

# For Practical and Legal Reasons, An Apology When Things Go Awry Is a Good Idea, but Beware of the Dangers

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Until recently the value of an apology in a business dispute has been predominantly anecdotal. Research in many disciplines seems to indicate a sincere apology—one that also accepts responsibility—can heal relationships and ameliorate damages, injuries, or losses. Research also shows it is crucial to know when and how to give an apology, since an improperly presented apology can exacerbate an already deteriorating situation.

As one of childhood's basic lessons, we were told to apologize for the harm we did to others. Why was this important lesson abandoned along the way to adulthood?

When faced with a critical problem, a manager often reverts to making "no

## • PART I OF II •

comment" or other such noncommittal language.

This two-part article looks at research into the value and effectiveness of obfuscation, denial, and stonewalling as viable tactics in crisis management, as compared with more conciliatory and collaborative approaches.

Apology's role will be examined in three areas: medicine, alternative dispute resolution, and in a general business context. Traditional views and uses of apologies will be compared, as well as more modern ap-

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proaches. The comparison uses some of the results found in studies of entities that have adopted more collaborative dispute resolution approaches. The articles conclude with suggestions for readers to consider, and some means of analyzing the data.

## ADR SKILLS

### WHAT IS AN APOLOGY?

Determining what constitutes an apology is the most important step in the analysis of how to proceed. And one of the most polarizing.

One consideration is some people will view the apology as an admission of wrongdoing. In our society, such an "admission" can have detrimental ramifications.

For an example, case law is divided on whether an apology by an insured at an accident scene is a violation of the insured's duty to not do anything that jeopardizes the insurer's interests. See Jonathan R. Cohen, "Advising Clients to Apologize," 72 *So. Cal. L. Rev.* 1009 (1999)(footnotes 54-56 citing *Cohen v. Employers' Liab. Assurance Corp.*, 187 F. Supp. 25, 28 (1960), *aff'd*, 289 F.2d 319 (4th Cir. 1961)); Annotation, "Validity, Construction, and Effect of 'No-Consent-to-Settlement' Exclusion Clauses in Automobile Insurance Policies," 18 A.L.R. 4th 249, § 4 (1981); "*U-Drive-It Car Co. Inc. v. Friedman*, 153 So. 500, 501 (1934)(holding that driver's signed affidavit admitting fault following car accident did not void insurance coverage despite contract clauses requiring 'that the assured shall at all times render to the [insurance] corporation all co-operation within his power,' and 'shall not voluntarily assume any liability . . . without the consent of the corporation previously given in

writing'). See also *Id.* at 503 ('[T]here is something contrary to our ideas as to what should be an established public policy for an insurer to require from the assured that he, the assured, shall not make a statement about the facts of an accident in which he may be involved.'). *Id.* at 504 ('[The] failure to co-operate could not be said to result from the making of a truthful statement.'). Several state legislatures are currently crafting laws making apologies privileged communication, thus exempting the apology as evidence of liability.

### THE ELEMENTS

Carl Schneider, a professor and professional mediator, discussed three elements of an apology in one of his articles: acknowledgment, assent, and vulnerability. Without all of those elements, there is no true apology. Carl Schneider, "I'm Sorry': The Power of Apology in Mediation," (October 1999) (available at [www.mediate.com/articles/apology.cfm](http://www.mediate.com/articles/apology.cfm)). See also, Justyna Herman, "A Civil Action: Is There Room for Apology in the Adversary System?" University of San Francisco, School of Law (2005)(available at [www.usfca.edu/pj/acivilaction\\_herman.htm](http://www.usfca.edu/pj/acivilaction_herman.htm)). See also, Lee Taft, "Apology Subverted: The Commodification of Apology," 109 *Yale L.J.* 1135 (2000). See also, Nicholas Tavuchis, "Mea Culpa: A Sociology of Apology and Reconciliation" (Stanford University Press 1991).

Tavuchis agrees with Schneider, claiming that for a true apology to exist it must contain the three elements: "The offender must be able to name the offense, then the offender has to admit fault and, finally, express remorse for the result of his or her act and the harm it caused. The remorse and regret include willingness to change on the part of the offender and agreement to accept all consequences."

Schneider also notes, "By looking at the elements of apology, it becomes obvious that there is an important moral quality in apology."

(continued on next page)

## Examining Apology

(continued from page 115)

The authors of this article agree that an effective apology must have the three primary components: It must be sincere, it must be timely, and it must be given by the right person.

