

# APOLOGY

## Its Power and Impact in Mediated Resolution

### *OVERRATED OR NOT?*

Are disputes like love, where the novel says you never have to say you're sorry? There has been an ongoing debate among ADR professionals about whether apology is appropriate and effective in mediation. The points and counterpoints of the dialogue are perhaps best characterized by Jeff Kichaven, a well known California mediator and Darrell Puls, his equally respected counterpart in Washington, who have both spoken and written about the subject. After studying both sides and plugging in my own experience, I have come down on the side of "effective." My mediation experience indicates that while meaningful apology may not make the dispute go away, it certainly may help set the tone and tempo of the negotiation and, in turn, relax the emotional level that may be playing a big part in the dispute. It is important to keep in mind that I refer to *meaningful* apology.

Kichaven concludes that apology is overrated, but does so with reservation. His reasons include the fact that most people don't feel they did anything wrong; apologies are not useful; and there are numerous other things you can do at mediation to make other people feel important and appreciated—such as dressing respectfully, listening attentively or even superficially apologizing. Nevertheless, he acknowledges that a "well-constructed apology" in the mediation is something that may serve you well. Kichaven writes that the major shortcoming of an apology is that it may be perceived as being made "for consideration" and therefore is meaningless. In the context of a mediation—an effort to negotiate resolution of a litigated case—it is difficult for an apology to be perceived in any other way.

Darrell Puls opines that perhaps one of the reasons apologies don't succeed is because they don't go far enough. He should know. He has conducted doctoral research into the subject of forgiveness and has written about the various levels of apology, with the strongest level adding the element of "justice" to the equation ("What can I do to make this right?"). Of course, not all cases are conducive to the use of an apology, with the ones having emotional aspects meriting its consideration the most. That having

been said, I have mediated what initially appeared to be benign, even dry, commercial disputes, only to find an underlying wide vein of emotion.

#### **Some Examples**

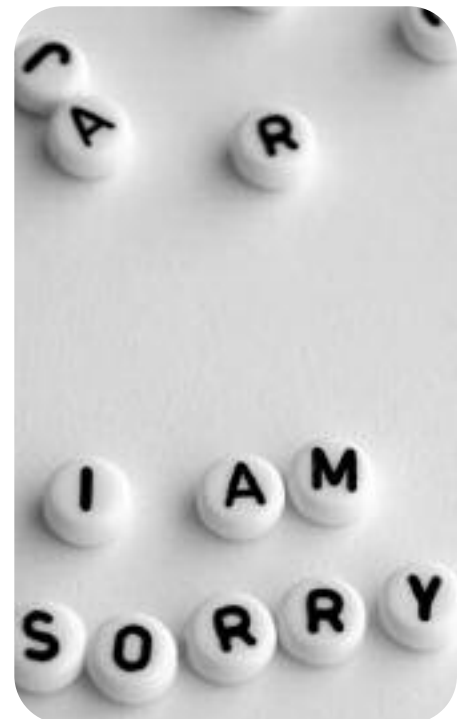
In demonstrating how an apology may set the tone for mediation, Kichaven describes an actual dispute he mediated where the opportunity to apologize was missed and the mediation ended in disaster. He relates how he offered to defense counsel, "a highly placed partner in a major law firm," a great opportunity to set a tone. It was not a large case, but to the plaintiff, an elderly banking customer who had received rude treatment after the bank reneged on one of its promotions, principle played a large part. It should have been resolved. Kichaven is a very talented neutral and his attempt to elicit an apology from defense counsel was perfect.

#### **Jerome F. Weiss**

Founder | Mediation Inc.

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*"You know, I'm glad you're here in mediation because your firm runs a business, I run a business, your client runs a business. We all have clients, or customers, and we all want to keep our clients happy. Here you have a customer who had been with your client's bank for more than 20 years and now she's a former customer. Nobody wants to have an unhappy customer. Here in mediation you have a chance to do something you could never do in a court. I know you don't believe your client has done anything wrong, and I'd never ask you to acknowledge any such thing. But here you have the unique opportunity to look across the table at this nice woman, and respecting*

some great stuff, too. Take, for example, the time when a superb medical malpractice defense lawyer spoke to the family of a college student who had died from an alleged undiagnosed pulmonary embolism. He represented one of several defendants and in opening caucus, when his turn came, he said the following:

*"Mr. and Mrs. Smith, I represent Dr. Jones who, as you know, was the first person to treat your wonderful son when he first complained of pains in his legs and chest. I was with Dr. Jones the day that he received the lawsuit. That was the first time he even knew your son had died. He was horribly shaken on that day. I was with him again last night in preparation for*

expression of regret. Apology is almost certainly doomed to failure if it is made without authenticity and genuineness: It should be made with the requisite amount of "humanness."

