



“Mea Culpa” in the Courtroom: Apology as a Trial Strategy

By Kevin Bouilly Ph.D.

In April of 2006, notable media mogul Hugh Hefner apologized to Jessica Alba for the unauthorized use of her photo, prompting the actress to halt pending legal action against Playboy magazine. Just a few years earlier a woman paralyzed in an accident associated with faulty tires on a well-known SUV settled her case for about one third of the \$100 million she originally sought. The shift occurred after defense attorneys offered the woman a bedside apology. Similar examples in legal as well as popular news abound, and the legal community has taken notice. Yet, many remain skeptical of apology's utility, partly because anecdotal evidence like the two stories above has been more available than sound research and evidence supporting apology's effectiveness, particularly its effectiveness in trial. Can apology really improve trial outcomes?

Listening to mock jurors as well as actual jurors confirms that jurors are familiar with apology and are highly attuned to its many forms. This should come as no surprise. Apologies occur constantly in everyday life, often in the simple form, “I’m sorry.” Recent media attention and empirical research also confirm that apology has a significant role in the legal system and litigators are right to pay attention. A proven strategy for preventing litigation, legal scholars also argue for apology's increased use in mediation, alternative dispute resolution, and settlement negotiations—and the attention continues to grow.¹

Apology's benefits can extend to trial as well. Defendants, and especially defendants with demonstrable overt responsibility, may benefit from apologizing at trial for the very same reasons apology prevents litigation in the first place. Apologetic communication can assuage hurt feelings, disarm anger

¹ Cohen, J.R. (1999). Advising clients to apologize. *Southern California Law Review*, 72, 1009-1069.

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and resentment, and lead to more positive evaluations by third party jurors.² Failure to achieve these effects can equate to real consequences for parties in litigation. However, the questions remain: Is apology a viable option in your next case? Is its impact beneficial more often than it is damaging? How can it be successfully incorporated into an effective trial message?

Strategic Communication Choices

A defendant alleged to have engaged in illegal behavior can employ innumerable strategic communication alternatives during the course of litigation. With regard to the expression of remorse, however, the effective choices are simple.

1. make no mention of apology or remorse
2. express a partial apology
3. express a full apology
4. express a lack of remorse

Most common are trial communication strategies lacking any mention of remorse or apology, in favor of an assertive defense. Indeed, most cases don't call for apologetic communication in any form. However, the strategic decision to apologize is becoming a more central part of litigation and may be more nuanced than once believed, particularly with regard to the distinction between a partial and full apology.

Social science research clearly defines the components comprising complete or "full" apologies in comparison to less complete "partial" apologies.³ A partial apology generally contains a single element, an expression of remorse, and commonly takes the form of "We're sorry..." An effective partial apology confines remarks to expressions of remorse rather than any expressions of blame, unlike alternative forms which often include excuses or deflective communication that can reduce sincerity by taking the form of "We're sorry, but..." Not surprisingly, jurors are keen to the differences.

A full apology incorporates the first and most critical element, an expression of remorse, accompanied by three additional elements. The second is an admission of responsibility for the relevant action. The third is an offer to repair any damage caused by the action, and fourth, a promise of reform to correct the behavior and prevent similar damage in the future. Research confirms that each of the four elements provides an independent and additive effect, proving the value of a full apology lies in its completeness.⁴ Consider the following shortcut to understanding the components of a full apology.

Jurors appreciate a full apology because it expresses a defendant's willingness to acknowledge wrongdoing and cede power to a victim or third party in exchange

| A FULL APOLOGY: THE FOUR 'R's | |
|-------------------------------|---|
| ELEMENT | EXEMPLARY STATEMENT |
| Remorse | The people of Acme Corporation want Mr. and Mrs. Jones to know they are extremely sorry, and you'll hear them express their remorse in this trial. |
| Responsibility | Acme Corporation takes full responsibility for what happened. |
| Repair | We want Mr. and Mrs. Jones to know we are willing to make this situation right and do whatever we can to remedy the damage they have experienced in this case. |
| Reform | Acme Corporation has already begun to implement changes in its policies, the supervision of its employees, and its procedures in order to prevent a similar outcome from happening in the future. |

² See generally, Scher, S.J., & Darley, J.M. (1997). How effective are the things people say to apologize? Effects of the realization of the apology speech act. *Journal of Psycholinguistic Research*, 26, 127-140.

³ *Id.*

⁴ *Id.*

for vulnerability. The full apology empowers the victim and/or jurors delegated to sit in judgment. A full apology also responds to the critical relationship among severity of harm, responsibility and apology. As the severity of harm and the amount of responsibility increase, so does the requirement for an elaborate, sincere, and complete apology.

