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# The Ethics of Apology and the Role of an Ombuds from the Perspective of a Lawyer

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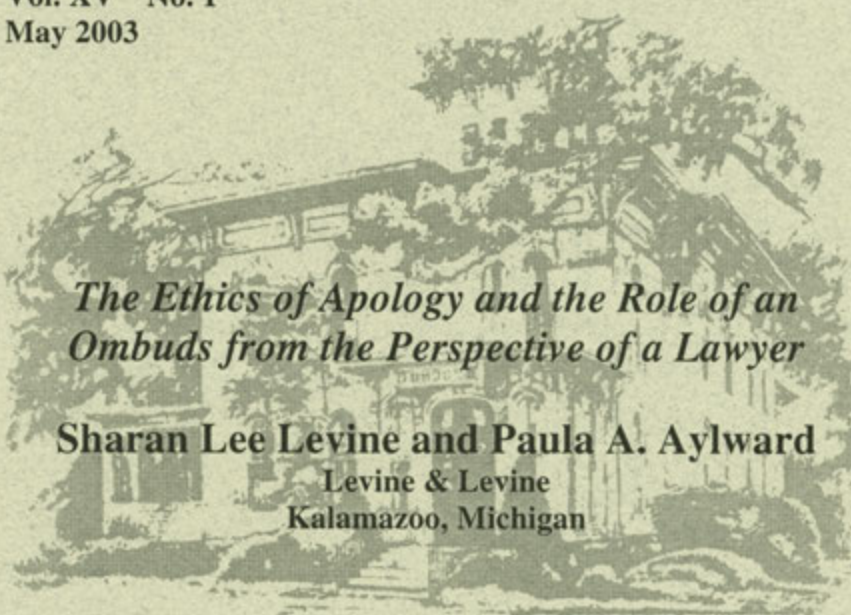
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*The Ethics of Apology and the Role of an  
Ombuds from the Perspective of a Lawyer*

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Kalamazoo, Michigan

# Center for the Study of Ethics in Society

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**The Ethics of Apology and the  
Role of an Ombuds from the  
Perspective of a Lawyer**

**Sharan Lee Levine and Paula A. Aylward**

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## THE ETHICS OF APOLOGY AND THE ROLE OF AN OMBUDS FROM THE PERSPECTIVE OF A LAWYER<sup>1</sup>

Sharan Lee Levine and Paula A. Aylward<sup>2</sup>, 2003©

The topic of apology – basically saying, “I’m sorry” – is one that each of us as individuals is familiar with. Placing apology within the context of the legal system – discussing if and how that simple phrase “I’m sorry” can find a home within the law – is the focus of this paper. Apology can serve many beneficial ends, and in many instances, serves parties in the legal system.

As a starting point, we could probably all agree that it is the right and the ethical thing to do to say, “I’m sorry” for a wrong that you have committed. Probably everyone remembers at least one instance from childhood when this lesson hit home: you say you’re sorry if you hurt someone, or if you do something wrong. Better yet, you are in fact sorry. Perhaps in the last few days, each of us has made an apology – to a loved one, to a co-worker, to a stranger.

So normally, we are conscious of apologies, and we understand apologies to be fundamental to our nature as fallible human beings. After all, the Talmud teaches us: “More beautiful is one hour of repentance and good deeds in this world than all the life of the world to come.” Judeo-Christian ethics and other important spiritual and religious teachings contain similar messages of striving to do good deeds, but being sure to make amends when they are less than good.

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<sup>1</sup> This paper is the result of a presentation made at the invitation of the Michael K. and Shirley Bach Endowment for the Ethics Center, Western Michigan University. The authors are grateful to Dr. Shirley Bach for the invitation. Ms. Levine also extends her thanks to her law partner, who is also her husband, Randall Levine, for the unceasing support for Ms. Levine’s interests, passions, and projects.

<sup>2</sup> Ms. Levine is a shareholder in the Kalamazoo law firm, Levine & Levine, and Ms. Aylward is an associate of the firm.

