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1.5 Other - Professional Development CLE Credits – A/V Approval #105510

Recording Date – April 13, 2017

Recording Availability – December 22, 2017

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	Thursday, April 13, 2017	12:00 PM to 1:30 PM	Use of Apology in Conflict Resolution

AGENDA

12:00 PM Presentation: ‘Use of Apology in Conflict Resolution’, by Melvyn Simbug, Simbug, Ketter, Sheppard & Purdy, LLP

This presentation will explore the use of an apology as a tool in conflict resolution. It is intended both for mediators and those who represent parties in mediation.

- When is an apology likely to be useful?
- What content (verbal and nonverbal) makes an apology successful?
- Who are the intended beneficiaries of an apology?
- How can a mediator or a party effectively introduce and use apology as a tool?

1:30 PM Evaluations & Adjourn

SPEAKER BIOGRAPHY:

Melvyn Simbug, Simbug, Ketter, Sheppard & Purdy, LLP - Mel Simbug is a partner in the law firm of Simbug, Ketter, Sheppard & Purdy, LLP in Seattle, Washington. He advises clients and provides dispute resolution assistance for business, IP and real estate matters, especially for technology and web contracts, rights licenses and international distribution. He also facilitates partnerships and organizations with their formation, dissolution, change and conflict resolution issues. Related to his areas of practice, he has served on Washington State and ABA committees, chaired seminars and written several articles. He has presented on mediation issues from fundamentals of mediation to resolution of IP disputes, including psychology of mediation and the advocate’s role, and mock mediation sessions.

Mel received his initial mediation training from the Institute for Conflict Management and the American Arbitration Association. He has served as a mediator and facilitator for over 20 years with an increasing emphasis in the last 10 years on working with partnerships and organizations. He has served as an Ombuds to assist persons dealing with an organization to obtain the process to which they are entitled. An example is his assisting landowners subject to eminent domain in dealing with the "taking" governmental authority on valuation, negotiation and the appeal process pre-litigation. For large group processes, Mel facilitates communications between members and leadership, addressing conflict and potential conflicts among various constituencies. Mel is a member of the Rule 39.1 neutral panel for the U.S.D.C., W.D. WA and the new KCBA Lawyer Referral Service Panel.

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Use of Apology in Conflict Resolution

This presentation will explore the use of an apology as a tool in conflict resolution. It is intended both for mediators and those who represent parties in mediation.

- When is an apology likely to be useful?
- What content makes an apology successful?

We will look at both the verbal and nonverbal content of an apology.

- What does “sincerity” mean in the context of an apology?
- Is sincerity in the form of expression or in remorse and repentance?
- Can necessary sincerity be coached and be learned?

Who are the intended beneficiaries of an apology?

- An apology is a tactic, one of many tools in the mediator’s tool kit.
- Deciding when to use this tactic involves an analysis of all affected parties, not just the person giving and the person receiving the apology. We will look at real life examples of apologies, why they were necessary or useful and how they affected pending conflicts.

How can a mediator or a party effectively introduce and use this tool?

- Determining whether an apology would be appropriate.
- Coaxing out the issue.
- Recognizing the needs of the potential recipient and the willingness of the potential apologizer.
- Coaching a successful apology.

Use of Apology in Conflict Resolution

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Apology

- When is an Apology an Appropriate Tool?
- What makes an Apology Successful?

CAT



DOG



THE SPHINX



- Look at the nonverbal communication.
- I am Cat.

What Does Nonverbal Communication Tell Us?

- **Fact Check:** Is the nonverbal message congruent with the verbal or is there a disconnect?
- **Sincerity:** Nonverbal messages bear the appearance of sincerity.

CAT

C: Context

A: Audience

T: Theme

Context

What contexts create the opportunity for a successful apology?

Audience

- Who is the intended audience or beneficiary of the apology?
- Is the apology intended for a recipient, a third party or both?

Theme

- What is the underlining theme that the apology will address?
- Is there a personal, family, cultural or other dynamic that makes the apology appropriate?

Holy Roman Emperor Henry IV



In January 1077, Henry trekked across the Alps from Germany to Canossa, Italy. Henry knelt in the snow for three days in front of the residence of Pope Gregory VII. The Pope finally invited Henry in, forgave him his “sins,” withdrew his excommunication, and welcomed Henry back into the Catholic Church.

