap had occurred.

Applying Apology

The technique: A sincere, well-constructed apology.

The settings and studies: Big pharma, medical malpractice, and product liability.

Why you haven't recommended it to your clients: It's not instinct, so it's easily avoided. It may not work. But mostly, you haven't noticed how impressive the results have been.

A 1999 study examined the 1990-1996 period, and found 88 malpractice claims filed against the medical center. The average resolution was only $15,600. The National Practitioner Data Bank reported the national mean malpractice judgment was $270,854 in 2001.

MEDICAL APOLOGY COMPONENTS

Part of offering an authentic apology involves allowing the patient and family members to ask questions about the course of events that led to the adverse outcome. At the core of disclosure is patients' and families' need to obtain information.

Researcher Thomas Gallagher found patients identify "truthfulness" and "compassion" as the most important qualities in the disclosure process. The focus groups revealed the affected parties usually want to know:

- What happened?
- How will this affect my health in the short and long term?
- Why did it happen?
- What is being done to treat the problem?
- Who will bear the cost of the error or complication?
- What will be done to prevent the same mistake from happening to another patient?

See Michael Woods, "Healing Words," supra, at 44, referring to Thomas Gallagher, et al., "Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors," 289(8) *J.A.M.A.* 1001-1007 (Feb. 26, 2003).

Remembering these main interests before entering into a discussion with the patient or family member can be helpful. Following a sincere apology at the outset, the physician needs to be prepared to address these common concerns. Being inadequately prepared to do so may give a sense of incompetence, indifference, or deceit and only fuel the problem.

There often is concern that full disclosure may reveal information that may be used against the physician in a malpractice suit at a later time. The American Medical Association advocates a "Code of Medical Ethics." The code attempts to address concerns regarding disclosure.

It states, "A physician is ethically required to inform the patient of all the facts necessary to ensure understanding of what has occurred," and "[c]oncern regarding legal liability that might result following truthful disclosure should not affect the physician's honesty with a patient."

"Healing Words" author Michael Woods proposes that since physicians are required to obtain informed consent prior to delivering medical treatment, they should view full disclosure as an extension of continuing informed consent. As part of giving informed consent to undergo treatment, the agreement between the physician and the patient is that the physician

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will continue to offer care and give information regarding continuing conditions, complications, and treatment plans.

One example of early intervention involving disclosure and apology is seen in the University of Michigan Health Care System, which adopted a new policy for handling malpractice claims based on three principles. First, the hospital wants to compensate quickly and fairly when unreasonable medical care caused injuries. Second, it wants to vigorously defend the accused when care was deemed to be reasonable and not to be the cause of injuries. Finally, the system administration wants all health care providers to learn from mistakes and the patients' experiences. David Ollier Weber, "Who's Sorry Now?" 32(2) *Physician Executive* 6-14 (March/April 2006).

The idea behind this approach is for the hospital to recognize mistakes and mishaps, and show they are willing to take measures to mitigate the situation promptly. With the hospital administration's support, physicians are encouraged to be honest in dealing with adverse outcomes.

THE TORO EXPERIMENT

In "Apology and Organizations: Exploring an Example from Medical Practice," 27 *Fordham Urb.L.J.* 1447 (2000), University of Florida Levin College of Law Prof. Jonathan Cohen discussed Toro Co.' experience and results from incorporating a more empathetic approach to claims.

Toro manufactures lawn-care products including power mowers, blowers and trimmers. These are the kinds of tools that lead to serious personal injury, often due to user negligence, ignorance, or misuse. Toro may have as many as 125 personal injury lawsuits annually. Andrea Gerlin, "Accepting Responsibility by Policy," A18 *Philadelphia Inquirer* (Sept. 14, 1999).

For years, "Toro handled all lawsuits filed against it by immediately referring them to outside counsel to be aggressively defended. [The strategy, said] Toro's assistant general counsel James Seifert, could be summed up as 'litigate everything.'" J. Stratton Shartel, "Toro's Mediation Program Challenges Wisdom of Traditional Litigation Model," 9 *Inside Litigation* 10 (June 1995).

