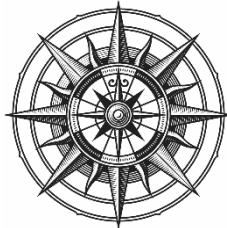


Crisis Counsel

Navigating Legal and Communication Conflict



by Tony Jaques, PhD

Print – ISBN: 978-1-944480-65-3

EPUB – 978-1-944480-66-0

WEB PDF – 978-1-944480-67-7



**ROTHSTEIN
PUBLISHING**

A Division of Rothstein Associates Inc.

www.rothsteinpublishing.com

EXCERPT

COPYRIGHT ©2020, Tony Jaques

Some case studies and tables reproduced by permission of Oxford University Press Australia from *Crisis Proofing* by Tony Jaques, copyright © Oxford University Press, www.oup.com.au.

Chapter Two copyright ©2020 Tony Jaques and SenateSHJ.

All Rights Reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form by any means, electronic, mechanical, photocopying, recording or otherwise, without express, prior permission of the Publisher.

No responsibility is assumed by the Publisher or Authors for any injury and/or damage to persons or property as a matter of product liability, negligence or otherwise, or from any use or operation of any methods, products, instructions or ideas contained in the material herein. Local laws, standards and regulations should always be consulted first as well as your legal counsel before considering any advice offered in this book.

Print – ISBN: 978-1-944480-65-3

EPUB – 978-1-944480-66-0

WEB PDF – 978-1-944480-67-7

Library of Congress Control Number: 2020938672

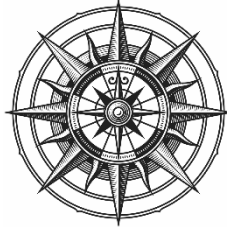


A Division of Rothstein Associates Inc.

4 Arapaho Road
Brookfield, Connecticut 06804 USA
203.740.7400

info@rothstein.com

www.rothsteinpublishing.com



WHAT YOUR COLLEAGUES ARE SAYING ABOUT ***CRISIS COUNSEL***

A must read for every enlightened CEO, Communication Specialist and Corporate Lawyer... should also be mandatory reading for every lawyer who advises on risk and liability, and every legal or communications student who has an eye on their future. – Jeni Coutts LLB, Corporate Affairs Specialist, Australia

Extremely useful to legal and communication professionals. Both will gain a better understanding of the other's viewpoint during a crisis. Senior executives will also benefit tremendously... Numerous cases of crises from around the world, interviews of global experts in crisis communication and senior legal practitioners... I highly recommend this book. – Daniel Laufer, PhD, MBA, Associate Professor of Marketing, Victoria University of Wellington, New Zealand

...Should be required reading for all the communications professionals who now add “crisis” to their websites, lawyers who venture into crisis advice, and quite frankly, anyone who wondered what it would be like to have to be a decision maker in a crisis rather than a critic. – Richard Levick, Esq., Chairman & CEO, LEVICK, USA

Inspiring from beginning to end. Exceptionally well written and very logically structured... everything is put so nicely into context. – Esben Hostager, CEO, Hostager Solo, Denmark

...Should be mandatory reading for senior managers who find themselves in the C-suite for the first time. Such specific legal and communications provocations are not covered in university management courses... replete with illuminating case studies and key takeaways... sage advice for Chief Executives who must ultimately make a decision based upon what they think is the right thing to do, often under pressure. Crisis team leaders and members will find this book equally of value. – Jim Truscott, Director, Jim Truscott & Associates Pty Ltd, Australia

A valuable resource for those responsible for risk, reputation, and organisational culture and strategy... provides insights and examples that will be greatly appreciated by CEOs, communication and legal professionals alike. –

**Neil Green, Chief Executive,
SenateSHJ New Zealand**

A wonderful book for legal and communication practitioners... rich with useful case studies and the thoughts of lawyers from around the world. A big strength is how it deals not just in process but also in relationships. A timely book, a must read for lawyers, communicators, executives, boards and others. –

**Darren Behar, Managing Partner,
Australia, SenateSHJ**

A critical resource for effective incident or issue communication. Pertinent case studies, provocative questions and clear guidance combine in this rich resource for communicators. A commitment to effective, accurate and timely communication shines through every page... Buy three copies of this book: one for you, one for your corporate attorney one for your CEO. –

**Marc Mullen, President, Marc Mullen
Crisis Communication Consulting,
USA**

...The role of lawyers in crisis management has been neglected. If discussed at all, it is often in negative terms. Tony Jaques adjusts this picture in masterly, yet eminently readable terms. His comprehensive discussion of apology in crisis management is likely to be a go-to source for years to come... A welcome book for anyone interested in how crisis-confronted corporations (and other organizations) can navigate the tricky legal waters of communicating under fire... A rich source of well-researched case studies. A gem!

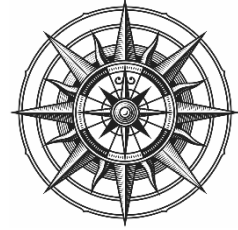
**– Chris Galloway, PhD, Head of
Public Relations, Massey
University of New Zealand**

Provides riveting case studies and practical advice... highlights the financial and reputational risks of not effectively integrating communication and legal counsel... should be on every communication practitioner's reading list and companies should insist their legal counsellors read it. –

**Noel Turnbull,
Former Chair, Turnbull Porter
Novelli, Australia**

I recommend that a leader facing major issues and crises read this book. You'll make better decisions if you do. –

**Tony Langham,
CEO, Lansons**



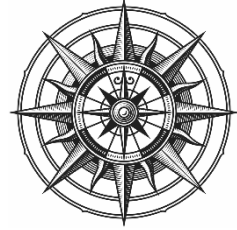
DEDICATION

Dedicated to the memory of my father Pat Jaques
1903-1980.

ACKNOWLEDGEMENTS

For data collection for Chapter Two, thanks to SenateSHJ and its PROI network partners, Lansons in the UK, The Vandiver Group in the US, and Brown & Cohen in Canada. Thanks also to the lawyers who contributed their expertise and insights.

EXCERPT



FOREWORD by DR. ROBERT HEATH

Tony Jaques is the right person to provide *Crisis Counsel: Navigating Legal and Communication Conflict*. The first evidence to support that claim comes early in the book when he compares the assessment provided by General Counsel and by the Communications Director following an explosion and chemical release at a manufacturing facility. Experienced readers will find the contrasting advice of these two archetypical individuals to be familiar. Readers who are novices in crisis response must mark that dramatic moment. It is a tug-of-war between two disciplines whose training and experience confront management with a difficult choice. Whose advice to follow?

Is the best advice to cautiously say little and challenge others to force the company to defend itself, a litigation model? Or should the company speak out to demonstrate that it cares and to protect its reputation, a mitigation model? Which advice should the management team adopt?

Readers will appreciate Jaques' selection of cases. Crisis communication is one of the most researched aspects of the public relations discipline today. A veteran quickly realizes that what a lot of research uses as its basis is at best a bad news day that will be gone tomorrow, leaving no tracks in the sand. Jaques makes the point that a true crisis can have lasting reputational and financial damage. It can

pose response choices, none of which lead to optimal answers. Now, this is a serious topic!

Jaques' valued advice draws on his years of work with issues management. It helps him cut to the heart of threats. It helps him point out that crises are unsettled matters. How legal counsel and communication can work together to help such matters be settled to the satisfaction of various contexts, courts of law or public scrutiny.

His perspective on this topic evolves slowly, methodically. That helps readers to understand the fair-minded teamwork required for examining and addressing the many aspects of a crisis. Listing the array of crises which he features also allows other voices at the management table to come through. He notes that discipline specialists such as environmental engineers or technology experts provide insights and substance which move each crisis beyond being merely a "legal" crisis.

It takes a team to manage a company's response to a crisis. The challenge is to make the most of the expertise needed and available. Also, it is important to understand the presumptions that underpin professionals' training. Thus, team management needs to recognize collective expertise rather than presuming that a lawyer should lead crisis management.

A benefit of this book, (especially for junior practitioners, legal counsel, or students,) is the presentation of the roles communicators play in a crisis. The more the crisis team members know about each other's specialization, the better collaboration can occur. It can reduce stereotyped comments, such as telling the communications director "to make it go away." "Communication" is *not* a magic bullet.

Jaques emphasizes how both general counsel and communications directors need to know each other's roles, procedures and expertise. The cases featured do an excellent job of providing concrete illustration of Jaques' advice. Each offers ample information about timeframe differences between a "communication" response and a "legal" response to crisis. The public communication phase can last a few days and might recur as legal events recur. In fact, it is often the case that communication about a legal event, a trial or ruling, may require the presentation of historical detail so that individuals who have not monitored or even known about the crisis can put a trial or ruling into context.

The cases emphasize the need for “leadership,” which includes helping to set agendas of various kinds. Leaders help set the tone of crisis response, often more inadvertent and less strategic than they might wish. Tone can be conciliating or provocative. Tone has legal as well as reputational implications. Tone can be street friendly or laden with legal jargon; both suggest the character of the company and its leaders.

Chapter 4 takes up the timeless topic of apology. Sorry, did I state that well? People in general, and some cultures more so than others, use apology routinely, ritualistically, even indifferently. As a rhetorical device, it is as ancient as the Golden Age of Greece, rhetorical apologia. Today, in social media, it can be expressed by emoji. Jaques poses both a reputational cost argument as well as common decency theme to guide the use of apology. I recommend the reader look at his “reasons for your organization to apologize” and ponder them until they become top of mind. Apology is best when it is mindful. It may be one element of crisis response, not the “only” element. But other elements may fail without a heartfelt and appropriate apology.

Jaques reasons that leaders need to know when and how to apologize. To that end, he recognizes the strategic advantage of critically, reflectively observing mistakes, but also notes the importance of recognizing “what was done well.”

Throughout this book, and especially relevant to crisis, the topic of perception is persistent. Lots of do’s and don’ts of media relations come down to strategies for influencing perception. It has a legal angle, as well as a communication one. Jaques’ core advice is this: “perception of an organization during a crisis often has a far greater impact on reputation and recovery than the crisis itself.” Reading that statement on a hot June day in Central Texas, I was reminded of a senior practitioner at a major utility company who contracted a misting company to cool down customers who were patiently waiting outside for rebates. The resulting headline was: “Utility company hoses customers.”

Jaques emphasizes that what is said, how it is said, and where it is said counts, for better or worse. It may require, he adds, that spokespersons need the “capacity to communicate empathy as well as authority.” On this matter, and many more, Jaques’ rich reservoir of cases, lines, examples, and illustrations help fix key points into readers’ minds. However good a spokesperson is, the total effort requires teamwork.

This book offers sound information and advice which can be consumed quickly. But, it also can be consumed slowly. It is provocative. Quick reading can help bring a novice up to speed, but slow reading with a fair amount of pondering involved gives the wisdom of years in the trenches time to penetrate the reader's judgment. Developing informed and ethical commonsense can be a slow and thoughtful process.