But the system of law in this country –even though derived from religious and spiritual traditions –often brings about a different result. Thus, those simple words we are trained to use often as children – ‘I’m sorry’ –when in the context of the law, become laden with other meaning and import. In the legal setting, an apology can result in establishing guilt in a criminal proceeding or liability for money damages in a civil proceeding.

These rules and laws would seem then to encourage adults to stop short of apology, and to deny liability, for what is in many instances harm caused negligently, or by accident, not intentionally.

This paper explores some of the legal ramifications of apology, and how, even with such ramifications, an effective apology has an important role to serve in our legal system, to promote healing, to resolve disputes, to better the community affected by the original harm caused, and to de-escalate or diffuse what could otherwise become lengthy and contentious litigation.

Though apology is used extensively in the criminal context, for example, during sentencing, this paper focuses on the function and role of apology in the civil legal system. While exploring these issues, we consider questions such as why do some apologies fail and why are some apologies perceived to be or are ineffective or inadequate?<sup>3</sup>

Finally, this paper will discuss the profession of ombudsmen, ombuds persons, or, as the American Bar Association refers to them, ‘ombuds’, and how the ombuds’ role intersects with the role of apology. Ombuds in corporate, academic and government communities support, encourage and aid the integrity and ethical governance of organizations, by serving as early neutral evaluators of questions, issues, and complaints. We will examine some of the parallels between

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<sup>3</sup> We could consider ‘This is Just to Say,’ a poem by William Carlos Williams on the issue of sincerity of apologies: ‘This Is Just to Say/ I have eaten/ the plums/ that were in/ the icebox/ and which/ you were probably/ saving/ for breakfast/ Forgive me/ they were/ delicious/ so sweet/ and so cold.’

the role of apology in the legal system, and the role of ombuds, the main links being that both systems seek justice, restore confidence in persons and entities, and bring a welcome reduction in litigation.

Before getting too far along, we want to acknowledge the valuable sources which inform this discussion. First are several articles regarding apology in the law, by Assistant Professor Jonathon Cohen at the University of Florida, and Professor Daniel Shuman, at Southern Methodist University, among an abundance of writings on the subject.<sup>4</sup> Also, the rich resources from within the Southwest Michigan legal community have been invaluable: more than 20 years ago, Federal District Court Judge Richard Alan Enslin, in writing rules on dispute resolution for the Western District of Michigan, suggested apology as a means of resolving cases in the federal courts. For the last several years, Kalamazoo County Circuit Court Judge William Schma and lawyers in our community have been actively involved in the theory and practice of Therapeutic Jurisprudence. These resources, together with our communications with Professor Cohen, Dr. Shirley Bach, and our experience as an attorney representing ombuds throughout this country, informed this paper.

"Apology" is defined in many ways, but for our purposes, there are three elements to an apology:

- (1) admitting fault;

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<sup>4</sup> In particular, we found the following articles and the sources cited therein, to be of particular help and interest: Jonathan R. Cohen, "Apology and Organizations: Exploring An Example From Medical Practice", *Fordham Urban Law Journal*, June 2000, Vol XXVII, No 5 (hereinafter cited as "Apology and Organizations"); Jonathan R. Cohen, "Advising Clients to Apologize", 72 *S. Cal. L. Rev.* 1004 (1999) (hereinafter cited as "Advising Clients"); Daniel W. Shuman, "The Role of Apology in Tort Law", *Judicature* Vol 83, Number 4 (2000) (hereinafter cited as "The Role of Apology"); Jonathan R. Cohen, Abstract of "Legislating Apology: The Pros and Cons", *University of Cincinnati Law Review* (Spring 2002); Elliot Klayman and Seth Klayman, "Punitive Damages: Toward Torah-Based Tort Reform", *Cardozo Law Review*, Vol 23:1, 2001; and Marsha L. Wagner, "Apologies", *California Caucus of College and University Ombudsman, UCI Ombudsman: The Journal* 1996. We are also grateful to Professor Jonathan Cohen and Dr. Shirley Bach for their helpful insights offered during conversations.



