

Alternatives



DIGEST

PRACTICE NOTES

Apologies aren't just for the end of talk shows anymore. In the first of two parts, Boston attorney **Deborah Levi** updates her CPR Institute for Dispute Resolution award-winning article on using apologies to help spur settlements. She analyzes the different kinds of apologies, and their significance as an ADR tool. **Page 147**

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Why Not Just Apologize? How To Say You're Sorry in ADR

BY DEBORAH LEVI

At the last debate between Republican presidential candidates before Super Tuesday, George W. Bush addressed his failure to challenge the anti-Catholic teachings of Bob Jones Jr. during his campaign visit to Bob Jones University in South Carolina: "I make no excuses. I make no excuses." After the debate, CNN commentators opined that Bush had effectively apologized for offending Catholic voters. Although Senator John McCain may have prevailed on other subjects covered by the debate, with Bush's apology, McCain could no longer capitalize on Bush's distasteful association with Bob Jones, and any further accusations of anti-Catholic bigotry would backfire. A week later, McCain had all

but lost the Republican nomination and pulled out of the race.

This, some might say, is indicative of the power of apology.

Tuning into apology in public forums as well as private disputes, one finds attempts at apology everywhere. From Paula Jones in her sexual harassment lawsuit against President Bill Clinton to the lead plaintiff in "A Civil Action" whose son died from exposure to contaminated water, the injured

demand apologies when money is not enough to heal their wounds. Meanwhile, from Clinton's Lewinsky scandal to Pope John Paul II repenting the historical sins of the Catholic Church, wrongdoers and their representa-

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PRACTICE NOTES

Ten Principles of Mediation Ethics

BY DAVID A. HOFFMAN

An important subject for mediators is how to distill from the various mediation ethics' codes the essential principles that these codes have in common. Such codes—each with somewhat differing provisions—have been developed by the Society of Professionals in Dispute Resolution, the Academy of Family Mediators, and the American Bar Association, among others. The 10 principles outlined below are a compilation of what this author believes are commonly accepted principles of mediation ethics.

This list, of necessity, oversimplifies the subject; a brief article cannot capture all of the nuances of ethical principles. The list

borrows heavily from many writings in the field—indeed, the point of such a list is not originality but an attempt to discern the principles on which there is consensus. This list also is a work in process; principles and standards are evolving as the field of mediation

matures. For the moment, however, the following seem to be the basic principles of mediation ethics.

1 CONFLICTS OF INTEREST.

Mediators must avoid serving in cases where they have a direct personal, professional, or financial interest in the outcome of the dispute. This duty becomes more complicated where the mediator's interest is

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ADR ETHICS

Ten Principles of Mediation Ethics

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indirect—e.g., he or she works in a firm with someone who has an interest in the outcome, or he or she is related to someone who has such an interest. In those cases, the question is how indirect is the interest? Is it simply a matter of disclosure or does it preclude serving in the case?

Mediators also should avoid an appearance of a conflict. Harvard Law School Prof. Frank E. A. Sander talks about applying the “headline test”: How would you feel about the potential conflict appearing on the front page of a newspaper?

Mediators should err on the side of disclosure. If the disclosure is made well in advance of the mediation, so that the parties have the opportunity to choose another mediator, their acceptance of the mediator—af-

ter full disclosure—generally resolves the potential conflict. In some cases, however, the mediator should decline the case if the conflict is so severe that even waiver does not cure it, or the appearance of impropriety is so strong that it cannot be resolved by full disclosure.

2 COMPETENCE/PROFESSIONAL ROLE BOUNDARIES. Mediators have a duty to know the limits of their ability; to avoid taking on assignments they are not equipped to handle; and to communicate candidly with the parties about their background and experience. Sometimes the parties want a mediator with subject matter expertise (such as divorce), or a particular set of process skills (such as multiparty public policy negotiations). Mediators must defer to their judgment about these matters by disclosing their degree of competence and letting the parties decide. Sometimes mediators get chosen to handle an assignment where they may lack competence; it is their duty to turn it down, even if the parties, having heard their protests, want them anyway. Observing professional role boundaries is the corollary of this duty.

Mediators must avoid providing other types of professional service, even if they are licensed to provide it. Mediators who are engineers, therapists, lawyers or whatever, should leave the parties’ engineering, therapy and law-related needs to others. Even though they may be competent to provide those services, they compromise their effectiveness as mediators when they wear two hats.

3 IMPARTIALITY. Mediation requires engagement, and it is difficult to engage the parties without developing some feelings about them. The duty to remain impartial throughout the mediation—from beginning to end—does not require them to withdraw from the case if they become aware of such feelings, but instead to act in such a way that those feelings (whatever they may be) are kept to themselves. Words, manner, affect, body language, and process management must reflect an evenhanded approach. If mediators’ feelings about the parties are such that they can no longer be evenhanded in their dealings with parties, they must withdraw.

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How To Say You're Sorry in ADR

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compensation would facilitate a happier future. Thus, compensation takes priority over forgiveness.

In tort cases, from products liability to medical malpractice, while the injured party's focus may remain on the past harm, the perceived possibility of large, life-changing damage awards may overwhelm the injured person's desire to address that underlying harm. Similarly, vulnerability to large damage awards may increase the reluctance of defendants to apologize in tort cases. Moreover, in tort cases, the putative wrongdoer may not be personally involved in mediation or negotiation of the dispute, and tort victims are unlikely to be moved by expressions of remorse delivered by the insurance adjuster, defense attorney or other representative of the putative wrongdoer.