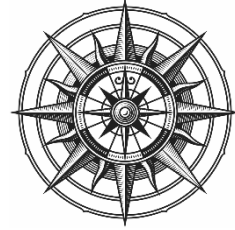
Chapter 8 brings the discussion of the previous chapters into focus and sets the scope and purpose of the chapters that follow by emphasizing the leadership need to do what's right: the balance of liability versus responsibility. Cases, quotations, best practices, and commonsense blossom into a coherent philosophy for responding to crisis in a collaborative manner. Jaques likes to provoke insightful pondering by asking questions such as "did the company do the right thing?"

I have known Tony Jaques for nearly two decades. I read his online commentary and have read other of his publications. I can hear his voice, and even know when his wit is adding an edge to his commentary or it is softening the blow. Reading his book reminds me of what I read not too long ago about aging: Young people remember names, dates, and myriad other facts; older people have to rely on wisdom gained by experience. Wisdom is more than knowing; it is recognizing the value of what one knows, and why it makes a difference.

This book impresses upon novices and reminds "experts" that crisis response demands preparation, planning, and collaborative response. Given the multidimensionality of crisis, response also needs to be multidimensional. Apropos to the theme of the book, and foretelling a successful career, Tony Jaques emphasizes the need for leadership navigation: "*lawyers and communicators need to respect each other's expertise and need to work better together in the interests of the whole organization.*"

Dr. Robert Heath

Emeritus Professor of Communication
University of Houston
Jack J. Valenti School of Communication
Houston, Texas USA
July, 2020



FOREWORD by HELIO FRED GARCIA

I have been a crisis advisor for more than 35 years and have taught crisis management and crisis communication in graduate business and professional schools for more than 30 years. I have advised lawyers and been hired through lawyers to advise our mutual clients. I have taught lawyers through bar associations and have trained individual lawyers in crisis management. And I have fought with lawyers; sometimes I have won those fights. And I have learned from lawyers.

A typical interaction is this: In the CEO's office the lawyer will give all the legal reasons to say as little as possible in the early phases of a crisis. The CEO will then look at me.

My reply, "I believe you have received excellent legal advice. And you should take it seriously. But please recognize that you don't have a legal problem, at least not yet. You have a business problem. And you need to make a business decision. You need to consider the risk of legal liability seriously. But not exclusively. You should also consider the consequences of the loss of trust of those who matter to

you: your employees, customers, investors, regulators, and others. You can protect yourself from legal liability that will play out years from now but lose the company in the process. Or you can attend to the immediate needs and concerns of your stakeholders now, in ways that manage future legal liability.”

It’s very hard for the lawyers to object to that. I then offer, “Between self-defeating silence and self-destructive blabbering, there’s lots of room to maneuver.” I then ask the lawyer about categories of possible communication:

- Acknowledge: Can we acknowledge awareness of what has happened? The answer is usually Yes.
- Can we express empathy toward those who are affected? The lawyers usually say, Yes, but we need to be careful not to admit blame. My reply, Great. Let’s do it carefully.
- Can we declare our values? We typically have them published on our website.
- Can we describe the overall approach we will take to address the crisis and resolve it? The lawyers usually say we need to be very careful. I again reply, Great. Let’s do it carefully.
- Can we make some kind of commitment? How about a procedural commitment: We’ll update you when we know more. Or a substantive commitment: We’ll get to the bottom of this and fix it.

This often leads to the lawyers and communicators collaborating early in the crisis to find the balance. It doesn’t need to be adversarial or either-or.

Tony Jaques has written a masterful guide to managing the natural tension between lawyers and communicators. *Crisis Counsel: Navigating Legal and Communication Conflict* is a highly readable guide to effective and respectful interaction among lawyers, communicators, and business leaders. He helps us understand the mindset of lawyers and the mindset of communicators, and how leaders can exercise good decision skills. He includes a wealth of real-world examples of well and poorly handled crises from around the world and across forms of organization. It contains both wisdom and practical tools for responding effectively in a crisis. And he quotes a wide range of crisis experts (full disclosure: including me).

This is an important contribution to our understanding of crises, leadership, and decision-making. It's the kind of book I wish I had been able to read when I was just starting in crisis decades ago. And it is a valuable book for lawyers, communicators, and leaders in all sectors.

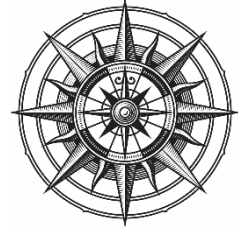
Helio Fred Garcia

New York City

July, 2020

Helio Fred Garcia is the president of the crisis firm Logos Consulting Group. He teaches crisis, leadership, ethics, and communication at New York University and Columbia University. He is the author of five books, including The Agony of Decision: Mental Readiness and Leadership in a Crisis.

EXCERPT



FOREWORD by Tony Langham

As the world has grappled with coronavirus and the resulting economic crisis, reputation has been the key word in the board rooms of major corporations and the inner circles of government. We're discovering if people trust their Government enough to do what it asks them to. We're going to find out which major brands emerge from the crisis with their reputations intact and which leave a bad taste in the mouth.

In March 2020 Warren Buffet called on American Express, in which his company is the largest shareholder, to protect its reputation during the pandemic because "the brand is special."

At a shareholder meeting in May, Amazon boss Jeff Bezos was asked if the increased scrutiny the business was under would harm its reputation with customers, to which he replied that the increased scrutiny would enhance its reputation with customers.

Reputation is, according to American academic and author John Doorley, an assessment of performance, behaviour and communication, underpinned by an assessment of an organisation's authenticity. Most of us working in consultancy and advising on reputation believe that having a clear purpose and real values – and living by those values – is vital to long-term success.

Yet in 2020, we see unresolved reputational crises all over the world. Insurers are arguing over paying business interruption claims to small businesses. Travel operators are fighting to not give back money for cancelled holidays. Major corporations are being challenged over the honesty and fairness of major redundancy programmes.

Across the world, senior leadership teams are having to balance doing the right thing for their customers and staff with limiting legal liability and maximising shareholder returns. The issues at the heart of this excellent book are being played out in board rooms all over the world. CEOs are being faced with sometimes conflicting advice from legal counsel and communication counsel.

I was introduced to Tony Jaques by our friends at SenateSHJ and Lansons was delighted to help with the interviews with lawyers for chapter two of this book. As Tony highlights, the relationships between communication specialists and lawyers are rarely confrontational and are rarely straightforward. Even the words we use cross over. Reputation management is a term used equally by law firms and communications consultancies. In my work, I describe myself as a specialist in managing reputations and will often work alongside a lawyer who says the same thing – but the skills we bring and the advice we give can be very different.

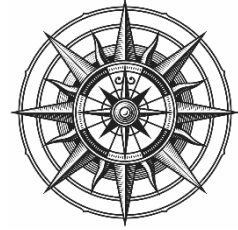
The key to success for the modern CEO in times of crisis is to blend different expertise, which in turn makes it easier to get the big calls right. Tony's book uses real examples and his own experience to help this process. I would recommend that a leader facing major issues and crises read this book. You'll make better decisions if you do.

Tony Langham

London, United Kingdom

July, 2020

Tony Langham is Chief Executive of Lansons, based in London and New York and the author of Reputation Management: The Future of Corporate Communications and Public Relations.



CONTENTS

WHAT THEY'RE SAYING ABOUT CRISIS COUNSEL	iii
DEDICATION.....	v
ACKNOWLEDGEMENTS.....	v
FOREWORD BY DR. ROBERT HEATH	vii
FOREWORD BY HELIO FRED GARCIA.....	xi
FOREWORD BY TONY LANGHAM.....	xv
CONTENTS	xvii
INTRODUCTION: MANAGING CONFLICTING ADVICE, AND WHY IT'S IMPORTANT.....	1
The book will help you to:	3
Structure.....	11
Key Takeaways.....	15

CHAPTER ONE ROLES AND RESPONSIBILITIES: WHO DOES WHAT IN A CRISIS?	17
This chapter will help you to:	18
The Nature of Crises	20
Avoiding the Legal Response Syndrome.....	23
The Role of Lawyers.....	26
The Role of Lawyers in a Crisis	28
The Role of Communicators	32
The Role of Communicators in a Crisis.....	33
So What’s Different?	36
The Decision Maker.....	40
How to get lawyers and communicators working together in a crisis	42
Recognizing the Crisis	43
A View from the Executive Suite	46
Key Takeaways	48
Questions for Discussion	48
CHAPTER TWO LAWYERS’ INSIGHTS	49
This chapter will help you to:	50
Where advice conflicts.....	51
The Risk of Speed.....	53
Who should be in charge?.....	54
Relationships and working better together	56
Perceptions of value	59
Summary of findings.....	63
Key Takeaways	64

Questions for Discussion	64
CHAPTER THREE CASES: PRODUCT CRISES AND WHY THEY HURT..	65
This chapter will help you to:	66
The Boeing 737 MAX Disasters.....	70
Samsung Gets Hot.....	76
Missing the Joke	81
Negative Online Reviews	84
The Pentium Chip Recall	86
Doing Business in China.....	89
A Mouthful of Mouse	95
Chipping Away at Reputation.....	97
Just Cruisin’ Along	99
Key Takeaways	104
Questions for Discussion	104
CHAPTER FOUR WHY SHOULD I APOLOGIZE?	105
This chapter will help you to:	106
What can go wrong	107
Reasons for your organization to apologize.....	110
When Lack of Apology Becomes the News	110
Sometimes it’s Just too Late	114
Apologizing to Reduce Liability.....	120
But I’ve Done Nothing Wrong!	123
The Political Apology	126
Governments	127
Organizations	129

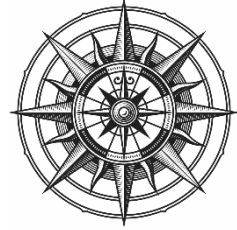
Companies.....	130
Key Takeaways.....	132
Questions for Discussion	132
CHAPTER FIVE HOW TO APOLOGIZE.....	133
This chapter will help you to:	134
A Job Well Done.....	140
The Great Chicken Disaster	144
Eight basic steps towards an effective apology	147
How Not to Do It	154
Words and phrases to avoid in an effective apology	158
Key Takeaways.....	163
Questions for Discussion	163
CHAPTER SIX CASE STUDIES: PATENTLY OBVIOUS RISK	165
This chapter will help you to:	166
Backcountry Claims a Natural Word.....	170
Fast Food Fiascos.....	175
Taking it Up to the Big Boys	180
Who Thought This Was a Good Idea?.....	182
The Value of a Sense of Humor.....	185
Taking on a Charity Icon	188
Key Takeaways.....	196
Questions for Discussion	196
CHAPTER SEVEN DEALING WITH THE MEDIA	197
This chapter will help you to:	198
When it All Goes Wrong	201

Try Humor	204
The Role of Spokesperson	207
Who should be the crisis spokesperson?.....	209
Speaking with one voice	212
Where to Go?	214
Getting Ready to Speak	218
What to Say... and Not Say	220
Dos and Don'ts of Crisis Communication	221
Five Initial Steps for Effective Crisis Communication.....	224
How to Make No Comment.....	225
Key Takeaways	229
Questions for Discussion	229
CHAPTER EIGHT DOING WHAT'S RIGHT – LIABILITY VERSUS RESPONSIBILITY	231
This chapter will help you to:	232
Stepping Up to Do What's Right.....	235
San Ysidro Massacre.....	241
The Ashland Oil Spill	244
The Huntington Beach Disaster	250
A contrast in responses to a major oil spill.....	254
Setting the Tone	255
Apologizing Without Admitting Liability	260
Key Takeaways.....	266
Questions for Discussion	266
CHAPTER NINE MARATHON CASES: IN FOR THE LONG HAUL.....	267