- (2) expressing regret for the injurious action, and
- (3) expressing sympathy for the other's injury.<sup>5</sup>

The first element –admitting fault –relates to the issues of liability or culpability. The latter two elements –expressing regret and/or sympathy –relate to the offender's feelings. To demonstrate the difference among these elements, let's take a simple fact situation: a car accident, in which one driver rear-ends another's vehicle. After the accident, the offender might say, "I am sorry about the accident". This could mean several things, such as (1) "it was my fault, I wasn't paying attention", or (2) "I regret that my car hit yours," or (3) "I hope you recover quickly."<sup>6</sup>

In the first scenario, the negligent driver has admitted liability – he was negligent since he was not paying attention as he was driving. In the second scenario, the driver is expressing regret that his day, and the other driver's day, has been interrupted by this inconvenient accident. In the third scenario, the driver is expressing what might be compassion, certainly unhappiness, that someone has been injured.<sup>7</sup>

The counterpart to apology is forgiveness, which can include elements of releasing the offender from liability, and/or ceasing resentment against the offender.

So what are the positive effects of apology? There are many – which inhere whether within the context of litigation or outside of it – and they can include the following:<sup>8</sup>

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<sup>5</sup> See Cohen, "Advising Clients", p 1014-1015.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> See Cohen, "Advising Clients", pp 1019-1023.

1. The apology can remove the insult from the injury - not apologizing can be viewed as disrespectful and as almost a second injury;
2. Apology can prevent future antagonistic behavior, such as retaliation, or the filing of a lawsuit;
3. It can repair a relationship that may have been damaged by the injury;
4. Apology can bring about quicker, and more satisfying, settlement of the issues for all involved; and
5. It can help the offender's spiritual and psychological growth, for, in Professor Cohen's words: 'responsibility and respect, rather than denial and avoidance, lie at apology's core.'<sup>9</sup>

The risks to the offender, or client, of making an apology can include psychological as well as financial risks.<sup>10</sup> An example of the former risk is that a person could view making an apology as showing weakness, or humbling oneself. As to the latter, apart from the obvious liability concern, is that some insurance policies specifically prohibit the insured from voluntarily assuming liability. Therefore, potentially, under some insurance policies, a person who apologizes in a way that admits liability may violate the terms of their insurance contract, and potentially have no coverage for the accident.

In our car accident scenario referenced above, I have heard a story in which the at-fault driver came over to the person whose car she had hit, and apologized profusely. Upon talking with her lawyer/husband a few minutes later, she was advised to retract her statements imme-

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<sup>9</sup> See Cohen, "Advising Clients", p 1021.

<sup>10</sup> See Cohen, "Advising Clients", pp 1023-1030.

diately –possibly because of genuine concern that the insurance policy might void coverage in the event she admitted fault for the accident.

In part because of these risks to making an apology, and in recognition of the real benefits, growing numbers of legal scholars are calling for a revision to our legal system to allow people to make “safe” apologies –that is, in a way that reduces the prospect of liability.<sup>11</sup>

Professor Shuman, like Professor Cohen, believes there is a real use for, and a need of, apology in the law. He cites the example of the 1982 crash of a Japan Air Lines DC-8 in which 24 people died, and 71 persons were injured. After that tragedy, the president of the airlines personally apologized to each of the victims and their families, and offered them compensation.<sup>12</sup>

Not a single lawsuit was filed. Now, Professor Shuman makes clear that cultural differences in Japan may, in part, account for the absence of lawsuits in that situation,<sup>13</sup> however, the power of apology cannot be disregarded.

Nonetheless, apology can never be a complete panacea; it will not make every wrong right. Professor Shuman points out that for some survivors of the holocaust, for example, an apology is without meaning; for the Pearl Harbor Survivors’ Association, a public apology by Japanese veterans was rejected.<sup>14</sup> For these wrongs and others of similar magnitude, it is likely that there are no words that could ever adequately respond to –certainly never repair –the harm done.