Lee Taft, author of several ADR articles, supports these views: "Apology is moral because it acknowledges the existence of right and wrong and confirms that a norm of right behavior has been broken. It is moral because the person who apologizes also exposes himself to the consequences of his wrongful act." See Taft *supra*. This acknowledgment allows the wrongdoing/pain to shift from the victim to the victimizer. *Id.*

The shift provides some restoration of wholeness for the victim. To many, however, an apology still retains the stigma of right versus wrong, which can be the death knell to using an apology.

Another perspective regarding the elements of apology is provided by Prof. Jonathan Cohen of the University of Florida, a leading scholar in the field of apology. Taryn Fuchs-Burnett, "Mass Public Corporate Apology," *Dispute Resolution Journal* (May-July 2002) (available at [www.findarticles.com/p/articles/mi\\_qa3923/is\\_200205/ai\\_n9060883](http://www.findarticles.com/p/articles/mi_qa3923/is_200205/ai_n9060883)); See also, Jonathan Cohen, "Advising Clients to Apologize," 72 *S. Cal. L. Rev.* 1009 (1999). He believes an effective apology must consider: "(1) Appropriateness of the case for apology; (2) timing of the apology; (3) scope of apology; (4) method of apology; (5) nuance, and (6) interpersonal variation."

Cohen's opinion gives a slightly different twist to each of the descriptions, and divides them into six elements, as opposed to Schneider's three. One common thread appears to be timing.

### TIMING THE APOLOGY

We can go back to our youth for a great example of the importance of timing. When a miscreant was confronted by his or her parents and told to apologize—at which point he or she looked at his or her feet and in a low voice, croaked out "Sorry"—most of us were not persuaded.

The reason the apology was unmoving

was because we judged it as insincere. Why? One reason was the timing. It was given as a result of being caught and not because the actor independently recognized wrongdoing.

The timing element is an important factor according to William Felstiner, author and professional mediator, because it allows the dispute to metamorphose. Hiroshi Wagatsuma & Arthur Rosett "The Implications of Apology: Law and Culture in Japan and the United States." 20(4) *Law & Society Review* 461-98 (1986); William L.F. Felstiner, Richard L. Abela and Austin Sarat, "The Emergence and Transformation

### Practicing Sorrow

**The goal:** Updating the techniques and jurisprudence surrounding the use of apologies in business conflict resolution settings.

#### How effective is the technique?

Very, but you need to understand the elements, and how to proceed.

#### Is it that difficult? Yes. Poorly

done apologies can embarrass. Really poorly done apologies will destroy a defense.

of Disputes: Naming, Blaming, Claiming," 15 *Law and Society Review* 631-654 (1980-81)(see [www.albany.edu/~barclay/felstiner.ppt#266](http://www.albany.edu/~barclay/felstiner.ppt#266) [at 11, Consequences]). See also, Deborah L. Levi, "Note: The Role of Apology in Mediation," 72 (5) *New York University Law Review* 1165-1210 (November 1997).

The apology starts at naming—that is, giving the injury a name, where the party is injured—shifts to taking responsibility, and then to claiming a remedy. Felstiner also says that if the apology is said at the wrong time in a conflict, it may have no effect or it could possibly escalate the conflict.

Schneider agrees with Felstiner regarding this metamorphosis. He notes, "Apology involves a role-reversal: The person apologizing relinquishes power and puts himself at the mercy of the offended party who may or may not credit the apology." Carl Schneider, "What It Means to Be Sorry: The Power of Apology in Mediation" 17(3) *Mediation Quarterly* 265-280 (Spring 2000) (available at [www.mediate.com/articles/schneiderC1.cfm](http://www.mediate.com/articles/schneiderC1.cfm)). He also believes "all elements are needed for an apology to be successful; the party has to accomplish some sort of restitution or reparations."

This is a recognition that a component to the success of an apology is forgiveness. Forgiveness is the Yin to the Yang of the apology. It should be noted, however, that forgiveness does not mean, by definition, that the offender will not have some price to pay for the offense. But as noted below, a properly presented, sincere, and timely apology can often effect the requital.

Aaron Lazare, a psychiatrist and author of the book "On Apology," agrees, concluding, "What makes an apology work is the exchange of shame and power between the offender and the offended." Aaron Lazare, "Go Ahead, Say You're Sorry" *Psychology Today*, 40-43, 76-78 (January/February 1995)(available using the search function at [psychologytoday.com](http://psychologytoday.com)). See also Aaron Lazare, *On Apology*, (Oxford University Press USA 2005).