Context of Henry and Gregory

- The Roman Emperor had always appointed the Pope, Bishops and other high Church officials. The positions came with income-producing lands and other perks.
- In 1075, Pope Gregory VII asserted only the church could name the Pope, and by the College of Cardinals.
- Henry ignored Gregory, who then excommunicated him. The excommunication theoretically stripped Henry of his crown, resulting in a nascent uprising of German Princes to replace Henry with a new Emperor of their choosing.

Henry and Gregory Audience

- The populace accepted Henry's excommunication and would not support his crown against the agitating princes.
- Henry restored his legitimacy as Emperor by obtaining the Pope's forgiveness and withdrawal of the excommunication.
- The populace now supported Henry and the princes' agitation for a new ruler failed.

Henry and Gregory Theme

- The King is Divine.
- But Divinity makes the King.
- Henry had to restore his divine blessing.

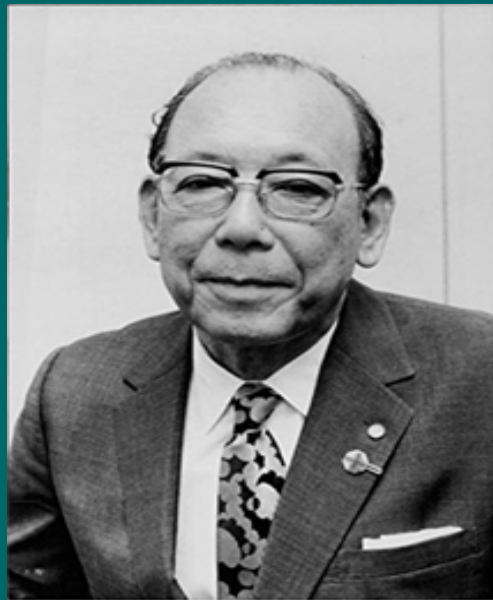
Henry and Gregory Epilogue

Having solidified his power, Henry shortly thereafter resumed appointing local Bishops.

Gregory then excommunicated Henry, but the populace saw this second one as political and maintained support of Henry as Emperor.

Henry then deposed Gregory and installed his own supporter as Pope Clement III.

Yasumoto Takagi -President of Japan Air Lines



Yasumoto Takagi -President of Japan Air Lines

In 1985, President Takagi addressed gathered relatives of those killed in a plane crash, bowing and saying to them "I am very sorry. I humbly apologize to you all."

He also donated the equivalent of \$182,000 to maintain a garden in memory of all decedents on the flight.

When family members viewed recovered bodies in a hanger to confirm identification, President Takagi personally apologized to each victim's family.

Context JAL Crash:

- A Boeing 747 on a domestic flight crashed in a mountainous area near Tokyo shortly after takeoff.
- The pilot could not control the plane after loss of the vertical tail fin.
- The cause was a faulty repair by Boeing personnel, but JAL personnel inspected it.
- Four persons survived and 520 perished. It was the worst single-plane disaster in aviation history.

Audience-JAL Crash

- Directly: the families of the victims.
- Indirectly: the Japanese flying public.
- Beneficiaries: Investors in JAL and those dependent on the airline staying in business.

Theme-JAL Crash

- Cultural expectations: Top ranking person takes responsibility.
- Cultural expectations: Company remorse.
- Protection of the Company and all who work for it or depend on it.

Epilogue - JAL Crash

- Boeing admitted fault, but rumors persisted of a cover-up of JAL inspection shortcomings.
- JAL paid \$7.6 million (US) to relatives as “condolence money” without admitting liability.
- President Takagi resigned; a maintenance manager and an engineer who had inspected and cleared the plane both killed themselves.
- Domestic flight traffic in Japan decreased by 25% and JAL passenger traffic by 33%, but JAL survived.

When? Health Care Providers

RCW 5.64.010: “Any statement, affirmation, gesture, or conduct expressing apology, fault, ...”

Not admissible in a civil action against a health care provider based on professional negligence if:

1. Conveyed by a health care provider **within 30 days** of the act, omission or discovery of act or omission, &
2. Relates to the discomfort, pain, suffering, injury or death of the injured person as the result of alleged professional negligence.