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<sup>11</sup> Professor Cohen uses the term “safe” apology, in the context of his discussion of protecting a client from adverse consequences when the apology is, or is perceived to be, an admission of liability. See Cohen, “Advising Clients”, pp 1031-1041.

<sup>12</sup> See Shuman, “The Role of Apology”, p 184.

<sup>13</sup> Id.

<sup>14</sup> Id.

In other situations, though, it may be that the person making the apology is –or appears to be –insincere. That may well have been the trouble with President Nixon's resignation speech, or with Senator Trent Lott's apology for his comments about his praise of Strom Thurmond's segregation policies. No doubt all of us could cite several examples of an apology that just did not work, that fell short or even exacerbated the insult. The problem with public persons and public apologies is the perception that the apology is a mere formula response: "I'm sorry if\_ I offended anyone;" "I'm sorry if\_ my remarks were perceived to be disrespectful". These approaches are awkward, as they seem to be driven by political strategy.

Ultimately, the problem can be that, as Professor Shuman notes: "For some victims, apologies are only a vehicle for wrongdoers to save face or avoid liability."<sup>15</sup>

But even though an apology does not address all wrongs nor heal all wounds, apology should be encouraged.

There is an increasing appreciation of the positive potential affect of apology within the law, just as there has been a trend in the establishment of programs –like ombuds' offices –and other systems to help redress wrongs, correct mistakes, reduce litigation, and to foster settlement.

For example, Professor Cohen details the success of a program begun by the Lexington Kentucky Veterans Affairs Medical Center in 1987.<sup>16</sup> This program was geared to surface, address, and respond to, instances of medical error. Though many voiced concerns that the hospital was opening itself up to ruinous liability, the hospital's position was that it was simply accepting responsibility when at fault. It

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<sup>15</sup> Id.

<sup>16</sup> See Cohen, "Apology and Organizations", pp 1448-1454.

formed a committee to review errors reported from its staff, and the affected patient and their family were immediately informed, received an apology from the person responsible, and were offered appropriate medical care, and a just amount of compensation.<sup>17</sup>

The hospital's policy made clear that it wished to create a culture in which mistakes could be acknowledged and hopefully avoided in the future. In some instances, if the error was found to be systemic, the hospital was able to implement a better system, which eliminated the problem entirely.<sup>18</sup>

A newspaper article detailing the hospital's policy noted an additional benefit to the hospital's forthright approach: patients' trust in the hospital was reinforced rather than undermined –and this even though the patient had just learned of the hospital's or treating physician's mistake.<sup>19</sup> Patients reported feeling increased trust in the facility since they had been dealt with honestly. Another benefit as reported, was that the hospital soon found that "doing the right thing" could also mean saving money.<sup>20</sup>

To illustrate this point, the article reported that just before instituting the new policy, the hospital had defended two malpractice claims which resulted in verdicts of \$1.5 million in one year.<sup>21</sup> Those sums do not include the costs of the hospital or of the litigation process. By contrast, between 1990-1996, the hospital paid an average of about \$190,000 per year in malpractice claims, with no litigation costs<sup>22</sup>.

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<sup>17</sup> Id.

<sup>18</sup> Id. This point is also made in Cohen, "Advising Clients", pp 1468; 1473-1476.

<sup>19</sup> See, Cohen, "Apology and Organizations", pp 1449-1451.

<sup>20</sup> Id.

<sup>21</sup> See Cohen, "Apology and Organizations", p 1451.

<sup>22</sup> See Cohen, "Apology and Organizations", p 1453-1454.