This chapter will help you to:	268
Litigation by Exhaustion.....	273
When Public Health and Profits Collide.....	277
McDonald’s and the Decision to Sue.....	281
A Canadian Soap Opera.....	287
Key Takeaways	292
Questions for Discussion	292
CHAPTER TEN TALKING TO GLOBAL EXPERTS.....	293
This chapter will help you to:	293
Who are the experts?.....	294
Is it Real?	295
The Rise of Social Media.....	297
Reputation and the Two Courts	299
How to Persuade the CEO	301
Who Leads?	304
How to Improve	307
Key Takeaways.....	311
Questions for Discussion	311
Biographies of the Four International Crisis Experts.....	312
Jonathan Bernstein	312
Deon Binneman.....	312
Jonathan Hemus	312
Richard Levick.....	313
CHAPTER ELEVEN WHAT TO DO NOW.....	315
The chapter will help you to:	316

CEO Reputation	317
Trust and Ethical Behavior	318
Social Media Presence	322
The Role of Leadership.....	325
12 Tips to Get the Most from Your Crisis Simulation.....	335
Where to Start?	337
Key Takeaways	338
Questions for Discussion	338
CHAPTER TWELVE LOOKING FORWARD – A PERSONAL PERSPECTIVE	339
Professionalization of communication.....	340
Functional Encroachment	342
What’s to Come?.....	344
INDEX.....	347
ABOUT THE AUTHOR	362

EXCERPT



Introduction

Managing Conflicting Advice, and Why It's Important

A decision is the action an executive must take when he has information so incomplete that the answer does not suggest itself.

US Admiral Arthur W. Radford

It's 2.00 am on a very cold morning and the telephone wakes me up. Working as an issue and crisis manager in the chemical industry, late night calls are never good news, and this is no exception.

There has been an explosion and chemical release at the plant and two night-shift operators were exposed to some toxic material.

I am only half-awake and start to get back into bed when my wife jerks me back to reality: "Hey, what was that all about." So I get dressed and drive off through the eerily-empty streets.

I arrive at the plant 20 minutes later to a worrying scene. The two operators are sitting in the control room shivering from shock and from having stood in the cold under the industrial decontamination showers. They are huddling under blankets to keep warm and are giving their explanation of what happened.

The fire brigade are on hand because they were automatically called when the deluge system was activated to knock down the release. Tons of firewater is flooding across the site and pouring into stormwater retention ponds. We know the local media monitor the police and emergency radio, so it won't be long before reporters and TV cameras are on the scene.

The engineer says production will be shut down for months and might never reopen. He predicts – correctly as it turns out – that the government will instigate a full-scale inquiry into the incident.

It has all the makings of a major financial and reputational crisis, and it's a somber group of managers who gather in the Board Room at 3.00 am to decide what to do.

How this crisis was managed, and its long-term aftermath, is a story for another occasion. The two operators were ok and there was no lasting environmental impact. But I did not realize at the time this would become the most complex crisis issue I would ever deal with.

While the crisis circumstances may differ for you, the urgent meeting in the Board Room is a familiar scenario played out in organizations everywhere.

The Crisis Management Team has assembled, and your CEO asks each person to present their assessment.

The Operations Director, Sales Manager, Chief Accountant, HR Manager, Production Manager and others chime in with their thoughts. All goes smoothly until it comes to the General Counsel and Communications Director.

The corporate lawyer recommends saying as little as possible and waiting until the full facts are known to avoid compromising any future litigation. The communicator wants to proactively speak out to demonstrate that the company cares and to protect reputation.

Now the CEO and executive must weigh the legal and communications positions along with other inputs, and your concern is to make an urgent decision at a time of great risk and uncertainty.

This book is about the factors which drive that disparity of advice and how you can help to develop a response – in the pressure-cooker environment of a crisis – which assesses competing counsel and navigates between what’s legally right and what’s right in the long-term interests of your organization and its stakeholders, and ultimately your reputation

My objective is not to favor one type of professional counsel over the other, but to support a workable and sustainable balance between legitimate differences, and to help you make the right decisions.

The book will help you to:

- Balance reputation protection and legal obligation during a crisis.
- Know why and how to apologize without increasing liability.
- Weigh legal and communications advice when a crisis strikes.
- Learn from original research which lets lawyers and communicators speak in their own words.
- Draw practical, everyday lessons from real-world examples of conflict between lawyers and communicators.
- Navigate the legal and communication challenges of dealing with the media in a crisis.
- Motivate lawyers and communicators to work better together.
- Identify and avoid crucial areas of potential conflict from selected crisis case studies.
- Understand the essential difference between corporate responsibility and legal liability.
- Make decisions and do the right thing to protect your organization.

If you haven't lived through a genuine organizational crisis it's not easy to appreciate the intensity of the situation. In one crisis where I was the communications focal point during a national transport strike, I was at my desk almost continuously for a week with only brief breaks to go home for a shower and a change of clothes, plus a snatch of sleep. That experience helped me understand how physical and mental exhaustion can threaten the effectiveness of the executive group. Add to that the modern expectation of being on-call 24/7 and you can imagine the pressure.

Furthermore, being personally involved in managing a genuine crisis helps you really appreciate what might be at stake. A serious crisis – either well or badly managed – can create reputational or financial damage from which your organization might never recover. One study of crises across a ten-year period in Australia found that more than a quarter saw direct costs associated with the crisis exceed AUD\$100 million. One in four of the organizations concerned went out of business or ceased to exist in their previous form.¹ A one in four chance you won't survive surely is reason enough to get it right!

The potential impact of a crisis

The *Economist Magazine* examined the impact of crises which struck eight major corporations (worth over \$15 billion) from 2010 to 2018 and the median share price fell by 33 percent. While most clawed back their absolute losses, compared with a basket of industry peers over the same time period the median firm was worth 30 per cent less in 2018 than it would have been without the crisis, a total deficit of \$300 billion across the eight companies.²

A survey of 685 business leaders from Fortune 1000 firms found they believed it would take

¹ Coleman, L. (2004). The Frequency and Cost of Corporate Crises. *Journal of Contingencies and Crisis Management*, 12(1), 2-13.

² Getting a handle on a scandal (2018, March 28). *The Economist*.

<https://www.economist.com/business/2018/03/28/getting-a-handle-on-a-scandal>

more than four years to recover from a crisis which damaged an organization's reputation, and three years for a crisis to fade from the memory of most stakeholders.³

And an international law firm analyzed major reputational crises around the world and found that in companies unable to recover pre-crisis share value, 15 per cent of senior executives left within a year, compared with a departure rate of just four per cent in companies where share value did recover.⁴

The wider impacts of a crisis were neatly captured by American communications practitioner David Weiner:

“Few circumstances test a company’s reputation or competency as severely as a crisis. Whether the impact is immediate or sustained over months and years, a crisis affects stakeholders within and outside of the company. Customers cancel orders. Employees raise questions. Directors are questioned. Shareholders get antsy. Competitors sense opportunity. Governments and regulators come knocking. Interest groups smell blood. Lawyers are not far behind.”⁵

³ Burson Marsteller study cited in Burke, R. J. (2016). Corporate reputations: Development, Maintenance, change and repair, in R. J. Burke, G. Martin & C. L. Cooper (Eds) *Corporate Reputations: Managing opportunities and threats* (pp 3-44) London: Routledge.

⁴ *Rogue employees and company misconduct spook markets most* (2012, December 3). London:, Freshfields Bruckhaus Deringer. http://news.freshfields.com/en/Global/r/2492/rogue_employees_and_company_misconduct_spook_markets_most

⁵ Weiner, D. (2006). Crisis communications: Managing corporation reputation in the court of public opinion. *Ivey Business Journal*, 70(4), 1–6.

In the face of such pressure, my experience is that some organizations appear to have a default position to defer to legal counsel. That way, they argue, management can always claim to have pursued “good governance,” irrespective of the outcome and irrespective of the values of the organization.

Yet at the same time it’s become almost a cliché that a controversial legal decision may allow you to “win in the court of law and still lose disastrously in the court of public opinion.”

That statement’s true, but it’s not very helpful or constructive. Plus, it doesn’t really lead anywhere.

I think it’s much more useful to consider *why* you can win in the court of law yet still lose in the court of public opinion; *what* that means in real-life situations; and, *how* you can address this important challenge.

While commentators and experts often *talk* about the contrast between the court of law and the court of public opinion, in this book we will honestly examine that paradox and provide case studies and practical advice on how to protect what may be your most valuable uninsured asset – your reputation.

Do you know what’s at risk?

Nothing destroys reputation faster or deeper than a crisis or an issue mismanaged. And the value of reputation can be enormous.

The latest research as of 2019 across the world’s top 15 stock market indices, shows corporate reputation accounted for 35.3 per cent of total capitalization, representing \$16.77 trillion in shareholder value. Out in front was the UK’s FTSE 100, which saw reputational factors contribute 47 per cent to overall market capitalization.⁶

⁶ Cole, S. (2019). What price reputation: Corporate Reputation value drivers. AMO Strategic Advisors.

http://www.reputationdividend.com/files/6415/6215/6989/RD_AMO_GLOBAL_REP_VALUE_030719.pdf

Some major global corporations, such as Unilever, BP and Shell, run at well over 50 percent.⁷ In fact 40 to 60 percent, depending on business sector, is a commonly accepted range for reputation as a share of market value. That's what may be at risk.

Remember that reputation reflects the cumulative opinion of stakeholders about your organization's products and services and how you behave – not lay-people's opinions about how your organization may have interpreted the technical niceties of the law in the heat of a crisis. In other words, just because you can take a legalistic position doesn't mean you should.

There can in fact be a massive chasm between what's legally correct and what's accepted as morally or ethically right.

A stark example is what happened following the death of four people on a malfunctioning Water Rapids ride at the Dreamworld theme park on Australia's Gold Coast in October 2016. Just two days later, at the Annual General Meeting AGM of the parent company, Ardent Leisure, the Board approved a short-term cash bonus of \$AUD167,500 for the Dreamworld CEO (equivalent to about US\$100,000). In the face of massive public outcry, the Chairman said the CEO was entitled to the bonus, and that he wouldn't discuss it further as it was a commercial matter.⁸

It might have been legal, and it may well have been related to the previous year's financial performance as the Chairman emphasized, but it was reputational poison. The CEO herself recognized the difference and donated her entire bonus

⁷ Cole, S. (2020). The UK 2020 Reputation Dividend Report. Reputation Dividend.
http://reputationdividend.com/files/7515/8263/1192/UK_2020_RD_report_FINAL.pdf

⁸ Pash, C. (2018, October 28). The CEO, her bonus and the Dreamworld tragedy. *Business Insider*.
<https://www.businessinsider.com.au/the-ceo-her-bonus-and-the-dreamworld-tragedy-2016-10>

to the Red Cross to support the families affected by the tragedy. Eight months after the accident she left the company with a payment of a full year's salary.⁹

It was publicly reported that at a fiery meeting with the Board, the company's external communication consultants had fiercely disagreed with the legalistic response to the crisis and threatened to resign the account, but were over-ruled.¹⁰ (In February 2020 a coronial inquiry into the disaster found there had been a "systemic failure by Dreamworld in relation to all aspects of safety" and the parent company was referred for possible prosecution.¹¹)

Such examples highlight the gap between a purely legal strategy and a strategy to address prevailing community standards.