This same theme is discussed by Harold S. Kushner in "Living a Life that Matters," especially in Chapter 4. Harold S. Kushner, "Living a Life that Matters," Chapter 4, page 60, (Alfred A. Knopf 2001). He discusses an Ariel Dorfman play, "Death and the Maiden," where a Chilean woman identifies the doctor who raped and tortured her as the agent of a repressive government. She captures him and is about to kill him in spite of his protestations of innocence. When he breaks down, confesses his guilt, and admits his shame, she has no need to wreak vengeance. In the play, his humiliation was more important than his death at her hands.

In a more positive note, Kushner's analysis of the South African Truth and Reconciliation Commission and U.S. restorative justice programs lead to a similar conclusion. Punishment is not the crucial issue to those aggrieved. They need to reclaim their loss of humanity at the hands

of others. In much the same way, an apology can remove the injured person's stigma of guilt, and place it where it belongs—with the offender.

### THE IMPORTANCE OF SINCERITY

Apologies also can be dangerous. If the apology is insincere, it can make the matter worse. If the apology is sincere and fully accepts responsibility, but is delivered at the wrong time or given to an injured person unwilling to accept it, it could make the giver vulnerable to more extensive damages. In the absence of protective legislation, such as a statute making an apology privileged communication, an apology could be construed as an admission of liability.

On the other hand, parties making sincere apologies and showing remorse, whether in a criminal matter or civil litigation, are judged considerably more favorably than when there is no apology. Gregg Gold & Bernard Weiner, 22(4) "Remorse, Confession, Group Identity, and Expectancies about Repeating a Transgression," *Basic and Applied Social Psychology* 291-300 (2000).

Research indicates behavior immediately after an accident or incident leading to injury, loss, or damage is more likely to be guided by the doer's conceptualization of fault and remorse rather than by what may be permissible under a protective statute. William K. Bartels, "The Stormy Seas of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made After Accidents," 28 *W. St. U. L. Rev.* 141 (2000-2001).

Sincere apologies given too long after the injurious situation or given offhand may appear insincere. Likewise, a showing of sympathy, stopping short of being an apology, may be rejected as being insincere or appearing to be a "tactic." It may look like legal posturing and inflame the situation.

### DANGERS OF APOLOGIZING

Many insurance policies include language that specifically forbids the insured from assuming liability absent the insurance company's consent. Could an apology that is construed as an admission of fault

void the insurance coverage? There are a few cases supporting this proposition, most of which arise from automobile accidents. The law in this area is anything but well-settled. See *Cohen v. Employers' Liab. Assurance Corp.*, 187 F. Supp. 25, 28 (1960), *aff'd* 289 F.2d 319 (4th Cir. 1961).

Most courts maintained the insured's coverage, yet others have not. See Annotation, "Validity, Construction, and Effect of 'No-Consent-to-Settlement' Exclusion Clauses in Automobile Insurance Policies,"

An apology in the legal environment opens up a can of worms. It could be considered an admission.

18 A.L.R. 4th 249, § 4 (1981). Courts that did not abrogate the insurance coverage seem to reason that voiding the insured's coverage simply because he or she apologizes is contrary to public policy.

Such policies might include encouraging private settlement of disputes or preventing people from being penalized for making sincere, truthful statements. The purpose of insurance, after all, is to pay for damages when a mishap has occurred rather than to discourage moral behavior following the mishap. Jonathan Cohen, "Advising Clients to Apologize," 72 *S. Cal. L. Rev.* 1009 (1999).

An apology may not work if the dispute has gone on too long and there is too much vitriol between the parties. It may not work if the injuries are too extensive. It may not

work if the parties are represented by an attorney unskilled or unwilling to engage in relationship rehabilitation instead of adversarial advocacy.

An apology in the legal environment opens a can of worms. It could be considered an admission—thus, an exception to the hearsay rule. See California Evidence Code § 1230-Declarations against Interest. As mentioned before, it could be considered by the insurer as an act by the insured against the insurers' interests. "[A] crucial inhibition to a person making an apology in an American legal proceeding is the possibility that a sincere apology will be taken as an admission; evidence of the occurrence of the event and of the defendant's liability for it." Hiroshi Wagatsuma & Arthur Rosett, "The Implication of Apology: Law and Culture in Japan and the United States," 20 *Law & Society Rev.* 461, 483 (1986).