This excellent track record caught the attention of other areas of the veterans system: in 1995, the Department of Veterans Affairs adopted a risk management policy that requires that the patient be informed of the error, be offered appropriate medical treatment, and be informed of the right to apply for compensation. Recently, several other VA hospitals adopted the Lexington model.<sup>23</sup>

This trend reveals what is truly a win-win situation, rather than the one that normally prevails in which a doctor, or other person, wants to apologize for having caused an injury, but does not do so out of a fear of being sued. It is often the absence of an apology that becomes the added insult to injury – and causes the victim to file the lawsuit. This was what occurred in the highly publicized and well-known case in which a woman was severely burned spilling McDonald's coffee in her lap. It was reported that all the injured woman wanted was an apology and an acknowledgment that a systemic problem existed concerning hot coffee purchased at the drive-thru window.

And if we think about that for a minute, it makes sense: don't we all know of situations in which all we wanted to hear was a sincere "I'm sorry", and when we did not hear those words, the seeds of anger or resentment or distrust took root. Professor Cohen writes of various studies that document this "vicious cycle", and reveal that many people only wanted someone to be honest with them, to acknowledge what had happened, to say they were sorry.<sup>24</sup>

Professor Cohen provides an example of how in the non-medical field as well, the use of apology has yielded benefits.<sup>25</sup> The Toro

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<sup>23</sup> See Cohen, "Apology and Organizations"; p 1454.

<sup>24</sup> See Cohen, "Apology and Organizations"; p 1458, fn 1.

<sup>25</sup> See Cohen, "Apology and Organizations"; p 1460-1463, citing the experience of The Toro Company.

Company, a manufacturer of lawn equipment, was experiencing about 125 personal injury lawsuits each year. Up until 1991, Toro's policy was to aggressively defend, and to litigate every single case. At that point, however, Toro decided to offer to mediate, rather than litigate, every claim.<sup>26</sup>

Mediation is a less formal process than litigation, in which a neutral evaluator listens to both parties and tries to recommend a resolution of the dispute which satisfies both of them.

During the mediation process, Toro's attorney, Miguel Olivella, would express sympathy for the claimant's injury, and make a fair offer of settlement. The attorney would not typically admit Toro's fault for the injury or accident, but expressed sympathy only.<sup>27</sup> As Mr. Olivella noted:

"Apology to an injured claimant has been something I do from the beginning of the mediation. It lets the claimant know that despite the accident's fault, no one takes any pleasure in knowing that a human being has been injured, seemingly putting the claimant more at ease when he discovers that the company is not the cold, cruel, evil empire he may have thought we were. In the context of a mediation, it is possible to act in such a fashion without it being a sign of weakness."<sup>28</sup>

The interesting difference between Toro's policy and the Lexington VA's program is worth noting. At the VA, the source of the injury was known to staff at the hospital since they have the records. But, in the Toro cases, initially, the company has little information about the injury, which could only be learned as the matter progressed.

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<sup>26</sup> Id.

<sup>27</sup> See Cohen, "Apology and Organizations", p 1461-1462.

<sup>28</sup> Id.

Using this approach, Toro settled claims much more quickly and at lower cost to the company than it had done using its "dam the torpedoes" litigation strategy. The average payout per claim before 1991 was over \$68,000; after the program began the average compensation was reduced to about \$18,000. In addition, claims were resolved much more quickly with the mediation process which averaged 4 months, as opposed to an average of 2 years for litigation.<sup>29</sup>

Why, in the face of such success stories as these and others, is apology not used more frequently to help resolve disputes?

Professor Cohen posits that it is due to the tension inherent in the laws of evidence that govern trials. Trials are designed, on the one hand to seek the truth, but on the other hand, to settle disputes and compromise claims. The rules of evidence – which govern what is permitted in as testimony or evidence in a trial – support the basic notion of a party's admissions as the "queen of proof" to prove a claim.<sup>30</sup> What better evidence to establish liability than the offender's own statements admitting the conduct? But, what greater disincentive to say you are sorry, and to admit you are wrong, than that your own words will be used to establish guilt or liability for damages? This conflict is manifested in the rules of evidence.