This is commonplace at the manufacturer's level. It is a prophylactic practice that calls for millions for defense, but not a penny for contribution. [This is a paraphrase of a frequently quoted line from the late John Costanzo, of the firm Hillsinger & Costanzo. The authors believe it is a variation of a quote attributed to Thomas Jefferson. He was referring to refusing to pay North African pirates for repatriation of our kidnaped sailors.]

Manufacturers have great incentive to spend as many resources as necessary to discourage assaults by plaintiff's attorneys. Although an individual lawsuit may be crucial to a plaintiff, it is still only one piece of litigation. On the other hand, the manufacturer faces a potential suit for *each* product it places in the stream of commerce. It is a common belief that if the manufacturer does not vigorously defend *every* suit, its exposure potentially includes expenses for recalls, retrofitting, and loss of market position. Furthermore, any suit may serve as the "precedent" for subsequent suits derived from the same product or factual scenario.

The manufacturer's choice also may be based on a cost/benefit process, attributed to Ford in its analysis of the Pinto. E.S. Grush & C.S. Saunby, "Fatalities Associated with Crash-Induced Fuel Leakage and Fires," Ford Motor Corp. Environmental and Safety Engineering Interoffice Memorandum (Sept. 18, 1973). This document often was associated with the Pinto litigation. But it was created to analyze whether Ford vehicles could comply with updated Federal Motor Vehicle Safety Standards and Regulations promulgated by National Highway Traffic Safety Administration in the early 1970s. There doesn't appear to be any evidence that a jury saw this document or used it in any deliberation.

In 1991, Toro began to take another approach. It was one of the first major corporations to respond to claims in a conciliatory manner, offering to begin the process first by mediation. John J. Upchurch, "Pre-Litigation Resolution of Claims through Early Intervention/Mediation," *Revolutionizing Litigation Management Report* 9 (June 1995). See also John D. McKinnon, "Cutting Legal Fees," *Florida Trend* 27 (May 1996)(describing Toro's adoption of mediation "as a way of trimming its fast-growing litigation cost"); Miguel A. Olivella Jr., "The Toro Company's Early Intervention ADR Program" 3 (September 1999) (unpublished paper on file with *Fordham Urban Law Journal*) (describing the adoption of a "pre-litigation intervention program that featured mediation as the cornerstone of claims disposition"); "CPR Institute's June 2002 Spring Meeting," 20 *Alternatives* 137 (September 2002), and Miguel A. Olivella Jr., "Toro's Early Intervention Program, After Six Years, Has Saved $50M," 17 *Alternatives* 65 (April 1999).

In mediation, after exchanging essential information about the claim, Toro's counsel typically would express sympathy for the claimant's injury and then make what Toro saw as a fair settlement offer. It should be noted, while Toro's representative expressed sympathy for the human plight the plaintiff was in, counsel did not usually make a complete, unequivocal apology—as discussed in Part I last month—one which accepted full responsibility in addition to apologizing.

In an interview, Toro National Mediation Counsel Miguel A. Olivella Jr. told Prof. Cohen:

> Apology to an injured claimant has been something I do from the beginning [of the mediation]. It lets the claimant know that despite the accident's fault, no one takes any pleasure in knowing that a human being has been injured, seemingly putting the claimant more at ease when he discovers that the company is not the cold, cruel evil empire he may have thought we were. In the context of a mediation, it is possible to act in such a fashion without it being a sign of weakness. [Electronic correspondence from Miguel A. Olivella, Jr. to Jonathan R. Cohen (Dec. 3, 1999).] Some may describe this statement as crafty. By strongly expressing sympathy, the statement gives the claimant the feeling of having been apologized to without an actual admission of Toro's fault. I, however, do not see it as fundamentally duplicitous.

THE NUMBERS AREN'T NUTS

The defense bar thought Toro was nuts. But the numbers tell another story.