A handful of incomplete apology options are not included as effective litigation alternatives. The classic example of Exxon's "botched" apology is one example of an ineffective apology that jurors easily identify and harshly criticize.⁵ This failed apology expressed remorse but deflected any responsibility for the consequences that ensued. Such a failed apology has many cousins, all of which communicate the message that while your client is saying they are sorry for what happened, they don't believe it was their fault, they aren't interested in repairing

the damage, they aren't truly interested in fixing the problem, and by the way, they aren't really sorry. This communication is fundamentally different from partial

and full apologies because it adds the deflective or excusatory communication that fuels rather than reduces juror anger. Unfortunately, examples of companies and defendants offering these inept apologies are numerous and memorable, highlighting the critical importance of understanding the impact of apology and its effective forms.

The Impact of Apology

Empirical research and experience establish apologetic communication's effects across many social situations. Research proves apology leads to more positive judgments of transgressors and reduced anger and punishment levied against them.⁶ It works primarily because apology alters the social dynamics and influences how

victims and third parties evaluate transgressors and their identities.

However, litigators are most interested in whether or not apology recipients, and jurors in particular, perceive the differences in the various apology forms and how those forms can be maximized for a client's benefit. Jurors do perceive the differences between a trial argument offering an apology and one that does not, and make differing attributions based on the number and nature of components included in apologetic communication.⁷ Recent research finds that compared to defendants offering no apology at all, mock jurors perceive defendants offering a full apology as more sincere, more apologetic, more willing to compensate the plaintiff, more accepting of responsibility, and more willing to correct the situation.⁸

The expression of remorse included in a partial apology may be the most critical component, making partial apology a useful option in the right circumstances.

Third party mock jurors perceive defendants offering a full apology as having higher moral character, being more regretful, and taking greater care in the future, and have been

found to experience reduced anger, greater forgiveness and offer greater sympathy to the defendant.⁹ Full apologies can also lead to greater acceptance of settlement offers.¹⁰

The news isn't all in favor of a full apology, however. Jurors are also more likely to attribute greater responsibility to a defendant offering a full apology, supporting litigators' primary fear that apology increases liability.

Clearly, apology influences jurors' perceptions of a defendant. However, despite the perception that partial apologies have fewer benefits and a greater risk of backfire, a simple "We're sorry" without accepting responsibility, promising forbearance, or offering repair is not necessarily an ineffective alternative for defendants. Full apologies lead to greater perceptions of

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⁵ Lazare, A. (1995). Go ahead, say you're sorry. *Psychology Today*, 45.

⁶ Darby, B.W., & Schlenker, B.R. (1982). Children's reactions to transgressions: Effects of the actor's apology, reputation and remorse. *British Journal of Social Psychology*, 28, 353-364.

⁷ See generally, Scher, S.J., & Darley, J.M. (1997). How effective are the things people say to apologize? Effects of the realization of the apology speech act. *Journal of Psycholinguistic Research*, 26, 127-140.

⁸ Bouilly, K.R. (2005). "Mea Culpa" in the courtroom: Juror perceptions of defendant apology at trial. Unpublished dissertation. The University of Kansas.

⁹ Robbenolt, J.K. (2003). Apologies and legal settlement: An empirical examination. *Michigan Law Review*, 102(3).

¹⁰ *Id.*

defendant responsibility and partial apologies are generally no worse than offering no apology at all.^{11,12} There is very little support for the conclusion that a partial apology negatively impacts a defendant. Instead, the expression of remorse included in a partial apology may be the most critical component, making partial apology a useful option in the right circumstances.

However, while anecdotes persist there remains little empirical support that apology in any form affects a defendant's bottom line at trial, at least in the form of damage awards. While empirical evidence shows apology can increase perceptions of responsibility and liability, only theory and anecdotal experience support the view that apology can mitigate damages. In one study of corporate negligence, different forms of apology didn't impact any trial outcomes, including attributions of comparative negligence, economic damages, non-economic damages and punitive damages.¹³ Litigators should find this less as a reason to ignore apology and more a reason to consider the effective and strategic use of its specific forms.

Apologizing Is Not a Concession of Liability

Litigators often fear apologizing and admitting any responsibility is tantamount to giving up on liability in exchange for a hopeful break at the damages phase. Jury research and practical experience demonstrate jurors don't see it that way. Jurors are willing to more positively evaluate parties that take appropriate responsibility for actions related to the dispute—even if the scope of those actions is narrower than the behavior directly to legal liability. For instance, once a party has explained how it met its responsibilities in a multi-party contract, jurors are often pleasantly surprised to hear the same party admit responsibility or express remorse for less critical behavior and choices that could have been handled differently.

There is overwhelming evidence that refusing to apologize can lead to negative outcomes in the public sphere and in litigation.

When narrowed to the appropriate scope, admitting safe responsibility or expressing remorse can occur without admitting liability and pointing out what distinguishes responsibility from liability can be an effective way of gaining credibility without capitulating. It is clear that parties can benefit from owning their behavior and apology is one way of communicating remorse and responsibility, making it a useful communication alternative to consider when evaluating your trial strategy options.