The most basic rule states in part, "all relevant evidence is admissible." This rule embodies the general notion that the rules of evidence, and in the civil context, the rules of discovery, are meant to assist in seeking the truth of a matter.

We would probably all agree that a statement acknowledging blame or fault for an accident or injury is relevant on the issue of what or who caused the injury. It may also help to establish how the

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<sup>29</sup> Id.

<sup>30</sup> See Cohen, "Advising Clients", p 1031.



injury or accident was caused, and by extension, who should be punished for it, or who should pay damages.

But another rule excludes evidence or statements made during the course of compromise negotiations. In other words, after a lawsuit has begun, statements made in an effort to resolve the dispute cannot later be used as evidence against the party making them. However, such evidence could be used later on to prove bias or prejudice of a witness, and for certain other purposes.<sup>31</sup>

Another rule excluding statements or actions from evidence in a trial concerns subsequent remedial measures; take for example a situation in which someone is injured when he falls through a step leading up to your house; if, after the injury, and to prevent anyone else being injured, you fix the step, the injured party cannot offer evidence of these subsequent remedial measures to prove your negligence or culpability, with some exceptions.<sup>32</sup>

A third rule keeps out of evidence an offer you might make to pay someone's hospital or medical bills, and the fact that you pay those bills.<sup>33</sup>

Other evidentiary concepts are contained in the exceptions to the hearsay rule. We are a society consumed with court cases, and television programs about the law and legal process. Everyone thinks they know what hearsay is, but here is a refresher: the hearsay rule says that a witness may not offer an out of court statement when the statement is being used to prove the truth of a matter asserted. In the car crash example: the victim can not get on the witness stand at trial and

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<sup>31</sup> See Cohen, "Advising Clients" pp 1032-1036 for a discussion about Federal Rule of Evidence ('FRE') 408, 407 and 409. See also, Michigan Rules of Evidence ('MRE') 407, 408, 409, which are identical to FRE 407, 408, 409.

<sup>32</sup> Id.

<sup>33</sup> Id.

state that he/she heard the passenger in the other driver's car say "the driver did not see the red light and ran into the back end of your car." But some exceptions to the hearsay rule might permit statements to be repeated in court – for example the exception which permits statements made in the excitement of the moment.<sup>34</sup>

Some of these evidentiary rules, then, though the result of efforts to craft a balance between admitting relevant evidence but not discouraging honest statements, or honest efforts to correct problems, can effectively discourage a person from apologizing.

There are certain "safe harbors" in which a person could make an apology safely, however. One such safety net mentioned before protects an apology made during the course of compromise negotiations; the biggest drawback to this rule is that it only applies when litigation has already begun.

Other "safe harbors" within which to make an apology are in the context of mediation, or pursuant to a contract such as a confidentiality agreement, or pursuant to a court's order.<sup>35</sup>

In light of this, should attorneys advise their clients to apologize? In appropriate circumstances, yes.

There are probably many reasons attorneys do not advise clients to apologize, but several innocent explanations are that for one, the idea simply does not occur to the attorney, since until the last several years, law students were not introduced to the subject of alternate dispute resolution or apology in law school. It could be that the attorney is not aware that making a "safe" apology is possible. It might be the attorney does not want to appear disloyal to the client; or that the par-

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<sup>34</sup> See, generally, MRE 804.

<sup>35</sup> See Cohen, "Advising Clients", pp 1031-1041.

ties themselves are too intractable to allow an apology or to permit meaningful resolution of the dispute.

Some of the less savory reasons why attorneys do not raise the issue of apology with their clients are that the attorney wants to appear tough, and an apology could appear to be soft; or that the attorneys' fees will be far less if the matter is resolved sooner rather than later.<sup>36</sup>

As we have noted, not all incidents, or injuries, can be addressed, healed or rectified through the use of apology. However, in many legal situations, apology can be an effective mechanism –together with an appropriate offer of compensation –to help resolve disputes.

