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TO APOLOGIZE OR NOT TO APOLOGIZE, THAT IS THE QUESTION

I. Introduction

Everyone has probably issued an apology in their lifetime. Sometimes you just feel better apologizing. Does this carry over to claims and/or litigation? How can we use an apology to resolve a claim and/or lawsuit, or should we even apologize? Will it hurt or help the businesses or clients we represent?

II. Elements of an Apology

Apologies differ depending on the situation. As such, to be successful with your apology, you need to explore certain elements and incorporate them into your apology. Lauren Bloom, an attorney and ordained interfaith minister, provides a good summary of what she deems “the six essential elements of an effective apology” in her book “Art of the Apology: How, When, and Why to Give and Accept Apologies”¹ as follows:

A. Sincerity

Most of the time, you are sorry for what has occurred; therefore, it is not difficult to be sincere. The problems occur when you are not really sorry but feel an apology is the right thing to do. In those cases, finding the reason you are saying the apology, and taking the time to phrase it correctly will be important.

B. Responsibility

Apologizing means admitting to what you did and not trying to minimize or blame someone else. Therefore, it is important to understand what you did wrong so you can apologize in a manner that gets the point across to the person affected, but does not make you look bad in the process.

C. Make Amends

¹ Bloom, Lauren. Art of the Apology: How, When, and Why to Give and Accept Apologies. New York: Fine & Kahn, LLC, 2014. Pages 23-32.

A serious apology sometimes means making amends. As Ms. Bloom states in her book, “Put your money where your mouth is.” Your apology with some form of compensation may make things right. Of course, there are other ways to pay for a mistake. Consideration can be given to payment towards a charity, taking the item or issue that caused the problem off the person’s hands, or a gift of some sort. Making amends will depend on the circumstances before you at the time, and what you are willing to do to resolve the issue. Be creative in resolving the claim and/or lawsuit and issuing the apology.

D. Express Appreciation

While apologizing, it is important to get across that you value your relationship with the other person. In other words, express appreciation for the person’s commitment to you or the company you work for, and let them know their concerns mean something. If this does not occur, there may be some risk that the person thinks the apology is forced, insincere or an obligation of some kind.

E. Listen

Make sure you allow the other person to talk and express themselves during an apology. This is typically an important part of the healing process as it allows them to talk about the issue that has caused them pain or concern. During this time, make sure you really listen, ask questions if necessary, and do not get defensive during the process.

F. Do Better Next Time

Mistakes occur, but learning from them can make us stronger. If you have an opportunity to improve a product, fix a claims handling process, or offer a solution to the occurrence that will help your company in the future. It may be beneficial to make those changes and offer them within your apology in a creative and productive way.

III. Factors to consider whether to use an apology

Even if you decide an apology should occur, there are factors that should be considered before it occurs.

A. Severity of the impact of the injury or damage to the person’s life.

If there is a serious injury or some type of damage involved, more thought may need to be put into the apology. For example, how do we make the person “whole,” how will it affect the company long term, can the claim/lawsuit be remedied or assisted with an apology?

B. The claimant's emotional state at the time of the incident.

The claimant typically has a range of emotions entangled within a claim/lawsuit. Thus, this is an important factor. They may not want an apology and/or may not be ready for one.

C. Determining if an apology was previously given

If an apology has already been given, will a second one benefit or hurt the end result? What happened after it was given? There is only so much you can do and decisions should be made to determine the benefits of a second apology.

D. Age, Income and social history.

What type of claimant are we dealing with? Do they have a lot of money so financial compensation is not a driving factor for them moving forward? Are they older and disappointed in what occurred and would like the apology? It is important to understand who the claimant is and what their driving force is behind their claim. Some individuals are more open to apologies than others.

IV. Timing the Apology

Timing is something that should be seriously considered when issuing an apology. In our line of business, an early apology may not be appropriate. In fact, it may cause problems if a lawsuit is filed. Apologies have been used to prove evidence of negligence in cases.² As such, finding the right moment is beneficial.

Some of the factors above will be an important influence. For example, an emotional claimant may not be the best person to apologize to; perhaps waiting until they have had time to think over what occurred will open the door to their acceptance. Perhaps a settlement conference or mediation is the best place for an apology to occur. Of course, an early apology may be the key to avoiding a lawsuit and attorney fees altogether. Alternatively, it might be important to get a lawyer involved to assist with creation of the apology and limiting problems with litigation.

V. Use of Apology Laws

Thirty-six states have apology laws, primarily in the medical context. Most of these laws prohibit admissibility of only so-called "partial" statements of apology, but allow the admission of statements of fault, liability, or causation. For example, saying "I'm sorry that happened," does not admit any fault, only remorse that an accident occurred. On the other hand, six states go further to prohibit the admission of even statements of fault: "I'm sorry I delegated that procedure to a resident; I should have

² Helmreich, Jeffrey. "Does 'Sorry' Incriminate? Evidence, Harm and the Protection of Apology." *Cornell Journal of Law and Public Policy*, Vol. 21. Page 571.

handled that myself.” Fourteen states have no apology laws at all. However, many statements of remorse could be deemed inadmissible under traditional rules of evidence. The prejudicial effect of apologies may be considered greater than the probative value, unless such apology also includes some utterance of factual value. ³

A. States that Have Apology Laws

36 states and the District of Columbia have apology laws.