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Anecdotally, it seems to be typical that under a more conciliatory approach, cases settle more expeditiously and more economically. As Cohen wrote about Toro:

> Pre-1991, the average lifespan of a claim from filing until settlement or verdict was twenty-four months, whereas from 1992 to 1996, the average lifespan was four months. Pre-1991, the average payout per claim on both verdicts and settlements was $68,368. From 1992 to 1996, it was only $18,594. Pre-1991, the average costs and fees per claim were $47,252. From 1992 to 1996, they were only $12,023. In sum, Toro's average total cost per claim fell from $115,620 to $30,617, saving Toro $54,329,840 during that period. In addition, Toro saved on insurance costs. Based upon the documented liability savings following the adoption of the new program, Toro's liability insurance premiums were reduced by $1.8 million per year for three years, after which Toro opted to self-insure. The savings have continued beyond 1996. Toro's counsel Miguel Olivella, Jr. estimates that by 1999, the Toro Company saved over $75 million from the new approach to settlement that it had adopted in 1991.

See generally Cohen, 27 *Fordham Urb. L. J.* 1447 (2000).

Toro has a specific program to direct cases to mediation. Motorola did the same thing for several years. While the numbers and statistics indicate the number of mediations, we still do not have accurate studies on the satisfaction of the results. Mediated resolutions were confidential. All statements made within the mediation environment were contractually deemed confidential and inadmissible. We are left only with the common experience that mediated results seem to be adhered to by the parties with some degree of frequency.

A decade ago, coauthor Michael Rainey interviewed Motorola's general counsel at its Schaumburg, Ill., campus. The company opened its files and shared raw data. In 1998, of 25 wrongful discharge cases filed against Motorola, the company had attempted to push all toward mediation. Twelve were absolutely resistant. Consequently, Motorola responded, did the discovery, and filed summary judgment motions. Motorola won 12 of 12. Of the remaining 13 matters, one settled on the courthouse steps. The remaining 12 went to mediation. In one memorable case, the plaintiff obtained a significant sum as damages, and retained his job. At the time of the file review, the employee had risen through middle management and appeared to be doing well in the organization.

Toro's savings showed in its average total legal costs per claim, which fell to $12,023, from $47,252 . In the Lexington VA medical center case, the data on decreased litigation costs were far less precise; Toro's experience, however, is suggestive of how significant rapid and conciliatory settlement techniques can be in reducing litigation costs.

* * *

To paraphrase the Bard, "To apologize or not apologize, that is the question." Will an apology subject the one giving the apology to the "slings and arrows" of outrageous litigation? Will it preclude the litigation, or mitigate the damages?

Past evidence of the value of the apology was primarily anecdotal. Such "evidence" is dicey and not a good foundation for a risk management program.

In the past decade, there has been significant attention on the value and effectiveness of a remorseful apology. A number of the articles have been cited here. Additionally, state legislatures, academics, and state bars have all been looking at the power of apology. While it is accurate to say the final jury is still out, we can assert some general premises.

The absence of apology or showing of sympathy, especially where there is clear liability is not a good thing. Studies show judges, juries, and other decision makers attribute strong negative beliefs to the unremorseful actor.

A showing of sympathy or a noncommital apology is beneficial at some level. It also is a double-edged sword. Under some circumstances, it can actually exacerbate the problems.

A sincere, well-delivered apology which assumes responsibility has shown to be the most effective means for errant actors to avoid litigation or excessive damages. Although, even an excellently executed apology may have little or no effect under a number of circumstances, such as highly emotional situations where there is excessive acrimony or situations where there are serious or extensive damages.

Finally, the best advice for a party contemplating making an apology in a serious business dispute or litigation, is to meet with a skilled attorney who is knowledgeable and experienced in the ADR field. Yes, litigation is a dispute resolution process, and it might be appropriate in some cases, but it has a big price tag and a lot of collateral damages. It makes sense . . . and dollars, too.

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Mediator Evaluation

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appropriate. Distinguishing that point can be difficult, and you know your clients' temperaments best. So, litigators, if the time for evaluation seems ripe to you, please say so if the mediator doesn't raise it first.

3. *What form should the evaluation take?*

A mediator's evaluation can take as many forms as there are stars in the heavens. The ABA Task Force report lists some of the most common: Asking pointed questions that raise issues or imply answers; giving an analysis of the case including strengths and weaknesses; making predictions about likely court results; suggesting possible resolutions or specific settlements, and applying some pressure.

Most experienced mediators are adept at all of these techniques, and more. Are some likely to be particularly effective with your client? How much pressure do you