Especially now in this climate of distrust of corporate governance, the model of an entity dealing openly, honestly and fairly, with its mistakes or errors, is a refreshing change. With the recent passage of the Sarbanes-Oxley Act of 2002<sup>37</sup> regarding corporate responsibility and corporate governance, establishment of systems such as that at the Lexington VA Hospital, and the Toro Company, and at other institutions in which ombuds offices have been established, should increase.

The adoption of legislation excluding apologies from being offered to prove liability could go a long way to increasing the benefits this policy can bring. A number of states have enacted or are considering legislation which excludes an apology made at the time of the incident from being offered to establish liability.<sup>38</sup> On the other hand,

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<sup>36</sup> See Cohen, "Advising Clients", pp 1042-1047.

<sup>37</sup> The Sarbanes-Oxley Act was the legislative response to the disclosures of corporate corruption and malfeasance at Enron, Arthur Anderson, among others.

<sup>38</sup> See Cohen, "Advising Clients", p 1030. Massachusetts was the first state to adopt such legislation, proposed by a legislator whose young daughter was killed when she was struck, while riding her bicycle, by an automobile. The legislator learned that the reason the motorist did not apologize for having killed the little girl

Congress is currently debating tort reform, and nowhere in the discussion could we find mention of apology or meaningful methods of resolving disputes in this proposed effort. Perhaps the primary problem with legislating apology however, is the distinction between making the apology and admitting liability. With regard to ombuds' functions, similarities between the role of apology in the law and the role of the ombuds are striking.

The American Bar Association recently adopted standards for encouraging the use and the establishment and operation of ombuds offices.<sup>39</sup> Ombuds are complaint handlers – they receive complaints and questions from individuals concerning persons and problems within an entity, whether a branch of government, a company, an academic institution, or nursing homes, just as examples. Ombuds work to resolve particular issues, and when appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect the legitimate interests and rights of individuals with respect to each other, and protect individual rights against the excesses of public and private bureaucracies. Ombuds protect those who work within an entity, and those who are affected by an entity's actions.

The essential characteristics of an ombuds are independence, confidentiality, and impartiality. An ombuds must be able to operate independently from the entity in which it serves. Without independence, an ombuds' efforts could be undermined, by, for example, having its budget cut as retaliation for the ombuds' findings which might be critical of the entity.

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was from a real fear of liability. The Massachusetts legislation provides that: "Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action." Mass. Gen. Laws ch. 233, §23D (1992).

<sup>39</sup> See American Bar Association Standards for the Establishment and Operation of Ombuds Offices, August 2001.

Ombuds operate with confidentiality, which means that all callers or visitors to the ombuds' office can report any concern or complaint without fear of being targeted as a whistle-blower.

Ombuds must be impartial—they are not an advocate for the visitor to their office, nor are they an advocate for the entity in which they work. Ombuds are advocates for fairness and justice.

Today, ombuds are found in nearly every part of the world, and in a wide variety of entities. Here in the United States, the establishment of ombuds' offices grew as a result of the civil unrest of the late 1960's. The first university ombuds was established at Michigan State University. Ombuds serve in other Michigan universities—such as Western Michigan University, University of Michigan, as well as in colleges and universities throughout this country. More than 200 ombuds serve in corporations such as Eastman Kodak, Coors Brewing Company, and Coca Cola. In March, 2003, the Tyco Company named an ombuds. In government, for more than 25 years, the City of Detroit has had an ombudsman, voted on by the citizens of that city. A number of other cities, as well as county, state, and the federal governments, established ombuds offices serving the citizens of those communities.

As we discussed earlier, in the veterans hospital example, the reports of errors came from within the entity; in the Toro example, the reports generally came from outside of the entity. In both instances, the reports were given prompt attention, due consideration, investigation, and a reasonable and fair response was formulated. All of these efforts can be undertaken by ombuds as well, based upon reports from inside or outside the entity, or upon the ombuds' own initiative and observations.