* States with laws related to “accidents” in general, not just medical malpractice.

^ States providing full protection to apologies, even admissions of fault or causation.⁴

Arizona^	Pennsylvania
California*	South Carolina^
Colorado^	South Dakota
Connecticut^	Tennessee*
Delaware	Texas*
District of Columbia	Utah
Florida*	Vermont
Georgia^	Virginia
Hawaii	Washington*
Idaho	West Virginia
Illinois	Wyoming
Indiana	
Iowa	
Louisiana	<u>No apology laws:</u>
Maine	Alabama
Maryland	Alaska
Massachusetts*	Arkansas
Michigan	Kansas
Missouri	Kentucky
Montana	Minnesota
Nebraska	Mississippi
New Hampshire	Nevada
North Carolina	New Jersey
North Dakota	New Mexico
Ohio	New York
Oklahoma	Rhode Island
Oregon	Wisconsin

³ Anna C. Mastroianni, Michelle M. Mello, Shannon Sommer, Mary Hardy and Thomas Gallagher. “The Flaws in State ‘Apology’ and ‘Disclosure’ Laws Dilute Their Intended Impact on Malpractice Suits,” *Health Affairs* 29, no. 9, pp. 1611-19 (2010).

⁴ Nicole Saitta and Samuel D. Hodge, Jr., “Efficiency of a Physician’s Word of Empathy: An Overview of State Apology Laws.” *Journal of the American Osteopathic Association*, Vol. 112, pp. 302-06 (May 2012).

B. Examples and Case Studies

Tennessee:

Tennessee Rule of Evidence § 409.1

“That 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 such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault that is part of, or in addition to, any of the above shall not be inadmissible because of this Rule.”

Tennessee is one of six states with laws specifically related to “accidents,” defined as occurrences which are not the result of willful action. Tennessee also makes it clear that a statement of fault is admissible, while an apology without a statement of fault is not admissible.

Georgia:

O.C.G.A. § 24-4-416

“In any claim or civil proceeding brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which is made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relates to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.”

Georgia’s statute is quite inclusive, making inadmissible *any and all* statements of apology, etc., related to an unanticipated outcome of medical care.

Florida:

Fla. Stat. § 90.4026

Another of the six states that relates to “accidents,” not just in the medical context. Statements of fault, however, are admissible.

Ohio:

Ohio Rev. Code Ann. § 2317.43

Typical medical care apology law with no specific language regarding accidents or admissions of fault, liability, and/or causation.

Ohio Court of Appeals held that testimony by patient’s daughter and husband that the surgeon told them he nicked an artery and took full responsibility was admissible as evidence of liability in spite of Ohio’s apology law at Ohio Rev. Code Ann. 2317.43. On review, the Court

held that the surgeon's statement was admissible because it did not include an expression of apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence. *Davis v. Wooster Orthopaedics & Sportsmedicine*, 952 N.E.2d 1216 (Ohio Ct. App. 2011) (appeal dismissed).

Ohio Court of Appeals determined that although the meaning of the word "apology" may be ambiguous in Ohio's apology statute, it was intended to exclude all statements of apology, even those admitting fault. *Stewart v. Vivian*, 2016-Ohio-2892, 2016 Ohio LEXIS 1753 (Ohio Ct. App. 2016).

VI. Non-apology apologies

Non-apology apologies are a great tool to try and diffuse a situation without admitting guilt or fault and to use in the claims or legal process. Wikipedia also calls this "nonpologies". These are "statements that use the word 'sorry' but do not express responsibility for wrongdoing[,] may be meaningful expressions of regret, but such statements can also be used to elicit forgiveness without acknowledging fault"⁵

An example would be the use of the expression "mistakes were made." Note, that there is no admission of fault and no reference to who made the mistake. In other words, "a passive-evasive way of acknowledging error while distancing the speaker from responsibility."⁶

You can also say you are sorry for someone's loss or injury without acknowledging fault. For example, "I am so sorry you were hurt." No admission of fault, but an expressing concern and opening the line of communication for settlement and resolution.

It is important to be careful with the use of "if" in your apology. Ms. Bloom mentions, using this word can make the apology ineffective.⁷ For example, "I apologize *if* I offended you." The "if" implies a lack of remorse, and can show they could not even take the time to find out what was wrong. It comes off as an obligatory statement more than a sincere statement.