Courts apply the law and it's up to politicians to make the law reflect what is perceived as community standards – what people think is right or how people believe organizations *should* behave. Similarly, legal counsel in a crisis can advise management on what the law provides, and the communications professional can advise on likely stakeholder response and the impact on reputation. Between them they should provide management with accurate information and sound advice to make a proper decision.

Consider this hypothetical scenario:

A bank's General Counsel has been asked to advise on the proposed foreclosure of a mortgaged property. The mortgage-holder has not made a payment in more than ten months and all discretionary periods have expired.

⁹ Kruger, C. (2017, June 12). Ardent Leisure CEO Deborah Thomas to exit with a \$731,000 payout. *Sydney Morning Herald*.

<https://www.smh.com.au/business/ardent-leisure-chief-ceo-deborah-thomas-to-exit-with-a-731000-payout-20170607-gwmclp.html>

¹⁰ Markson, S. (2016, October 28). Crisis of confidence in Dreamworld board. *The Australian*. <https://www.theaustralian.com.au/news/nation/crisis-of-confidence-in-dreamworld-board/news-story/b5ace6efc84b7190b07e22df361cc432>

¹¹ McKenna, K. (2020, February 24). Dreamworld Thunder River Rapids accident inquest findings handed down by coroner. *ABC News*.

<https://www.abc.net.au/news/2020-02-24/dreamworld-accident-inquest-coroner-findings/11993742>

“I have reviewed all the processes and formal notifications and the bank has fully complied with our legal requirements and correctly applied the hardship provisions. In my legal opinion we should proceed to foreclose on the property.”

However, the bank’s Communications Director has also been asked to review the same situation.

“The mortgage-holder is an Iraq war veteran who lost a leg and was partly blinded by an improvised roadside bomb. He is the sole support for his autistic daughter after his wife left him, and he can’t get paid work. We know from regular media monitoring that his story has already been taken up by the Association of Iraq and Afghan War Veterans and has generated sympathetic support. Unless we want to feature in the news throwing this man and his daughter out on the street, in my opinion we need to find a way to negotiate a better outcome.”

Over to you Mr. or Ms. Senior Executive. It’s your call!

Or take a real-life case, when Nestlé, the world’s largest food company, launched legal proceedings in the early 2000s to recover £3.7 million (about US\$4.5 million) from the Government of Ethiopia during a terrible famine.¹² The claim was compensation for assets seized 25 years earlier, and Ethiopia offered £926,000, (US\$1.1million) which Nestlé declined “as a matter of principle” (although the company said any money received would be channeled into famine relief in Ethiopia). Threatened by a coordinated international campaign of protest, Nestlé eventually announced it would drop the claim.

A leading British finance journal reported at the time:

“There may well have been strong legal arguments for suing the Ethiopian Government, but this course

¹² Denny, C. (2003, January 23). Nestlé U-turn on Ethiopia debt. *The Guardian*. <https://www.theguardian.com/world/2003/jan/24/debtrelief.development>

of action is obviously going to have a negative PR aspect once it becomes public knowledge. Too often companies are dominated by lawyers and accountants who, while happy to stick to the letter of the law, seem oblivious of the complex human issues involved in situations like these.”¹³

My hypothetical mortgage foreclosure scenario, and the real-life cases involving Nestlé and Dreamworld, have one critical element in common, namely that in the end someone needs to assess conflicting priorities and make a decision. And sometimes you will also need to publicly explain or justify the position your organization takes. In the Nestlé case the Swiss food giant claimed it was “taken by surprise” and said the original decision to pursue compensation was made by an external lawyer hired by a small subsidiary in Germany. Unfortunately, justification often turns out to be finding someone else to blame. In Chapter Three you’ll read about some other high-profile brand crises and how legal action can sometimes inadvertently damage brand reputation.

The difficulty of reaching a decision over contradictory advice and conflicting demands is hardly new. It’s an issue identified over 200 years ago by the British statesman and philosopher Edmund Burke: “It’s not what a lawyer tells me I may do, but what humanity, reason and justice tell me I ought to do.”

In modern times this purpose is reflected in the well-established discipline of Enterprise Risk Management, which concerns the need to consider and balance all risks and not allow one to take unwarranted priority over the others. Or the more recent disciplines of Corporate Social Responsibility, and the Triple Bottom Line, which both set out the need to address social and environmental impacts as well as just the business objectives. It’s nothing new that balancing competing needs is often central to executive decision-making.

Exactly the same considerations apply when it comes to crisis management, as illustrated in my three reputational crisis scenarios. Most importantly, it also reflects the fundamental requirement which I identified when developing my

¹³ Piggott, C. (2003, February 2). No point in hiding. *Foreign Direct Investment Magazine*

concept of *Crisis Proofing*.¹⁴ That idea focuses on the need not just to respond to crises when they strike, but on the expectation that you need to identify and address potential issues and problems early in a way most likely to avoid them developing into crises.

While this book talks about how organizations respond *after* a crisis strikes, it also highlights my favorite original advice to clients: *The best possible form of crisis management is to take planned, positive steps to avoid a crisis occurring in the first place.*

It's this link – the need to identify and address issues in the best long-term interests of the organization as a whole in order to avoid crises – which forms the foundation of *Crisis Counsel: Navigating Legal and Communication Conflict*, and the task of balancing communications and legal advice.

Whether a company survives a crisis with its reputation, operations and financial condition intact is determined less by the severity of the crisis – the underlying event – than by the timeliness and quality of its response to the crisis.

John Doorley and Helio Fred Garcia¹⁵

Structure

The book includes chapters on the respective roles of communication and legal professionals, focusing on where they intercept, overlap and sometimes conflict; as well as the crucial difference between legal liability and corporate responsibility; the legal and communication challenges of dealing with the media in the event of a crisis; and two chapters on the highly contentious issue of why, when and how to apologize.

¹⁴ Jaques, T. (2016). *Crisis Proofing: How to save your company from disaster*. Melbourne: Oxford University Press

¹⁵ Doorley, J. & Garcia, H. F. (2007). *Reputation management: The key to successful public relations and corporate communication*. New York: Routledge.

Each chapter addresses the role of senior management and the need for a balanced approach when a crisis threatens. Chapter eleven reviews the issues and summarizes practical ways forward for you as a busy executive.

This need for balance is also addressed in two chapters which share the views of the two professions at the heart of the book – namely communicators and lawyers.

I interviewed four global experts in crisis communication – two in the United States, one in England and one in South Africa – about their experiences working with lawyers in a crisis situation and their recommendations to obtain the best possible outcomes for organizations under threat.

In addition, in partnership with SenateSHJ, a reputation and change communication consultancy based in Australia and New Zealand, along with their international partners in PROI Worldwide, we interviewed senior legal practitioners in the United States, Britain, Canada, Australia and New Zealand to understand the legal view of potential conflict with communicators and how executives can balance conflicting advice. While there is some general literature on the role of lawyers in a crisis, this unique research is the first ever study to specifically address the legal/communication interface from the perspective of practicing lawyers.

Taking the lead from lawyers, who rely so often on precedent and case law, this book frequently refers to past cases where communications and legal advice may have been in conflict.

Apart from cases scattered throughout the book – and description of lessons to be learned – I have written three chapters devoted entirely to more in-depth assessment of high-profile examples which illustrate potential conflict and sometimes the reputational damage which followed. Those three chapters explore

- **Trademark and patent cases** in defense of intangible assets where legal advice may outweigh a broader management approach.
- **Product cases** where over-zealous or misguided legal action can backfire on the brand.
- **Marathon cases** which involve prolonged proceedings where the public sometimes forget what the case was about while a steady flow of negative media continues to create long-term damage to companies and brands.

Some of the cases referenced in the book are recent and some are from earlier decades. But as every law student knows, the value of citing a case is not when it occurred, but how the case applies to the present. Let's not forget that as recently as March 2019 the Speaker of the British House of Commons made a crucial and controversial decision in the Brexit debate based on a parliamentary convention dating back over 400 years to 1604. And, of course, so much contemporary American law relies on the consensus of white men in wigs who sat down to devise the Constitution for the United States between May and September 1787. What's important is not how long ago the case emerged but the fact that every example here has been chosen to make a point or offer a perspective which is relevant to you today.

The value of citing a case is not when it occurred, but how the case applies to the present.

Apart from recency and relevance, remember that while some of the case examples presented in this book may portray one or the other side in a negative light, we usually don't know what happened behind the closed doors of the board room. Accordingly, we can only infer conclusions from what has appeared in the media or in open court, in other words, what was done, said or reported publicly.

There is a generous catalogue of T-shirt slogans, memes and inspirational posters warning against judging people by their actions without understanding their motivations. But when it comes to assessing corporate responses to a crisis or potential crisis, we most often don't know – and have no way of knowing – what prior discussion took place.

Sigmund Freud said, “The thought is father to the deed,” so you can reasonably assume that corporate decisions in a crisis, as they appear in public, ought to reflect conscious decision-making by rational executives. But of course rational doesn't necessarily mean smart.

Was good legal advice provided and then overruled? Did the executive go along with recommendations which proved to be damaging? Did bad communications advice reflect information or circumstances which never became public? Did the executive simply ignore advice from all quarters? In most cases we'll never know for sure.

The other key point about such cases is that my commentary should not in any way be construed as a blanket criticism of lawyers or communicators or any other group. The purpose of all the cases discussed is not to blindly judge those who may have provided counsel, but to illustrate how crises can turn out well or turn out badly, and hopefully help you and your organization to learn from what's happened before. My intention is not to needlessly criticize any particular profession or any directly named organization, but to help you and professionals everywhere to understand the issues and make better decisions.

Throughout this book I have used the term communicator, or communications professional, to refer to the full range of professionals working in organizational communication. This includes public relations, public affairs, issue management, crisis management, corporate affairs, community relations, stakeholder engagement, government affairs, media management and the host of other terms which have become common.

Similarly, the generic term lawyer is taken to include attorneys, barristers, solicitors, advocates, counsel and all other legal advisers.

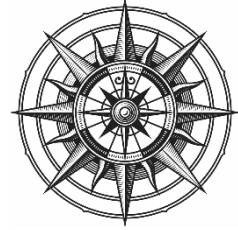
Neither term should be taken as exclusive. The principles and challenges remain the same regardless of job title.

Key Takeaways

- There can be a big gap between what's legally correct and what's morally or ethically right.
- Reputation may be your most valuable uninsured asset.
- In the face of a crisis you need practical methods to weigh potentially conflicting advice.
- Uncertainty and stress in a crisis make decision-making more difficult.
- Past crisis case examples involving legal and communications elements provide valuable insights for you today.
- The best possible form of crisis management is to take planned, positive steps to avoid a crisis occurring in the first place.