In spite of the above obstacles, a mediator or lawyer sensitive to a client's desire in a particular case to reach a reconciliation that goes beyond damages can overcome the apparent mutual exclusivity of apology and

optimal damages. As in the happy-ending scenario described above, an injured party may forgo an attempt to add a penalty (retribution) to reasonable compensation in favor of an apology, which provides closure with respect to the moral and emotional components of the offense, coupled with damages based upon a realistic assessment of the injured party's loss.

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The unique power of apologies to repair intangible harm has made many advocates wonder why more wrongdoers don't just apologize. Nevertheless, when wrongdoers attempt to apologize, the sensitivity of apology to the right words, the right people, the right timing and the right subject matter render such apologies subject to criticism. No wonder so many recent apologies have made the news: Apologies are prime material for editorial commentary. Meanwhile, because apology deals in intangibles rather than dollars and cents, it has long been overlooked by practitioners whose negotiating vocabulary is limited to the remedies afforded by the legal system.

Nevertheless, as mediation and other al-

ternative dispute resolution mechanisms have fostered increased interest in the psychological dimension of disputes, lawyers and mediators can and should tune into apology as a tool that may enhance client satisfaction with the process of negotiating and settling conflicts. In order to facilitate apology, however, practitioners must be sensitive to the factors discussed here that influence the likelihood that an apology attempt will prove worthwhile.

Indeed, because many of those factors hinge on the way representatives frame the issues in disputes and about the likely outcomes of disputes, lawyers and mediators can help their clients optimize chances for successful apology by legitimizing their desires for reconciliation, by helping clients gauge the right time to offer or demand an apology, by evaluating realistically the other remedies available to their clients in a particular dispute and by assisting their clients to meaningfully express or recognize real remorse.

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Next month, more on apology in a business setting, from another CPR Award winner, University of Florida Prof. Jonathan Cohen.

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[4] VOLUNTARINESS. Although some parties come to mediation because they are required to do so (e.g., ordered by a judge, or compelled to mediate under a dispute resolution clause in a contract), they must have the right at a certain point to walk away from the table. In other words, even in a mandatory mediation setting, the parties' duty is to participate in good faith and make an effort to negotiate a resolution. Mediators, however, should remind the parties that any agreement they reach must be a product of their own free will, and therefore they may withdraw from the process if it is not moving in the direction of an agreement that they prefer to the alternative—i.e., continuation of the dispute or resolution of it in some other manner.

[5] CONFIDENTIALITY. There are two aspects of the duty of confidentiality. First, mediators must safeguard the privacy and confidentiality of the mediation process vis-a-vis third parties—i.e., those outside the mediation. Second, when a mediator meets separately with one of the parties, he or she must maintain the confidentiality of anything said in that private session which that party does not want the other party or parties to know. In addition, mediators have a duty to inform the parties of any relevant limits of confidentiality, such as mandated reporting of child abuse or the planned commission of a crime.

[6] DO NO HARM. This familiar principle (borrowed from the Hippocratic Oath) requires mediators to avoid conducting the process in a manner that harms the participants or worsens the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically; some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism toward each other rather than resolving it. The process should be modified where necessary (e.g., meet separately with the parties, or meet only with counsel). Mediators should withdraw from the mediation if it becomes apparent that, even as modified, mediation is inappropriate or harmful.

In short, mediators must avoid adding fuel to the fire. To be sure, there are circum-

stances in mediation (as in medicine) where the problem may have to get worse before it can get better; venting emotions can be a painful process. Before employing this technique, however, the mediator must be confident that he or she has the skill and experience to avoid making matters worse.

[7] SELF-DETERMINATION. Party autonomy is one of the guiding principles of mediation. Supporting and encouraging the parties in a mediation to make their own decisions (both individually and collectively) about the resolution of the dispute, rather than imposing the ideas of the mediator or others, is fundamental to the process. Mediators are frequently asked by the parties: What would you do? What do you think is fair? What do the courts usually do in cases of this kind? Their job is to help the parties find their own answers—i.e., arrive at a resolution that meets their tests of fairness rather than the mediator's. Mediators should also prevent one party from dominating the other parties in the mediation in a manner that prevents them from being able to make their own decisions.

[8] INFORMED CONSENT. A voluntary, self-determined resolution of a dispute will serve the parties' interests only if it is an informed choice. Although the mediator need not be (and usually should not be) the source of the parties' information, mediators should make sure that the parties have enough data to assess their settlement options and alternatives. If the parties lack this information, the mediator should talk to them about how they might obtain it.

[9] DUTIES TO THIRD PARTIES. Just as the mediator should do no harm to the parties, he or she should also consider whether a proposed settlement might harm others who are not participating in the mediation. This is particularly important when the third parties affected by a mediated settlement are children or other vulnerable people (such as the elderly or infirm). In some cases, the affected third parties might be members of the general public, such as in a case involving allegations of faulty construction of a public works project. Since third parties are not directly involved in the process, the mediator may have a duty in some cases to ask the parties for information about the impact of the settlement on others, and encourage them to bring the interests of one or more

third parties to bear on the mediation discussions.

[10] HONESTY. For mediators, the duty of honesty means, among other things, full and fair disclosure of (a) their qualifications and prior experience, (b) any fees that the parties will be charged for the mediation, and (c) any other aspect of the mediation which may affect their willingness to participate in the process.

Honesty also means telling the truth when meeting separately with the parties. For example, if Party A confidentially discloses his bottom line, and Party B asks the mediator if she knows the opponent's bottom line, saying she didn't know the number would be dishonest.

Instead, the mediator might say that she has discussed a number of things with Party A on a confidential basis and therefore is not at liberty to respond to the question, just as the mediator would be precluded from disclosing certain things learned from Party B.

When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position. The mediator must not abuse the parties' trust even if the mediator believes that bending the truth will further the cause of settlement. 

ANNUAL INDEX



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