Other Alleged Tortfeasors

- RCW 5.66.010: “The portion of statements, writings, or **benevolent gestures expressing sympathy** or a general sense of benevolence relating to the pain, suffering, or death..., shall be inadmissible as evidence in a civil action.”
- **But:** “A **statement of fault**, however, which is part of, or in addition to, any of the above shall **not be made inadmissible** by this section.”

Mediation

RCW 7.07.030 (1): **Privilege** against disclosure.

“Except as otherwise provided in RCW [7.07.050](#), a mediation communication is privileged as provided in subsection (2) of this section and **is not subject to discovery or admissible in evidence** in a proceeding unless waived or precluded as provided by RCW [7.07.040](#).”

RCW 7.07.070: **Confidentiality**.

“Unless subject to chapter [42.30](#) RCW [*Open Public Meetings Act*], mediation communications are confidential **to the extent agreed** by the parties or provided by other law or rule of this state.”

What is an apology?

“Apologies are rituals designed to cure arrogance through humility, obeisance, respect and appreciation for the suffering of others, thereby rebalancing the power in the relationship”

Kenneth Cloke--Center for Dispute Resolution
Santa Monica California.

Employee to Employer

- I left in a rush last night and the door did not latch closed.
- Someone came in and stole a laptop.
- I am very sorry and feel terrible about it.
- From now on, I will be absolutely sure that the door is latched and locked when I leave.

Employee to Employer v. 2

- I left in a rush last night and the door did not latch closed.
- Someone came in and stole a laptop.
- I feel terrible that the door didn't lock properly and this happened.
- I will see if we can get the door fixed soon.

Elements of an Apology

Key Components:

1. Acknowledgment of responsibility.
2. Offer of repair.
3. Expression of regret. (tie)
4. Declaration of repentance. (tie)
5. Explanation of what went wrong. (tie)
6. (Optional: request for forgiveness).

Lewicki, Negotiation and Conflict Management Research J. (May 2016)
(Ohio State University Business School Study of 755 Subjects)

Elements of an Apology 2

1. Statement of the substance of the offense.
2. Acceptance of responsibility or accountability.
3. Acknowledgment of pain or embarrassment inflicted.
4. Characterization/judgment about the offense.
5. Statement of regret.
6. Statement of future intentions.

Marsha L. Wagner-Columbia University 1999.

Context of Offense; Themes

- Business v. Personal
- Cultural Responsibility or Expectations
- Employee Mistake v. Insensitive Expression
- Dealing with the “clueless”
- Preventing the counter-productive “apology”
- Should it be in writing or oral?
- Third party beneficiaries? Explain to children?

Potential Mediator Actions

- Exploring the feelings of the aggrieved person and asking whether it is okay to convey them to the offending party.
- What would you have liked the other person to have said after this happened? Or how would you have felt if the other person had said_____?
- Does it make sense to ask whether the offending party wants to apologize?
- Coaching an appropriate apology. Such as...

Nature of the Offense

Yes: “Yesterday I said...”

Not: “Yesterday I said something that apparently you found offensive.”

Responsibility or Accountability

Yes: “I spoke without thinking. I should have used other words.”

Not: “When I am mad, I say things that I don’t really mean.”

Acknowledgment of the Damage

Yes: “If someone had said that to me, I would not have liked it either” or
“It is understandable that what I said would have upset you” or
“I understand that my doing/saying _____ resulted in_____.”

Not: “I am sorry if you felt offended” or
“I didn’t know you were so easily hurt.”

Acknowledging the Offense

Yes: “I was insensitive” or
“What I did was wrong” or
“I made a mistake.”

Not: “That’s my sense of humor” or
“I was just making a joke.”

Statement of Regret

Yes: “I am sorry I used those words” or
“I wish I had thought before I did/said
_____.”

Not: “Apparently my timing was off.”

Future Intent

Yes: “In the future I will think about the impact of my words before speaking” or
“I will not be flippant again, but will treat you with respect.”

Not: “I hope we can avoid future misunderstandings.”

Takeaways

- When is an apology likely to be useful?
A: Remember the Context, Audience, Theme
- What makes an apology successful?
A: Nonverbal must match verbal message.
Include the essential elements.
- How can a mediator help?
A: Assessing, probing, coaching.

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