Disclaimer: The author is not a lawyer and nothing written in this book should be interpreted as legal advice.

EXCERPT



Chapter Four

Why Should I Apologize?

“In litigation as in life, one thing is certain: A party who feels wronged wants an apology.”

Bradley M. Henry.

One of the most common areas of disagreement between lawyers and communicators is about when and how to apologize.

That probably won't surprise you. The truth is that while apologizing seems simple, it's not easy. Think about it at a personal level – how hard it is to genuinely apologize, even to your friends and loved ones. How much harder it is for corporations and CEOs having to do so on the public stage, in the glare of the news media, beset by concerns about avoiding embarrassment and protecting reputation and share value while surrounded by a phalanx of nervous lawyers and anxious communication professionals.

That prospect can generate a whole catalogue of reasons why you don't *want* to apologize. Which in turn leads to the defensive questions: “Why should I

apologize at all? What's the worst that can happen?" Those issues demand both legal and communications involvement.

This chapter will help you to:

- Recognize why you *should* apologize when you've done something wrong.
- Assess the legal implications of apologizing.
- Learn from real-life examples how lack of a proper apology can trigger a crisis.
- Avoid making the crisis worse by failing to apologize.
- Know how apologizing can sometimes reduce legal liability.
- Accept why you sometimes need to apologize, even when you've done nothing wrong.
- Show how legal or political pressure can demand organizational apologies for historical issues.

What Can Go Wrong

The first and most obvious reason to apologize is that very often it's simply the right thing to do.

This seeming statement of the obvious was the conclusion of Dave Carroll in his book *United Breaks Guitars: The power of one voice in the age of social media*.¹¹³

Carroll is neither a lawyer nor a professional communicator. But his experience has come to be a classic example of what can go wrong when a company fails to respond. Carroll is a Canadian folksinger who was flying from Halifax to Omaha with his band Sons of Maxwell. During a stopover at O'Hare Airport, Chicago, in March 2008, United Airlines baggage handlers were seen mishandling his \$3,500 Taylor acoustic guitar, which was badly damaged and cost him \$1,200 in repairs. But for nine months the airline refused to apologize and brushed off his claim for compensation.

At that point Carroll could have gone to any newspaper or online platform to complain, as thousands of unhappy customers have done before and since. Instead, Carroll created a catchy song called "United Breaks Guitars" and posted it on YouTube.¹¹⁴

*"I flew United Airlines on my way to Nebraska
The plane departed, Halifax, connecting in
Chicago's O'Hare.
While on the ground, a passenger said from the seat
behind me,
"My God, they're throwing guitars out there."*

Within weeks the \$150 clip had been viewed more than three million times, and millions more were exposed to criticism of the airline when Carroll appeared on TV chat shows across America. United Airlines belatedly relented and agreed to compensate Carroll, but he refused the money and the airline instead decided to

¹¹³ Carroll, D. (2012). *United Breaks Guitars: The power of one voice in the age of social media*. Carlsbad, CA:., Hay House.

¹¹⁴ The Dave Carroll protest song video can be seen at <http://www.youtube.com/watch?v=5YGc4zOqozo>

make a \$3,000 donation to the Thelonious Monk Institute of Jazz. (It was later revealed that the Institute was, at the time, chaired largely by United executives and used United Airlines exclusively for its corporate travel.)

But this modest “goodwill gesture” was dwarfed by the wider reputational and financial impact of the incident. The *Times* of London reported:

“Within four days of the song going online, the gathering thunderclouds of bad PR caused United Airlines’ stock price to suffer a mid-flight stall, and it plunged by ten per cent, costing shareholders \$180 million. Which, incidentally, would have bought Carroll more than 51,000 replacement guitars.”¹¹⁵

A respected business website commented:

“Can United’s \$180 million loss be chalked up entirely to a song on YouTube? Probably not. Did the song have a very real and very negative effect on United’s brand equity? Absolutely.”¹¹⁶

When I last checked, the YouTube video had accumulated over 20 million views. And it has been reported that 150 million people overall were exposed to the negative story about the airline, largely because it chose not to apologize promptly and deal with the issue.

Carroll later wrote a book and delivered a TED talk on his experience and the power of one person on the internet. He concluded: “Sometimes saying you’re sorry is not only the right thing to do, but also the least expensive.”

¹¹⁵ Ayres, C. (2009, July 22). Revenge is best served cold, on Youtube: How a broken guitar became a smash hit. *The Times*.
<https://www.thetimes.co.uk/article/revenge-is-best-served-cold-on-youtube-2dhbsh6jtp5>

¹¹⁶ Sawhney, R. (2009, July 28). Broken guitar has United playing the blues to the tune of \$180 million. *Fast Company*.
<https://www.fastcompany.com/1320152/broken-guitar-has-united-playing-blues-tune-180-million>

Lessons learned

Airline passengers have lost or damaged baggage every day of the week and you never hear about it. The story of Dave Carroll's damaged guitar just might have made it into the news because he was a reasonably well-known musician. And celebrity does increase newsworthiness. You may remember the incident a couple of years later when actor-director Kevin Smith was removed from a Southwest Air flight because he was "too fat to fly."¹¹⁷ Smith launched a Twitter tirade and the airline promptly apologized. Most importantly, the airline had reacted quickly and, after some media attention, the story soon faded from view.

Contrast this with United's failure to promptly deal with Carroll's broken guitar. If the musician had complained to a newspaper or simply ranted online it may have generated a short-lived reputational blip. But instead, the airline's prolonged refusal to apologize, and the customer's innovative YouTube protest, turned an otherwise unremarkable incident into a genuine reputational and business crisis.

The other key lesson from the broken guitar debacle is that the issue was dealt with for some time by a low-level customer services representative (immortalized in the YouTube song as Ms. Irlweg) and was seemingly not escalated to management until far too late. I can't overstate how important it is that your employees on the ground know the rules yet have discretion to act and know when to involve more senior management. In the Kevin Smith case, while the airport staff initially implemented the airline's "customers of size" policy requiring him to purchase two seats, he was quickly and correctly rebooked on another flight the same day.

¹¹⁷ De Nies, Y. and Yeo, S. (2010, February 15). Kevin Smith Too Fat to Fly. *ABC News*. <https://abcnews.go.com/WN/kevin-smith-fat-fly/story?id=9837268>

Reasons for Your Organization to Apologize

- To acknowledge that an injury or damage has occurred.
- To express responsibility and/or regret for the event.
- To limit legal or insurance liability.
- To commit to change and promise action to avoid a repeat.
- To draw a line in order to move forward.
- To avoid prolonged media attention or reduce online outrage.
- To protect reputation and share or brand value.
- To re-establish working relationships with stakeholders.
- To demonstrate executive leadership, internally and externally.
- To reduce the likelihood of unwarranted regulatory scrutiny.
- Because it's the right thing to do.

When Lack of Apology Becomes the News

United's refusal to promptly apologize and compensate Dave Carroll – which basically created a reputational crisis out of a standard damage claim – leads directly to another key reason to apologize: namely when lack of an apology in an already serious situation becomes the story rather than the incident itself.

Unfortunately, nine years later, United found itself at the center of one of the most notorious global reputational crises of recent years when lack of a proper apology was once again a feature.

Extraordinarily, the scene was again O'Hare Airport, in April 2017, where a 69-year-old passenger was physically dragged from an overbooked flight for which he held a valid ticket and was already seated.¹¹⁸ Disturbing mobile phone footage of Dr. David Dao, bloodied and protesting, being dragged down the aisle by burly Chicago Aviation security officers was viewed hundreds of millions of times around the world.

¹¹⁸ Lartey, J. (2017, April 11). United Airlines passenger violently dragged from seat on an overbooked flight. *The Guardian*. <https://www.theguardian.com/us-news/2017/apr/10/united-airlines-video-passenger-removed-overbooked-flight>

It was unquestionably time for a prompt and profound apology, but United CEO Oscar Munoz instead praised his employees for “following established procedures” and blamed the passenger, who he described as “disruptive and belligerent.”

In a letter to employees he said: “There are lessons we can learn from this experience.”¹¹⁹ Yet nowhere did he appear to concede the airline had done anything wrong. This from the man who just one month earlier had been declared PR Week’s “Communicator of The Year.”

Contrast United’s support for employees supposedly following procedure with the Chicago Department of Aviation, which said the incident was “not in accordance with our standard operating procedures.” They immediately suspended the three officers involved pending a review and one was later discharged for excessive use of force.

I would agree with PR writer and blogger Ed Zitron who told CNN News that United's response was “a classic case of a company too afraid to make a categorical statement of compassion for fear of a lawsuit.”¹²⁰

With the share value of United Airlines tumbling more than \$1 billion in a single day,¹²¹ Mr. Munoz issued a poorly executed statement in which he appeared to place the interests of the airline first:

¹¹⁹ Horton, H. (2017, April 11). United Airlines CEO sends letter praising staff after doctor was forcibly removed from an overbooked plane. *Telegraph UK*. <https://www.telegraph.co.uk/news/2017/04/11/read-united-ceos-painfully-tone-deaf-letter-employees-man-forcibly/>

¹²⁰ Griffiths, J, and Wang, S. (2017, April 11). Man filmed being dragged off United flight causes outrage in China. *CNN*. <https://edition.cnn.com/2017/04/11/asia/united-passenger-dragged-off-china-reaction/index.html>

¹²¹ United Airlines loses \$1.3 billion in market value after passenger is dragged off plane (2017, April 13). *News.com.au*. <https://www.news.com.au/travel/travel-updates/united-airlines-loses-13-billion-in-market-value-after-passenger-is-dragged-off-plane/news-story/ae121d39a770b85cfc70eea3a9c5b8b>

“This is an unsettling event to all of us here at United. I apologize for having to reaccommodate these passengers.”¹²²

This tone-deaf response, which failed to apologize to the passenger himself, provoked further outcry, and the unfortunate euphemism “reaccommodate” was widely mocked across social media.

The so-called “involuntary denied boarding process” occurred on a Sunday, and only the following Tuesday, after several attempts, did the CEO issue what could be regarded as an adequate apology.

“The truly horrific event that occurred on this flight has elicited many responses from all of us: outrage, anger, disappointment. I share all of those sentiments, and one above all: my deepest apologies for what happened. Like you, I continue to be disturbed by what happened on this flight and I deeply apologize to the customer forcibly removed and to all the customers aboard. No one should ever be mistreated this way.”¹²³

His statement went on to say: “It’s never too late to do the right thing.” However, it surely was too late to apologize.

Never forget though that “doing the right thing” can be very costly. When Hollywood actor Kevin Spacey was accused of predatory sexual behavior, Netflix dumped him from their highly acclaimed series *House of Cards*, and scrapped a biopic about Gore Vidal which was already in post-production. Netflix later

¹²² Sakzewski, E. (2017, April 13). United Airlines: What we can learn from the company’s ‘breathhtakingly bad’ crisis management. *ABC News, Australia*. <https://www.abc.net.au/news/2017-04-13/united-airlines-what-went-so-wrong-pr/8441796>

¹²³ Winchel, B. 2017, April 12). Learning from United’s vow to ‘do better’ *Ragan’s PR Daily*. <https://www.prdaily.com/learning-from-uniteds-vow-to-do-better/>

announced that the decision to sever all ties with their former star cost them \$39 million.¹²⁴

Lessons learned

There is a maxim much loved by motivational speakers: You only get one chance to make a good first impression.