As with the Lexington VA and the Toro policies, the ombuds' system is less formal—and certainly less adversarial—than litigation, and can often help the parties to avoid litigation entirely. Like those other approaches, the ombuds' system has resulted in financial sav-

ings to organizations in which ombuds serve. Often an employee grievance, or a citizen complaint, if aired to an impartial and objective person, can lead to a resolution which satisfies the complainant, and which may help the entity, by ensuring reform of a needed systemic issue.

The bottom line is that a policy of apology –like the ombuds' process –can remove much of the sting out of the injury. Both processes can be cathartic and therapeutic, and are certainly more humane than the adversarial posturing which seem inherent in, and inseparable from, the litigation process.

In addition to the benefits which accrue to the complainant, and the economic benefits to the entity, the apology and ombuds processes also bring about other and non-economic benefits –such as alleviating guilt of an offender, repairing a damaged relationship, restoring trust, among others.

To be effective, apologies must be sincere, and, as Professor Cohen notes, they 'should be rooted in responsibility and remorse rather than in economics and strategy. It is the ethical response to injuring another, irrespective of the economic consequences.'<sup>40</sup> That point resonates as being another parallel between a policy of apology and the establishment of an ombuds' office: that it is the right thing to do, that it creates a supportive and caring atmosphere in which grievances can be aired confidentially, investigated impartially, addressed ethically and fairly, and resolved promptly.

Another similarity between apology and ombuds is the concern that establishing an ombuds' office will open the organization up to liability. This concern stems from the fact that ombuds may be fielding complaints of matters that may be illegal, such as work place discrimination, sexual harassment, and the like.

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<sup>40</sup> See Cohen, "Apology and Organizations", p 1459.

However, you will recall that the Lexington VA Hospital administrators were also confronted with those concerns, but they instituted their policy of review and apology anyway. And what they found was that they had not opened the floodgates to litigation and ruinous liability but instead, to financial savings, since fewer lawsuits were filed. In my years as counsel to ombuds, I have seen a similar realization dawn among the entities which established ombuds' offices.

Ombuds use apology as one of the tools in their toolbox in working toward effective resolution of an issue. Ombuds Marsha Wagner of Columbia University developed materials for teaching effective apology to ombuds.<sup>41</sup> Dr. Wagner summarizes some of the elements of an effective apology and includes the following six considerations.

1. An apology might contain a statement that sets forth a common understanding of the substance and nature of the offense or perceived offense. Such as - "yesterday, on the phone I said..."
2. Another consideration might include recognizing responsibility or accountability on the part of the one who offended - for example, "I could have chosen other words..."
3. Third, acknowledging the pain or embarrassment that the offended party experienced. Such as "it's understandable that was upsetting to you."
4. The apology might contain a judgment about the offense, for example: "I was insensitive."
5. Generally, we expect an apology to contain a statement of regret: "I am sorry I used those words."

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<sup>41</sup> Marsha L. Wagner, "Apologies", California Caucus of College and University Ombudsman, UCI Ombudsman: The Journal 1996.

6. And, finally, the apology might include a statement about future intentions: "In the future, I will try to think about what I say before I say it..."

Every year, ombuds help resolve massive numbers of complaints on issues ranging from procedure and process for employment options, to illegal activity; from workplace violence and deep-seeded resentment and hurt associated with allegations of race discrimination, to matters relating to ethical and fair treatment. Each of the governmental units, corporations and academic institutions with established ombuds offices have reduced litigation, improved morale and productivity and satisfactorily resolved many issues. When an organization is willing to accept responsibility for errors, employees become more willing to report their own errors, which, in turn, makes it easier for the organization to then correct the system. Apology can help all persons involved make appropriate corrections.

To sum up, we can look to the words of Abraham Lincoln who said more than 150 years ago:

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man (and I think if he were alive today, woman). There will still be business enough."<sup>42</sup>

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<sup>42</sup> See Cohen, "Apology and Organizations", fn 98, p 1472.



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