Your Trial Message

Apologetic communication is nuanced and highly dependent on specific human circumstances. While there have been significant strides in the research, there are no hard and fast rules defining exactly how and when litigators should incorporate apology in the course of trial. However, there is overwhelming evidence that refusing to apologize can lead to negative outcomes in the public sphere and in litigation, and that an appropriate apology can lead to some powerful and positive results. Victims desire apologies and jurors are attuned

to the various forms apologies take, including the idiosyncrasies of insincere, poorly timed, or "botched" apologies. Confidently advise your clients that apology can be an effective strategy by knowing

the circumstances that cause victims and jurors to clamor for a particular response, and being mindful of the best possible time to provide that response.

Timing Is Critical

First, consider the critical importance of a well-timed apology. In some circumstances, apology at trial may be too late to affect a defendant's trial outcome. There is no doubt that timeliness is directly related to an apology's sincerity and jurors may perceive the decision to apologize on the eve of trial as "a settlement tactic, not

¹¹ Bouilly, K.R. (2005). "Mea Culpa" in the courtroom: Juror perceptions of defendant apology at trial. Unpublished dissertation. The University of Kansas.

¹² Robbennolt, J.K. (2003). Apologies and legal settlement: An empirical examination. *Michigan Law Review*, 102 (3).

¹³ Bouilly, K.R. (2005). "Mea Culpa" in the courtroom: Juror perceptions of defendant apology at trial. Unpublished dissertation. The University of Kansas.

a sincere expression of regret.¹⁴ An early and immediate apology can often defuse anger and prevent litigation, a positive benefit of reacting sincerely and immediately in the wake of a transgression. However, there is also some research suggesting an early apology combined with a trial apology can increase damage awards against apologetic defendants in medical malpractice suits.¹⁵

Jurors' perceptions of defendant behavior are critical. A pattern of repeated apologetic communication for a single incident may give jurors greater certainty of the defendant's overt responsibility and legal liability. A lack of specific apologetic communication leading up to trial may make jurors certain an apology at trial is nothing more than a manipulative strategy. Clearly, timing is critical. Organizations that engage in ongoing public communication find that timely, efficient and strategic apology can provide restored social status, public forgiveness, and a return to levels of social acceptance enjoyed before the transgression.¹⁶ It represents an opportunity for the organization to communicate its core values, demonstrate them to the jury-eligible public and manage lasting impressions. In other instances, a specific case may clearly warrant apology as a communication strategy at trial. In those instances, your message depends on additional factors like those discussed below that influence the impact of your apology options in front of a jury.

Utilize Your Options

Consider your potential apology options when the following evidentiary and injury conditions are present.¹⁷

1. A Partial Apology—Maximize its utility when the strength of the evidence is ambiguous and the injury severity is minor. Mock jurors' and actual jurors' comments confirm the belief that victims and jurors generally require a less complete apology when the injury is less severe.

An expression of remorse should not increase attributions of responsibility when injuries are minor and can often serve to influence perceptions of the defendant and improve identity evaluations. Your opening statement or closing argument should incorporate simple language expressing remorse.

2. A Full Apology—Maximize its utility when the strength of the evidence is clear and the injury severity is major. The risk of increasing perceived responsibility with a full apology is reduced because the evidence of responsibility is already strong. Instead, this situation allows you to put the benefits of apology in play without significantly increasing the risks. Recent juror interviews confirm the value of a full and sincere apology in such circumstances. After the wrongful death of a young man, jurors wanted to hear corporate witnesses express remorse and prove they were serious about preventing similar accidents in the future. Victims and jurors want acknowledgement in this scenario, and will likely perceive a partial apology or failed attempt at a full apology as evasive and incomplete.

3. An Assertive Defense Without Apology—Clearly, there are many instances where this approach is warranted. Generally speaking, apology as part of an attorney's trial message remains somewhat rare. Avoiding apology may be critically important when the strength of evidence is ambiguous and the injury severity is major. Substantial damages exposure due to serious harm coupled with an apology that may increase liability is likely to be a scenario you want to avoid.

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¹⁴ Shuman, D.W. (2000). The role of apology in tort law. *Judicature*, 83(4), p.185.

¹⁵ Bornstein, B.H., Rung, L.M., & Miller, M.K. (2002). The effects of defendant remorse on mock juror decisions in a malpractice case. *Behavioral Sciences and the Law*, 20, 393-409.

¹⁶ Benoit, W. (1995). Sears' repair of its auto service image: Image restoration discourse in the corporate sector, *Communication Studies*, 46(1-2), 89-105.

¹⁷ Robbenolt, J.K. (2003). Apologies and legal settlement: An empirical examination. *Michigan Law Review*, 102(3).