In the same way, you only get one chance to apologize promptly and properly. Huffington Post's headline on the case said it all:

"United Airlines Boss FINALLY makes proper apology to passenger pulled screaming from plane."¹²⁵

On the same theme I really liked the post by Chicago-based PR commentator Marylou McNally: "You don't swing and miss at your first apology and think you can hit a home run later."¹²⁶

The victim's lawyer Thomas Demetrio, later said:

"United has taken full responsibility for what happened, without attempting to blame others. For this acceptance of corporate accountability, United is to be applauded."

¹²⁴ Menta, A. (2018, January 23). Netflix lost \$39 million from firing Kevin Spacey. *Newsweek*. <https://www.newsweek.com/kevin-spacey-netflix-lost-money-788690>

¹²⁵ Sommers, J. (2017, April 12). United Airlines Boss FINALLY makes proper apology to passenger pulled screaming from plane. *Huffington Post*. https://www.huffingtonpost.co.uk/entry/united-airlines-oscar-munoz-apology_uk_58ed3274e4b0c89f91224bcc

¹²⁶ McNally, I. (2017, April 12). Let's stop the non-apology apology: The do's and don'ts of 'I'm Sorry.' Blog *Original Content Matters*. <https://ocmsite.wordpress.com/2017/04/12/lets-stop-the-non-apology-apology-the-dos-and-donts-of-im-sorry/>

But it is only fair to point out that was after his client had received an undisclosed “amicable settlement,” rumored to be over \$100 million.

Most importantly, I have to emphasize that you should not take any of this to suggest that the United Airlines de-planing debacle was simply a communication or legal problem. The disturbing mobile phone images meant it was always going to be a major reputational crisis dominating the headlines, regardless of what the CEO said and regardless of the compensation paid. However, I believe that a prompt and proper apology would have reduced the impact.

Sometimes it's Just too Late

A BBC headline a few years ago claimed “It’s never too late to apologize.”¹²⁷ But I would argue that sometimes an apology is so late as to have little value.

While Mr. Munoz of United was just a few days too late, some apologies have been so far overdue that they lost any significant meaning, such as when the German drug-maker Gruenthal waited more than 50 years to apologize for the morning sickness pill Thalidomide which had caused devastating deformities to over 10,000 babies born in the 1950s before it was withdrawn in 1961.

In 2012, CEO Harald Stock offered a cautious apology, which showed every sign of having been carefully crafted by lawyers concerned more with legal liability than compassion.

“We ask for forgiveness that for nearly 50 years we didn’t find a way of reaching out to you from human being to human being. We ask that you regard our long silence as a sign of the shock that your fate caused in us.”¹²⁸

¹²⁷ It's never too late to apologise (2009, February 9). *BBC News*.
http://news.bbc.co.uk/2/hi/uk_news/magazine/7875005.stm

¹²⁸ German thalidomide maker Gruenthal issues apology (2012, September 1). *BBC*. <https://www.bbc.com/news/health-19443910>

Victims groups said the apology was welcome yet was of little value if the company wouldn't open discussions on financial compensation. In addition the statement appears remarkably insensitive and more about the company than the victims.

For years the drug maker consistently defended itself by arguing that the potential impact of Thalidomide could not have been detected by tests before it was marketed. But four years after this apology an official report, produced by the University of Muenster for the German state of North-Rhine Westphalia, confirmed the long-held suspicion that Grunenthal had early knowledge about possible side effects and gave out intentionally false information and hushed up its knowledge.¹²⁹

Similarly, the New York Police Department waited five decades to formally apologize for the notorious raid on a gay Greenwich Village nightclub – the Stonewall Inn – which triggered a serious riot in 1969. Demonstrators were protesting not only against heavy-handed police tactics, but also against being arrested for simply patronizing a gay establishment or for being “out” in public. With the 50th anniversary of the raid approaching, in June 2019, Police Commissioner James O’Neill declared:

“The actions taken by the NYPD were wrong, plain and simple. And for that I apologize.”¹³⁰

The raid wasn't the first time that LGBT people had demonstrated or clashed with police, but it proved a turning point that spurred a wave of activism.

A more blatant example of the lack of an apology becoming the story involved controversial Australian radio host Alan Jones who used every legal means at his

¹²⁹ Martin, M. (2016, May 14). Thalidomide maker hushed up drug's side effects, German report says. *Reuters*. <https://www.reuters.com/article/us-germany-thalidomide/thalidomide-maker-hushed-up-drugs-side-effects-german-report-says-idUSKCN0Y4281>

¹³⁰ Brockwell, G. (2019, June 6). ‘Wrong, plain and simple’: 50 years after the Stonewall raid, New York City’s police commissioner apologizes. *Washington Post*. <https://www.washingtonpost.com/history/2019/06/06/wrong-plain-simple-years-after-stonewall-raid-new-york-citys-police-commissioner-apologizes/>

disposal to delay an apology for nearly eight years. In on-air comment in April 2005 Jones called Lebanese men “vermin and mongrels” who “simply rape, pillage and plunder a nation that’s taken them in.”¹³¹ His incendiary views are widely believed to have contributed to a race riot at Cronulla, in Sydney, a few months later.

After prolonged legal wrangling and appeals, in 2009 the New South Wales Administrative Decisions Tribunal found that these remarks incited hatred and contempt of Lebanese Muslims and ordered Jones to apologize within eight weeks.

The broadcaster then launched more than two years of further legal proceedings in an attempt to overturn the decision. Only when his legal options ran out in December 2012 did the broadcaster finally state publicly that his comments were unlawful and that he apologized for making them (using a script directed by the Tribunal after they deemed an earlier apology was “an inadequate statement of wrongdoing.”)¹³² But this was almost eight years after the original offense and, remarkably, the amended apology was broadcast via a prerecorded message when the man himself was on leave.

It’s not often that an individual or organization will go to such exhaustive legal lengths to evade having to make an apology. By then of course the apology had little or no value, which we can only guess is what he intended

It’s important to remember that the cost of failing to apologize and failing to be apologetic doesn’t just apply to business corporations. The international aid charity Oxfam enjoyed a stellar reputation until revelations in early 2018 that some staff had sexually exploited female disaster victims in the wake of the devastating Haiti earthquake in 2011, and that Oxfam covered up the scandal for years.

¹³¹ Nguyen, K. (2007, April 11). Jones ‘incited’ Cronulla violence on air. *The Age*. <https://www.theage.com.au/national/jones-incited-cronulla-violence-on-air-20070411-ge4mti.html>

¹³² Wells, J. (2012, December 14). Jones forced to apologize over racist comments. *ABC News*, Australia. <https://www.abc.net.au/news/2012-12-13/jones-to-apologise-after-calling-lebanese-muslims-vermin/4426692>

In the face of falling donations and severely damaged reputation, CEO Mark Goldring gave an extraordinarily ill-judged interview in which he accused critics of “gunning” for the charity and that the response was “out of proportion:”

“The intensity and the ferocity of the attack makes you wonder, what did we do? We murdered babies in their cots? Certainly, the scale and the intensity of the attacks feels out of proportion to the level of culpability. I struggle to understand it. You think: ‘My God, there’s something going on there’.”¹³³

Lessons learned

The main lesson in each of these cases comes not from the fact that the apology was delayed, but from why. While the reasons were very different in each instance, the cases tell you a lot about the balance between legal and communication objectives and also a lot about the difference between focusing on yourself or on those affected by your actions.

The occasion for the apology by Grunenthal was unveiling a bronze statue of a child born without limbs because of thalidomide, though the words used were very clearly more about the company than the victims, of whom 5,000-6,000 still survive. While CEO Stock said he was sorry his company had remained silent for so long, they never admitted liability.

As usual, the behind-the-scene reasoning before his apology is not publicly known, but this appears to be a case where legal considerations prevailed. In fact the official report released four years after the CEO’s statement said the firm had used delaying tactics and legal threats of potential claims against the state to keep the drug on the market as long as possible. There are some cases where legal advice should rightly take precedence over reputation,

¹³³ Aitkenhead, D. (2018, February 17). Oxfam boss Mark Goldring: ‘Anything we say is being manipulated. We’ve been savaged.’ *The Guardian*.
<https://www.theguardian.com/world/2018/feb/16/oxfam-boss-mark-goldring-anything-we-say-is-being-manipulated-weve-been-savaged>

and it could be argued that – from the company’s perspective – Grunenthal’s medico-legal strategy may have been their best option.

By contrast the New York Police Department apology for the Stonewall nightclub raid was almost entirely about the victims rather than the organization. Commissioner James O’Neill declared that the raid was a clear example of discrimination which was no longer acceptable in society. The apology may have been five decades in coming, but from a communication perspective you would have to agree that the eventual timing was perfect. Commissioner O’Neill spoke in June 2019, just days before the 50th anniversary of the riot, which was marked by WorldPride Weekend in New York City, claimed to be the largest LGBTQ event in history with five million attending in Manhattan alone.

Sadly, the same focus on victims was glaringly absent from the strategy of radio host Alan Jones, whose hard-fought and very public resistance to apologizing seems to have been to protect himself rather than defending any significant legal principle. He appeared to have little or no regard for the ethnic group he had denigrated and apologized reluctantly and only after intense legal pressure.

However, Jones has a long history of outspoken and sometimes offensive commentary and was evidently playing to his massive and generally conservative radio audience. He probably did little to harm his reputation among that audience and in fact his reputation may even have been enhanced by his steadfast defence of his opinions. Despite a record defamation payout for other on-air comments; threats of advertising boycotts; and management warnings to tone down his controversial style; Jones continued as one of the highest paid and most popular radio hosts in Australia (he retired in June 2020).¹³⁴ I suspect he would argue that he knew

¹³⁴ Carmody, B. (2009, May 28). Alan Jones signs on for another two years at 2GB. *Sydney Morning Herald*. <https://www.smh.com.au/entertainment/tv-and-radio/alan-jones-signs-on-for-another-two-years-at-2gb-20190429-p51i6o.html>

his audience better than anyone, and that pursuit of reputation trumps legal caution.

In the other case of a long-delayed apology, Oxfam CEO Mark Goldring mirrored Alan Jones' example and made it about himself rather than the victims, but the outcome for him was very different. When the aid charity was accused of covering up a staff scandal from some years earlier, Goldring failed disastrously in an attempt to portray the organization and himself as victims of disproportionate criticism. It was reported at the time that the CEO gave the interview "unchaperoned by press officers" and it is hard to imagine that, with proper legal and communication advice, any responsible executive would have made such unguarded and provocative remarks. His comment that he "struggled to understand" the situation was probably his most accurate statement. Goldring later excused himself by saying "I do apologize. I was under stress."¹³⁵ But unlike in the case of Alan Jones, the charity's reputation and finances had suffered severe damage and the CEO was soon forced to resign.

Each of these cases offers you some very different perspectives on the legal and communication elements of apologizing for events long passed. But all four examples highlight one of the most important lessons about making an apology – It's not about you. It's about the people affected.