Faced with the dilemma of apologizing and reducing the possibility of or impact of litigation, or apologizing and incurring enhanced liability, many states have taken the initiative of statutory protection for apologies. In "The Art of the Apology," *Mich. Bar J.* 10-11 (June 2002)(available at [www.michbar.org/journal/pdf/pdf4article448.pdf](http://www.michbar.org/journal/pdf/pdf4article448.pdf)), Bruce W. Neckers gives the following example:

In a case in which I represented the plaintiff, the wrongdoer himself tearfully acknowledged his role in the tragic accidental death of my client's son. It had a huge impact on the settlement of the case. There never would have been a lawsuit if the same person had made the same comments to the mother during the 30-day period in which her son lay dying in the hospital, or during the three days his young body was at the funeral home. *The sad part in that case is that the defendant and his company wanted to express the same thought near the time of the accident, but claimed to have been prohibited from doing so by their insurance carrier.* [Emphasis added by authors.]

Analogous to the protection of settlement discussions, states increasingly are adopting evidence rules making apologies inadmissible. For example, California Ev-

(continued on next page)

## Examining Apology

(continued from page 117)

idence Code § 1152 makes discussions and offers made in the course of settlement discussions inadmissible as evidence. Evidence Code § 1115, et seq., is a comprehensive statutory scheme designed to keep conversations and evidence presented in a mediation confidential and inadmissible. The California Legislature went as far as to make the mediator incompetent as a witness (Evidence Code § 1121).

In 2000, California's Legislature enacted Evidence Code § 1160 which states:

(a) The portion of 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 that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is

part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

While this statute excludes the specific term "apology," as of the writing of this article, no court has ruled that the word "apology" is excluded.

Although Massachusetts was the first state to adopt statutory protection (Mass. Gen. Laws, ch. 233, § 23D), Florida acted a law in 2001 (Fla. Stat. Ch 90.4026), Texas in 1999 (Tex. Civ. Prac. & Rem Code Ann. § 18.061), and Washington state in 2002 (Wash.Rev.Code § 5.66.010(1)).

As seen in California's example, the Legislature distinguished expressions of sorrow and sympathy from admissions of fault. One need not be prescient to see there will be skirmishes over whether a given apology is an expression of sympathy or acceptance of guilt and/or liability. If the apology is not an acceptance of responsibility, then is it sincere?

One of a myriad of problems in insulating apologies or making them an ex-

pression of sympathy in lieu of a genuine apology is how they will be received by the aggrieved party. An effective apology must be *sincere*. Sincerity is enhanced when the person who gives the apology gives it even though they stand to be held financially liable or have something at risk.

If people are given the license to indiscriminately issue an apology, the recipient may wonder if it is sincere and the apology may lose its impact. On the other hand, Jonathan Cohen said, "[W]hile a full apology will usually be most powerful, merely expressing sympathy can often be a large step."

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*In Part II next month, the authors examine high-profile product liability and health care matters, applying principles for constructing effective apologies.* ■

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## Unclaimed Funds

(continued from page 113)

These functions, in our judgment, range too far from the judicial role and can lead to appearances of favoritism. How do potential recipients gain the attention of the court, after all? By hearings? Independent inquiry? Lobbying?

Unsurprisingly, some charities are hiring lawyers to lobby judges for these funds. While some potential recipients know nothing about the practice, others are starting to count on it.

Legal services organizations that represent indigent clients, for example, are beginning to rely on class-action settlements to finance their work. Accordingly, legislatures and higher courts are being asked to take actions that keep that money coming to them.

Before the practice becomes institutionalized, there should be serious, focused discussion on this issue. There should be a consensus on the proper disposition of

these funds, and the policies and procedures to manage their distribution, as well as making their existence and the means of access to them widely known.

### Class Money

**The issue:** There is no guidance for disposing of unclaimed settlement funds.

**Isn't that a good thing?** For the judge-chosen beneficiaries, sure. But is this really a judicial function?

**A proposed solution:** A public distribution panel in each federal circuit.

As it is now, the way the funds are handled is neither transparent nor open to all

who may want consideration. There are no published criteria for determining who gets the money and, as far as we know, no way for interested parties to see a "grant request proposal" form, if, indeed, such a form exists in any of the federal circuit or state courts. Announcements after the fact hardly suffice.

The money is there, however, and should be put to productive use. The issue is how to do it responsibly, satisfying needs for fairness, transparency and accountability.

Judges have gotten into the business of charitable giving because there are no clear requirements for these funds' use. The American Law Institute, an influential Philadelphia group of lawyers, judges and academics that proposes ways to improve justice administration, takes the position that all sums from class-action settlements should go to plaintiffs unless they cannot be found or the sums involved are trivial. The institute has met vigorous resistance in its efforts to devise a plan to deal with the unused funds.

Unsurprisingly, perhaps, there already