Just because lawyers – especially trial lawyers – might be wonderful at the arts related to advocacy and litigation, does not mean their skills of negotiation or mediation advocacy are in tune with the realities of the moment. I have seen many fine lawyers snatch defeat from the jaws of victory by awkwardness, insincerity (the kind that can make you crazy when, for example, little kids say "I'm sorry" but clearly don't mean it), missteps and downright ineptitude during the negotiation process. These lawyers didn't understand being "in role" as mediation advocates. In fact, I am spending more and more time, as are many neutrals, in advising lawyers on negotiation and mediation advocacy. Getting an apology on the table—especially the right kind—is a difficult, unique and extraordinarily challenging task that we often take for granted.

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*the fact that you don't think your client did anything wrong, you can still tell her how sorry you are that she got so upset that she took the extraordinary steps of hiring a lawyer and filing a lawsuit against you."*

Kichaven goes on to tell how this lawyer straightened up in her chair, looked down at her notes, and responded to what Jeff thought was "a big fat softball pitch:"

*"I will do no such thing! I am here to explain why all appropriate banking regulations were followed, why my client did nothing wrong, why we are extremely likely to obtain summary judgment in this case and why we think it has at best nuisance value for settlement purposes."*

Kichaven describes this as the "...worst mediation advocacy I had ever seen, and the result was predictable. By the day's end, the president of the bank had seen fit to offer \$30,000 in settlement, an amount in excess of the anticipated future defense fees . . . [and probably \$20,000 more than the case was worth] . . . but the case did not settle. No matter what the number had been, it could not have been high enough to make up for the manifest disrespect . . . [this lawyer] . . . had shown the widow and her daughter hours before."

I have experienced similar moments in my mediation practice—Some horrible mediation advocacy, but

*this mediation, nearly two years after the filing of the lawsuit and I want to tell you he was as shaken last night as he was two years ago. We feel terribly about this tragic loss and hope we're able to resolve any differences we have in this mediation today."*

Think of the difference between this presentation and the first example. This lawyer represented one of five defendants. None of the other four defendants had made such an unusually focused, heartfelt and meaningful statement of regret. And while significant money was ultimately paid to the plaintiff, the words of this particular lawyer helped set the tone for the rest of the day. He helped everybody in the room by assisting people to focus on the limited nature of the mediated resolution—he fact that this wonderful young man who had perished could never be replaced—and it allowed the family the dignity and moral room to negotiate with honor and pride and to move on with their lives. I bumped into this lawyer a few weeks later and told him how constructive his statement was. He said, "Jerry, I learned something about mediation. You need to come with the right attitude." It is this "right attitude" that perhaps best describes good mediation advocacy.

Now, getting back to my point about *meaningful*. Other words: *sincere and genuine*. I have seen this verbiage used in other mediations, only to fall flat on its face, either because it was done insincerely or because it was done so aggressively it belied any

### Recent Interest and Study

What does the data tell us about the value of an apology? There's a growing amount since the topic has generated considerable interest lately. Common sense tells us that communication is an essential ingredient to effective mediation and negotiation. Common sense and statistics also tell us, with respect to the whirlwind world we live in, there is increasingly less time, room and effort to conduct effective communication. Mediation isn't the only arena that's paying attention to apology. Health care is becoming increasingly focused on the subject—notable apology and communication "science" and experience is being compiled with respect to medical mistakes.

I recently spoke to a group of doctors and observed that unfortunately they do not have the time or resources to take a patient's history like they once did, and so have lost one of the significant opportunities to establish rapport with their patients. What was once the norm is now an exception. This practice doesn't help when mistakes are made, since lack of communication between patients and medical providers can lead to an increased likelihood of medical malpractice cases. There is no line on any reimbursement form that says, "Empathy Services" and yet it is exactly this empathy—a form of communication—that has always been a structural element of the doctor/patient relationship. Likewise, it is an essential element in the communication that is often necessary for a successfully negotiated or mediated resolution in legal disputes.


Following this data and trend, some legislatures, including ours, are protecting apologies for medical mistakes by excluding them from legal proceedings. Leading the trend, various medical institutions, with

*continued on page 52*

continued from page 41

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or without legislative protection, such as Johns Hopkins University and affiliated hospitals and the University of Michigan Health System, have established formal apology policies and procedures. The results are remarkable, with a dramatic drop in claims and suits. The other, and perhaps more important byproduct, according to a recent article in *Time* magazine, is that there is better medicine. Things are not swept under the rug and so can be better explored to find what really had gone wrong. Plus, the elements of bitterness and adversity are removed.

Likewise, it is the adversarial nature of litigation that too often dominates the mediation and needs to be removed from the proceeding, thereby allowing the expressions of empathy and regret that can be so effective. A challenging task indeed. Like doctors, disputants and representatives in legal-based disputes who are actively engaged and sensitive to the opportunity for apology generally have a much better success rate with respect to concluding disputes than their counterparts who are not. 



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