¹³⁵ Rawlinson, K. (2018, May 17). Oxfam chief steps down after charity's sexual abuse scandal. *The Guardian*.
<https://www.theguardian.com/world/2018/may/16/oxfam-head-mark-goldring-steps-down-sexual-abuse-scandal>

Crisis is an equal opportunity risk

The distressing experience of the charity Oxfam is a salutary reminder that crisis is an equal-opportunity risk that doesn't discriminate among organizations. In a workshop I was running, two attendees from a high-profile children's organization told me: "We are a charity, so we don't have issues that might turn into crises."

When I suggested a couple of fairly basic potential crisis scenarios which might affect them – the accountant absconding with donated funds, or the CEO arrested for having child-porn on his computer – they seemed genuinely offended at the idea that their long-serving colleagues might behave in such a way.

A few months later the organization was on the front page of all the local newspapers because they had knowingly allowed street kids to take drugs on their premises. Not-for-profits are especially vulnerable to reputational damage and the predictable outcry put future donations and grants at risk. Never forget, no one is immune from crisis, no matter how pure their intentions.

Apologizing to Reduce Liability

While delaying or declining to apologize can seriously damage reputations, a timely and appropriate apology can serve to reduce legal liability.

I discuss the broader question of liability versus responsibility in crisis in Chapter Eight and how it can impact your success in responding to a crisis. For the moment I want to focus on the strategic use of an apology to reduce legal exposure in civil proceedings.

Make no mistake, this is a contentious area of management where the decision is most often led by the lawyers rather than communicators. Yet it's typically a legal decision with very definite reputational as well as legal consequences.

You would probably expect this is a topic more often found in legal journals than in a book like this. In fact, there is a massive library of legal articles about this subject. To take just one example, a leading academic review of the power of apology cites over 120 mainly legal sources and unhelpfully concludes – after 50 pages of analysis – that it is *still* unclear how apologies function in relation to civil liability and how the relationship between the law and apologies works.¹³⁶ If legal experts find it difficult, what hope for everyone else?

Richard Ingrams, co-founder of the frequently-sued British satirical magazine *Private Eye*, was hardly joking when he famously said: “When lawyers talk about the law, normal human beings begin to think about something else.”

However, my purpose here is not to attempt to analyze the law, but to focus on circumstances which show you when executives have accepted the principle that an apology may yield a positive legal outcome.

Although you may not be involved in the provision of health services, you can learn a lot about the effect of apologies from the extensively studied area of medical malpractice. For instance, an American study of factors which prompted families to file medical malpractice claims following perinatal injuries found that 24 per cent filed suit when they realized that physicians had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them.¹³⁷ The study concluded that such filings may have been prevented by an apology.

Similarly, a study of British patients and families suing doctors found that 37 percent might not have brought malpractice suits had there been a full explanation

¹³⁶ Vines, P. (2007). The power of apology: Mercy, forgiveness or corrective justice in the civil liability arena? *The Journal of Law and social justice* Vol 1, 1-51.

¹³⁷ Hickson, G.B., Clayton, E.W., Githens, P. B. & Sloan, F.A. (1992). Factors that prompted families to file medical malpractice claims following perinatal injuries. *JAMA* 267, 1359-1361.

and apology, factors which to them were more significant than monetary compensation.¹³⁸

And, more specifically, when the University of Illinois Medical Center introduced a new program of patient disclosure, apology and compensation, the number of malpractice suits halved in two years and in the 37 cases where the hospital acknowledged a preventable error and apologized, only one patient filed suit.¹³⁹

As crisis expert James Lukaszewski has boldly written with no room for ambiguity:

“An apology may be the trigger to settlement. Failure to apologize is always a trigger for litigation.”¹⁴⁰

Would an apology satisfy you?

Think about it from a personal perspective. If you or one of your loved ones was adversely affected by a preventable medical mishap, how much would an explanation and apology influence your decision whether to lodge a lawsuit for malpractice against the doctor or the hospital? Would you really be satisfied or simply less inclined to sue?

It is important to recognize that reputation is valuable not only as a business asset but is also valuable as a legal asset in the event of litigation. There is good evidence that when lawsuits do proceed, both judges and juries tend to appreciate apologies and look upon them favorably in terms of modifying penalties.¹⁴¹ This

¹³⁸ Vincent, C., Yong, M. & Phillips, A. (1994). Why people sue doctors: A study of patients and families taking legal action. *Lancet*, 343, 1609-1612.

¹³⁹ Sack, K. (2008, May 18). Doctors start to say ‘I’m sorry’ before ‘See you in court’. *New York Times*. <https://www.nytimes.com/2008/05/18/us/18apology.html>

¹⁴⁰ Lukaszewski, J. E. (2019). The Perfect Apology: the atomic energy of empathy. From *PR News Tipsheet*. <https://www.e911.com/the-perfect-apology/>

¹⁴¹ Cohen, J. R. (1999). Advising clients to apologize. *Southern California Law Review*, 72, 1009-1069.

has been shown not only in cases of medical malpractice but also in other types of civil suits, including allegations of libel or defamation.

However, there is an important caveat. While I have said that in some cases the offer and acceptance of an apology can help an organization to pre-empt accusations and negative publicity, diffuse public anger and even help avoid a lawsuit entirely, you should *never* expect an apology to allow your organization off the hook for what has happened.

But I've Done Nothing Wrong!

In contrast to trying to reduce or avoid punishment for wrongdoing, another – more controversial – reason to apologize is when you *need* to, even though you believe you have nothing to apologize for.

This is not just about denial or refusal to accept responsibility. It's about when you genuinely believe you've done nothing wrong and *still* need to apologize.

You'd be right to think this situation causes conflict between lawyers and communicators. And it also causes disagreement between crisis management experts themselves.

The contrarian New York crisis consultant and writer Eric Dezenhall has championed this approach and even coined a label for it. Dezenhall calls it the “marital apology” which, he says, arises in cases fraught with so much tension that there is no chance of a resolution until that tension is released.

“Long-married people know this phenomenon well. Even though it's not in the sanctioned marital relations handbook, there are times that you apologize even when you're not sure what you did wrong. Or even if you're convinced you were actually right in the first place.”¹⁴²

Dezenhall argues that the same principle can apply to corporations, and he cites the case of Toyota following multiple reports of alleged uncontrolled sudden

¹⁴² Dezenhall, E. (2014). *Glass Jaw: A manifesto for defending fragile reputations in the Age of Instant Scandal*. Chapter Eight, The Three Apologies. (pp 133-142). New York: Twelve.

acceleration. That crisis led Toyota to recall millions of cars at a cost of billions of dollars, and the company paid nearly \$50 million in fines and saw a massive fall in its share price.

Motor vehicle recalls are common and the Toyota case in particular has been widely reported. But what makes the Toyota recall different – and why it’s relevant to you in this context – is that the Japanese carmaker was convinced there was no manufacturing fault.

However, the company faced a firestorm of allegations and devastating news media coverage, especially in the United States, and CEO Akio Toyoda – for legal and reputation reasons – eventually had little choice but to issue an apology.

How To Apologize When You Believe You’ve Done Nothing Wrong

Speaking to a press conference in Japan, the Toyota CEO Akio Toyoda said he “deeply regretted” the concern the acceleration faults had caused to customers and said it was his “personal responsibility” to fix the problem.

“The recalls are affecting several models in several regions and have caused anxiety among customers who are wondering if their cars are OK. For that we are very sorry.”

“I believe we will soon win back the trust of Toyota owners. Believe me, Toyota cars are safe. We always put the customer first.”

A subsequent investigation by the National Highway Traffic Safety Administration (NHTSA) cleared Toyota by announcing that the company’s electronic throttle system was not to blame for reported episodes of runaway acceleration.¹⁴³ This supported the company’s belief that there was not a fundamental manufacturing fault and helps explain why the CEO’s apology

¹⁴³ For more detail on how Toyota cars were tested see Chapter Nine on Marathon cases.

carefully avoided admitting having caused the problem. Yet at the same time Toyota also avoided blaming its customers.¹⁴⁴

Contrast this with the response by Audi to a similar “sudden acceleration” crisis in the 1980s which devastated the company’s sales and caused long-term damage to reputation.¹⁴⁵ Here too human error was found to be the main cause, and many years later the woman whose story triggered the Audi allegations admitted she had pressed the accelerator instead of the brake. Although Audi was eventually vindicated, many crisis experts at the time faulted Audi for blaming drivers and consequently suffering added damage.

Lessons learned

Despite these dissimilar outcomes, the question of whether to apologize when you believe you have done nothing wrong remains a contentious one for both lawyers and communicators.

John Doorley, a recognized expert on reputation, disagrees with Dezenhall’s concept of the “marital apology:”

“Apologizing, even when the individual or organization did nothing wrong – despite what some crisis communicators advise – may stop the bleeding, but is untruthful and bad behavior. It will, therefore, harm reputation over the long term.”¹⁴⁶

¹⁴⁴ McCurry, J. (2010, February 6). Toyota president Akio Toyoda 'very sorry' for safety recalls. *The Guardian*.

<https://www.theguardian.com/business/2010/feb/05/toyota-president-very-sorry-recalls>

¹⁴⁵ Risen, J. (1989, September 14). Audi Sales Still Weak, Despite Federal Report That Car Is Safe. *Los Angeles Times*. <https://www.latimes.com/archives/la-xpm-1989-09-14-fi-357-story.html>

¹⁴⁶ Doorley, J. (2019). To manage reputation is to treat it as an asset: Not to do so is to make it a liability. In T. Lingham (Ed.), *Reputation Management: The future of corporate communications and public relations* (pp 71-76). Bingley, UK: Emerald Publishing.

So, was Toyota right to apologize even though their vehicles were not at fault? The bottom line is that Toyota regained its position as top global carmaker within 12 months.

I don't think there is a "right answer" to this question, although the Toyota example is very instructive. Consider the unusual circumstances of the case. On one hand Toyota was able to call on an enormous reserve of goodwill (which many companies do not enjoy) while on the other hand the alleged faults arose in the context of reported faults across a number of different brands of motor vehicles, and amidst greatly heightened media interest in vehicle safety.

Moreover, it seems clear that if Toyota had not apologized, the media story would have become the company's "hostility to consumer safety." In other words, the real impact is sometimes not what the apology does but what the lack of an apology may do.

I think the case also highlights another important consideration, namely the difference between apologizing when you know you have done nothing wrong as opposed to apologizing when you don't yet know whether in fact you have done something wrong.

On balance perhaps Dezenhall and Doorley are both correct. That conclusion may not be helpful, but this issue could truly be one of those times when each case must be considered on its individual circumstances.

The Political Apology

My final reason for apologizing is also legally controversial and has the added challenge that it is often deeply entangled in politics: when you are pressed to apologize for the actions of someone else, or on behalf of someone else, for historical misdeeds.

It's most often seen in the area of national politics, but can also apply to businesses, NGOs and other organizations.

While such apologies may be regarded as largely symbolic, they nevertheless attract widespread publicity and sometimes generate passionate debate. Similarly,

failure to apologize for historical events can also generate passionate current debate – witness the long-standing refusal by the Government of Turkey to acknowledge or apologize for the so-called Armenian Genocide at the time of the First World War.