Nonpologies are used by negotiators to calm tense situations. "An apology can defuse emotions effectively, even when you do not acknowledge personal responsibility for

⁵ "Non-apology apology." Wikipedia: The Free Encyclopedia. Wikipedia Foundation, Inc. June 2016. Referencing Lazare, Aaron (2005) "On Apology", Oxford University Press p. 99 ISBN 978-0-19-518911-7. Retrieved 3 October 2012.

⁶ "Non-apology apology." Wikipedia: The Free Encyclopedia. Wikipedia Foundation, Inc. June 2016. Referencing Safire, William (2008) "Safire's Political Dictionary", Oxford University Press p. 431 ISBN 9780195343342.

⁷ Bloom, Lauren. Art of the Apology: How, When, and Why to Give and Accept Apologies. New York: Fine & Kahn, LLC, 2014. Pages 166.

the action or admit an intention to harm. An apology may be one of the least costly and most rewarding investments you can make.”⁸

VII. Examples of an effective apology

Whether you work in claims, for a law firm or within a corporation, opportunities will arise where an apology can be used and when they should not be used.

VIII. Determining if apologies make good business sense

There are many cases where an apology could have benefited a company during the litigation and/or claim process. Unfortunately, fear of copycat lawsuits, or concern over sales if an apology becomes public may delay or impede apologies in certain settings.

A. McDonald’s Coffee Case

Stella Liebeck was holding her coffee cup between her legs. She was trying to remove the top to add cream and sugar when the coffee spilled all over her lap. She was apparently hospitalized for eight days and suffered third-degree burns over six percent of her body and underwent skin grafting. Discovery revealed that there had been more than 700 claims by people burned by coffee the ten years before this incident occurred.⁹

It appears the family wanted to settle for 20K to cover 11K in bills. McDonald’s offered 1K. The family sued and received 200K for injuries and 2.7 million punitives (reduced to 640k by Judge). Testimony came out that McDonald’s refused for the coffee to be cooler even though there were complaints.¹⁰

B. GM’s Ignition Failure Cases

Lawsuits have been filed as a result of GM installing faulty ignition switches in some of their cars. Claimants have claimed defective design of the ignition switches, failure to warn of the dangers, and/or breach of warranties. Major recalls and negative publicity has resulted from the problem. America’s best-selling automobile brand has been injured. GM has also filed bankruptcy.¹¹

⁸ “Non-apology apology.” Wikipedia: The Free Encyclopedia. Wikipedia Foundation, Inc. June 2016. Referencing Fisher, Roger; Ury, William L. “Getting to Yes: Negotiating Agreement without Giving In”, New York: Penguin Book. ISBN 9780140157352, OCLC 24318769.

⁹ Lectric Law Library. The Net’s Finest Legal Resource For Legal Pros & Laypeople Alike. <http://www.lectlaw.com>.

¹⁰ Bloom, Lauren. Art of the Apology: How, When, and Why to Give and Accept Apologies. New York: Fine & Kahn, LLC, 2014. Pages 83.

¹¹ “GM Ignition Switch Lawsuit: Overview”. <http://injury.findlaw.com/product-liability/gm-ignition-switch-lawsuit--overview.html>

C. Baylor Sexual Assault Case

The attorney for a sexual assault victim that's suing Baylor University claimed that the former head football coach, Art Briles, agreed to and then failed to apologize to the victim who had been raped by a player. Apparently, there were settlement negotiations the day before mediation. Briles' attorney agreed that his client would be at mediation and would apologize to the victim. He never showed up and the case did not settle.¹²

IX. Why Apologies Fail or Will Not Work

A. Legal Advice

An apology that results in an admission of fault may cause problems if the case progresses and a lawsuit is filed. It can effectively be used in trial to increase punitive damages.

B. Insurance Coverage – Exclusions

There are some liability policies that contain “no admission” or cooperation clauses. These clauses will exclude coverage if the policy holder admits or assumes liability. Courts “generally have been reluctant to void coverage on the basis of a policyholder’s truthful statements to an injured person, either for public policy reasons or because “no admission” clauses have been construed narrowly.”¹³ However, an insurer can make the argument that the apology undermined their ability to settle the case or investigate the case.¹⁴

C. Media/Internet/Brand reputation

An apology by a corporation may result in backlash. Copycat lawsuits may be filed. If a product is involved, sales may be affected. Media looks for news. If a corporation is involved it may be a front line story and reputation can become a focal point.

D. Money

Some folks equate an apology with an admission of guilt. If an apology occurs, they then feel that they should be compensated for the act. A decision will need to be made as to monetary value of a claim before issuing any apology.

¹² Lavigne, Paula. “Attorney Says Art Briles Broke Promise to Apologize to Rape Victim.” www.6abc.com.

¹³ Bronte, Patricia. “Reviving the Lost Art of Apology.” Section of Litigation, American Bar Association.

¹⁴ Id.

X. Conclusion

An apology can be an effective tool when handling a claim or lawsuit. However, careful consideration needs to go into forming the apology. Also, you should look at the facts of each incident to determine if an apology will be beneficial.