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## PERSPECTIVE

# The power of apology in mediation

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Apologies are an integral aspect of human behavior. An apology given in appropriate circumstances can have a profound impact on both the person giving and receiving it. Besides the psychological benefits, apologies may - if done genuinely and correctly - result in economic benefits as well. Studies show that doctors who give apologies in serious medical malpractice claims pay less to settle their claims compared to cases without apologies. With these advantages in mind, what disputes are appropriate for apology in mediation and how can they be made effectively?

*The Emotional Benefits of Apology.* A sincere apology provides therapeutic benefit for both parties. The injured party may feel a sense of emotional healing, no longer stuck in the past with anger and resentment. An apology engenders the human emotion of forgiveness and empathy for the wrongdoer. Conversely, the person giving the apology takes responsibility for the actions causing harm, thereby mitigating the debilitating physical and emotional effects of remorse and shame felt after hurting another. One theory suggests that apology encourages forgiveness by eliciting sympathy.

*Elements of an Apology.* To be effective, an apology should include an acknowledgment of harm, a

statement of remorse, and a willingness to take responsibility and remedy the wrong. Conversely, a bad apology is worse than no apology at all. Ineffective apologies are so common, there is a term for them, "a non-apology." If an apology is to be made, it must be given well or the attempt should be avoided all together since it will backfire and move the parties further apart.

*The Economic Benefits of Apology.* Economists Benjamin Ho and Elain Liu conducted two studies on the effect of apology in medical malpractice claims. They examined whether state-level apology laws had any impact on malpractice lawsuits and settlements. These laws encourage physician apologies by making them inadmissible to prove liability. Ho and Liu found an overall decrease of 12.8% in average malpractice payments in cases involving severe injuries. Less severe injuries resulted in fewer claims, although the settlement amounts were not reduced. In short, doctors who apologized for their malpractice faced fewer claims in cases of less severe injuries, and paid less on average in cases involving severe injuries, than those doctors who did not apologize.

*Application to Mediation.* Most disputes handled by commercial mediators and lawyers involve money. The mediation is ultimately about a negotiation to see if the parties can agree on economic terms. It would be naïve to think an apology would ever be in lieu of a monetary

settlement. At the same time, as reflected in data from medical malpractice settlements, an effective apology can make it easier to settle difficult cases and, in some instances, for less money. In addition, the parties may experience emotional benefits.

*Appropriate Cases.* In determining those cases best suited for apology in mediation, the subject matter is less important than the parties involved. Any type of dispute - business, personal, real property, professional liability, personal injury - may be appropriate if the right human dynamics are present. Is the person who caused harm willing to say "I'm sorry," and give a sincere and effective apology? Would the party receiving the apology be receptive to it? Because apologies are restorative and can help repair damaged relationships, they are particularly beneficial where the parties had, or are required to continue in an ongoing, albeit strained, relationship.

Likewise, disputes with emotionally harmed claimants may also benefit from an apology because of the emotional healing that follows from receiving and accepting an apology. The key is to identify the right disputes and mediator, one skilled in recognizing and managing interpersonal emotional dynamics, to determine if the mediation is one appropriate for an apology.

For example, in a sexual molestation case, the defendant apolo-

gized to the plaintiff. In turn, she accepted the apology while describing to him the harm she had suffered. In a letter to the court, plaintiff's counsel explained the mediation afforded her client the opportunity to confront the demons that had haunted the client for many years, a rare gift that few victims of sexual molestation receive, and one not available through the court system.

In a more typical case, a dispute between former partners to a romantic relationship that ended in an assault by one against the other, an apology set the stage to reach a monetary settlement in what had been a lengthy and intractable dispute. Finally, in a boundary dispute between neighbors of oceanfront properties, an apology and acceptance of it allowed both men to move beyond their considerable egos to see each other in a different light and settle their dispute.

*Making Effective Apology in Mediation.* All statements made in mediation are cloaked by the mediation privilege and rendered inadmissible at trial under Evidence Code § 1119. Therefore, mediation is an ideal and protected space in which to give an apology.

Great care must be taken to ensure the setting and tone are conducive to the right communication. This can be done in a joint session or in a principal-principal meeting with the mediator and without counsel, but only with their blessing. To make the right

impression on the person receiving the apology, it must be genuine and given well.

*Timing of the Apology.* The best time for an apology is usually before the negotiation commences, though one can be made at any time. Apologies can be given even at the conclusion of the mediation, after a settlement is reached, where doing so before the negotiation was inappropriate.

For example, in tort cases settled with insurance money, defendants may be afforded the opportunity to apologize for the harm caused. This can provide tremendous relief to a defendant tormented by the debilitating effects of regret for causing physical or emotional harm to another human being. When the apology is made sincerely and accepted by the plaintiff, the defendant obtains closure and can move forward.

*Conclusion.* Depending on the dynamics and circumstances of the dispute, an apology can enhance the chance of success (settlement) and allow the parties to experience additional, positive effects. In this way, mediation can provide participants with the kind of relief on a human level unavailable in the litigation process, even to successful litigants. The power of apology is often overlooked and

should always be considered in appropriate cases.

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