The political sensitivity of this issue, even 100 years later, was reinforced in late 2019 when the US Senate voted to recognize the Genocide and Turkey immediately threatened retaliation.¹⁴⁷

However, to apologize for a wrongdoing decades or even centuries ago has, or is often intended to have, a positive impact on reputation and reconciliation.

Let me list just a small sample:

Governments

- US Senate apologized (2009) for slavery, though added a disclaimer that the resolution couldn't be used as a rationale for reparations.¹⁴⁸
- Australia's Parliament issued a "National apology" (2008) for the "stolen generation" – thousands of mainly mixed-race aborigine and Torres Strait Island children forcibly removed from their families between 1910 and 1970 as part of an assimilation policy and placed in state institutions or fostered to non-indigenous families.¹⁴⁹

¹⁴⁷ Ortega, R. (2019, December 16). Turkey threatens to close air base that hosts US nuclear warheads in response to proposed sanctions and genocide declaration over mass killings of Armenians. *Daily Mail*

<https://www.dailymail.co.uk/news/article-7795427/Turkey-threatens-close-air-base-hosts-nuclear-warheads-response-proposed-sanctions.html>

¹⁴⁸ Becker, B. (2009, June 18). Senate Approves Slavery Apology, With Reparations Disclaimer. *New York Times*.

<https://thecaucus.blogs.nytimes.com/2009/06/18/senate-approves-slavery-apology-with-reparations-disclaimer/>

¹⁴⁹ Welch, D. (2008, February 14). Kevin Rudd says sorry. *Sydney Morning Herald*. <https://www.smh.com.au/national/kevin-rudd-says-sorry-20080214-gds0vu.html>

- Norway’s government apologized (2018) to Norwegian women targeted for reprisals by the authorities for having relationships with members of the German occupying forces during World War II.¹⁵⁰
- US President Reagan apologized (1988) to over 100,000 Japanese-American citizens and residents removed to remote internment camps during World War II as a “security risk.”¹⁵¹
- British Prime Minister Gordon Brown apologized (2010) for the UK’s role in sending an estimated 150,000 underprivileged children aged between three and 14 to countries such as Canada and Australia from the 1920s to the 1960s, where many ended up being abused in foster homes, state-run orphanages and religious institutions.¹⁵²
- The West African Country of Benin apologized (2000) for its role in selling fellow Africans to the American slave trade.¹⁵³
- South Korean police finally apologize (2019) for massacres during a communist uprising on Jeju island in 1948. The Prime Minister had apologized in 2003.¹⁵⁴

¹⁵⁰ Norway apologizes to women punished for relationships with German soldiers (2018, October 18). *The Guardian*.

<https://www.theguardian.com/world/2018/oct/17/norwegian-women-get-apology-for-reprisals-over-wwii-friendships>

¹⁵¹ Bishop, K. (1988, August 11). Day of apology and ‘sigh of relief’ (1988, August 11). *New York Times*. <https://www.nytimes.com/1988/08/11/us/day-of-apology-and-sigh-of-relief.html>

¹⁵² Gordon Brown to apologize for UK's role in child migrant scandal (2010, February 24). *The Guardian*. <https://www.theguardian.com/politics/2010/feb/24/gordon-brown-apology-child-migrants>

¹⁵³ Benin apologizes for role in slavery (2000, May 1). *Globe and Mail*. <https://www.theglobeandmail.com/news/world/benin-apologizes-for-role-in-slavery/article22402977/>

¹⁵⁴ South Korean Police apologize for Jeju Island massacre (2019, April 13). *Channelnewsasia*. <https://www.channelnewsasia.com/news/asia/south-korean-police-apologise-jeju-incident-massacre-11408500>

- On the 80th anniversary of the Nazi invasion of Poland, German President Frank-Walter Steinmeier apologized (2019) and begged for forgiveness.¹⁵⁵

Organizations

- The Church of England General Synod voted unanimously (2006) to apologize to descendants of slaves for its role in benefiting from slave labor in the Caribbean in the 18th century.¹⁵⁶
- Pope John Paul II apologized (2004) on behalf of the Catholic Church for the sack of Constantinople by Christian Crusaders in April 1204.¹⁵⁷
- Boy Scouts of America apologized (2019) to more than 12,000 victims of sexual abuse from 1944 through 2016 for harm during their time in scouting.¹⁵⁸

¹⁵⁵ Waterfield, B. (2019, September 1). President apologizes to Poland for Nazi invasion. *The Times*. <https://www.thetimes.co.uk/article/president-apologises-to-poland-for-nazi-invasion-0g857s0t0>

¹⁵⁶ Church of England apologizes for having been at the heart of slavery (2006, February 10). *Sydney Morning Herald*. <https://www.smh.com.au/world/church-of-england-apologises-for-having-been-at-the-heart-of-slavery-20060210-gdmxvu.html>

¹⁵⁷ Connolly, K. (2004, June 30). Pope says sorry for crusaders' rampage in 1204. *Telegraph, UK*. <https://www.telegraph.co.uk/news/worldnews/europe/italy/1465857/Pope-says-sorry-for-crusaders-rampage-in-1204.html>

¹⁵⁸ Hanna, J., Joseph, E. & Squeglia, K. (2019, April 25). The list of Boy Scouts leaders accused of sexual abuse has nearly 3,000 more names than previously known. *CNN*. <https://edition.cnn.com/2019/04/24/us/boy-scouts-sexual-abuse-allegations/index.html>

Companies

- Georg Krayer, President of the Swiss Bankers Association, apologized (1999) on behalf of Swiss banks which were said to have hoarded millions of dollars deposited by Jews who later perished in the Holocaust¹⁵⁹
- To mark the 70th anniversary of the end of World War II, Mitsubishi, one of the largest companies in Japan, apologized (2015) for mistreatment of prisoners of war.¹⁶⁰
- France's state railway SNCF apologized and paid compensation (2010) for its role in transporting innocent victims to the Nazi death camps. The Dutch national railway NS did the same in 2019.¹⁶¹

Lessons learned

When you look at these examples you might think corporations and other organizations are not likely to find themselves in such a high-profile "political" situation.

It's a comforting thought, but such exposure is not as uncommon as you might imagine.

Over recent years hundreds of Japanese and German companies, and some major British and American multi-nationals, have been forced to confront their role during World War II.

¹⁵⁹ Drozdiak, W. (1999, December 7). Panel finds 54,000 accounts of Nazi victims. *Washington Post*. <https://www.washingtonpost.com/wp-srv/WPcap/1999-12/07/070r-120799-idx.html>

¹⁶⁰ Ripley, W. (2015, July 20). Mitsubishi apologizes to WWII Japanese prisoners of war. *CNN*. <https://edition.cnn.com/2015/07/19/asia/mitsubishi-japan-pow-apology/index.html>

¹⁶¹ Cuskey, P. (2019, June 28). Dutch railway operator to pay compensation for role in Holocaust. *Irish Times*. <https://www.irishtimes.com/news/world/europe/dutch-railway-operator-to-pay-compensation-for-role-in-holocaust-1.3939610>

For example, IBM has had to address persistent claims that the company knowingly supplied the punch card tabulating technology which helped Nazi Germany implement their Final Solution.¹⁶²

The reality is that such companies, and many others, find themselves facing a variety of different reasons why they need to apologize.

To summarize, I'd like to give the last word to my friend Peter Sandman, one of the world's leading authorities on risk and risk communication, who created the famous formula "Risk = Hazard + Outrage."

"Clients often claim the barrier to apologizing is legal. They say they're afraid that greedy 'victims' will take advantage of an apology to sue for damages... In fact, an apology can actually improve a defendant's legal position, by reducing the impulse of prospective plaintiffs to sue and by reducing the impulse of jurors to impose punitive damages. Both of these effects result from the powerful effect of apologies on outrage. It's hard to stay angry at people who say they're sorry – which makes apologizing one of the best and certainly one of the cheapest outrage reducers around."¹⁶³

I couldn't have said it better myself.

¹⁶² Jackson, B. (2011, June 20). IBM's darkest chapter: Controversy over Second World War. *ITBusiness, Canada*. <https://www.itbusiness.ca/news/ibms-darkest-chapter-controversy-over-second-world-war/16394>

¹⁶³ Sandman, P.M. (2001, May 4). Saying you're sorry. *Peter Sandman Blog* <http://www.psandman.com/col/sorry.htm>

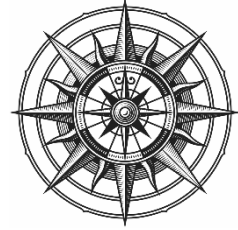
Key Takeaways

- Apologizing is often the right thing to do and may be the least expensive.
- Failing to apologize can make a reputational crisis even worse.
- A delayed apology risks losing all meaningful purpose.
- Apologizing can reduce legal liability, especially in civil suits.
- The “marital apology” is when you need to apologize, even when you’ve done nothing wrong.
- Sometimes you have to apologize for historical wrongdoing committed by other people.

Questions for Discussion

1. *Would United Airlines’ notorious “deplaning” reputational crisis at Chicago Airport have ever mattered if it wasn’t captured on mobile phones?*
2. *Is it ethical to issue a so-called “marital apology” when you know you’ve done nothing wrong just to avoid further controversy or liability?*
3. *Does a political apology delivered after 50 or 100 or even 600 years serve any useful purpose beyond making the apologizer feel better?*
4. *As a member of the jury, would it make any difference to your opinion if the organization on trial had issued an apology? Or had refused to apologize?*
5. *Is a delayed apology worse than no apology at all? How long would be perceived as “delayed”?*

EXCERPT



ABOUT THE AUTHOR

Dr. Tony Jaques has spent much of his working life describing, researching and writing about crisis management, and helping to manage crises in government and in corporations.

As a government ministerial advisor, corporate executive and business consultant he has established an international reputation as an authority on issue and crisis management and risk communication.

In his role as Asia-Pacific Issue and Crisis Manager for The Dow Chemical Company for more than 20 years he was responsible for implementing local issue, crisis and community outreach programs



throughout the region and had a hands-on role in managing a number of high-profile crises.

He continues to serve as a thought leader in those areas with new projects to educate other fellow professionals as a conference speaker.

Dr Jaques is a New Zealander who now lives in Australia, where he runs his own consultancy and lectures post-graduate students at two universities. At an earlier stage of his career he was a journalist in New Zealand and London, and later worked as a management strategic advisor and speechwriter.

He has written very extensively about issue and crisis management in academic and business publications around the world, and is the author of three previous books in the field – *Don't Just Stand There: the Do-it Plan for Effective Issue Management* (2000); *Issue and crisis Management: Exploring issues, crises, risk and reputation* (2014); and *Crisis Proofing: How to save your company from disaster* (2016). He is also the author of the definitive, three-volume *Dictionary of Battles and Sieges* (2006).

Dr Jaques is a former member of the Board of Directors of the Issue Management Council in Washington DC and received their Howard Chase Award for achievement in the field. He holds a doctoral degree from RMIT University (Melbourne).

Contact the author:

Email: tjaques@issueoutcomes.com.au

Website: www.issueoutcomes.com.au

