

# The Power of Apology in Family Mediation

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Advanced Dispute Resolution  
GS LAW 6309 6.0/ LLM (ADR)  
Osgoode Hall Law School  
Elizabeth Hyde  
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## **Table of Contents**

Introduction	3
Apology Defined	5
Elements of an Apology	6
Motivations to Apologize	9
Personality Traits	10
Gender	11
Culture	12
Forgiveness and Reconciliation	13
Implications for Mediation	16
Conclusion	21
Bibliography	23

## Introduction

The “Promise of Mediation”, the title of Bush and Folger’s<sup>1</sup> often quoted book, captures the essence of mediation in the family law context. For those of us coming from a litigation oriented practice, the process of mediation continues to both amaze and inspire. The potential for an outcome where the parties at the very least communicate openly with each other is one that is particularly important in the context of family conflict. Where the preservation of relationships is of the utmost importance, mediation offers an alternative to the often destructive process that litigation provides to separating spouses. As one now involved in ADR, there is much healing to be done in the context of mediation. When parties are stuck for reasons the mediator may not understand, it is often that a real apology has never been received by the party that perceives they have been wronged. If true reconciliation is to be achieved, or at a minimum, if the parties can leave feeling they can communicate at even a functional level for the sake of their children, then a discussion around apology is something the mediator needs to keep front and centre and be ready to introduce at the opportune time. This paper will focus on apology in the family mediation context only.

Apologies in 20th century North America have generally been looked upon as a sign of weakness and failure. We have been socialized from a very young age that the usual sequence of events following bad behaviour involves getting caught by an adult, marched over to the wronged individual, and told to “say you are sorry” to the

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<sup>1</sup> Robert A. Baruch Bush, & Joseph P. Folger. *The Promise of Mediation*, Rev. Ed. (San Francisco: Jossey-Bass, 2005).

victim. Rarely was there a discussion about why you were apologizing, how the victim felt, the elements of a true apology or the value it could hold for both the victim and the offender. We view young children as incapable of understanding the deeper moral and emotional issues associated with apology thereby missing an extraordinary opportunity to assist in the development of these skills at an early age. Rather than teaching them valuable skills at a formative time in their lives, we treat it as a perfunctory part of the play process. Studies done with young children around their responses to guilt displays suggest that children between the ages of 4 and 5 become sensitive to the appeasement functions of displaying guilt.<sup>2</sup> Thus adult intervention becomes more important when one considers that although young children may understand the validity of moral rules, they do not necessarily understand the emotional consequences of following or breaking those rules.<sup>3</sup> Because we often miss these developmental opportunities when children are young, most of us grow up with the notion that those who apologize are weak and embarrassing and have less perceived authority than those who do not engage in apologetic behaviour.<sup>4</sup> Research in this area suggests the opposite; that leaders who apologize are actually viewed more positively, and that apologies have a variety of positive effects from forgiveness, restoring trust, reducing aggression, enhancing future relationships and

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<sup>2</sup> Amrish Vaish, Malinda Carpenter, & Michael Tomasello. "Young Children's Responses to Guilt Displays" (2011) *Developmental Psychology*. Vol. 47, No. 5, at 1256, 1248-1262, online:<DOI 10.1037/a0024462>.

<sup>3</sup> Tina Malti & Brigitte Latzko, "Children's Moral Emotions and Moral Cognition: Towards an Integrative Perspective" in Brigitte Latzko & Tina Malti, eds., *Children's Moral emotions and moral cognition: Developmental and educational perspectives. New Directions for Child and Adolescent Development* (San Francisco: Jossey-Bass, 2010) at 4.

<sup>4</sup> Sean Tucker, Nick Turner, Julian Barling, Erin M. Reid, & Cecilia Elving. "Apologies and Transformational Leadership" (2006) *Journal of Business Ethics*, 63, at 196, online:< DOI 1-1007/s10551-0053571-0>.

promoting general well being.<sup>5</sup> More importantly for the family mediation context, evidence suggests that apologies influence the reconciliation and forgiveness process. Further, there exists a relationship between forgiveness and psychological and physiological benefits, relationship well-being and possibly even physical health.<sup>6</sup> This is the true promise of mediation.

## Apology Defined

Historically, the word apology originated with the Greek *apologia* which was defined as a formal written defence or rebuttal.<sup>7</sup> The Oxford dictionary now defines apology as a regretful acknowledgement of an offence or failure.<sup>8</sup> The English root of the word has no acknowledgement of guilt or blame thus leaving the word with a lack of emotional power and not reflective of the modern meaning. In contrast, in Spanish, German and Japanese cultures, the word apology is rooted in the concept of guilt, blame and culpability.<sup>9</sup> As the literature on apologies becomes more prolific, the modern usage of the word has evolved to include acknowledgement and expressions of regret for a fault without a defence.<sup>10</sup> The sociologist, Goffman defines apology as an:

“expression of embarrassment and chagrin; clarification that one knows what conduct has been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved;

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<sup>5</sup> *Ibid.*

<sup>6</sup> Debra Slocum, Alfred Allan, & Maria M. Allan. “An Emerging Theory of Apology” (2011) *Australian Journal of Psychology*, 63, at 83, online:< DOI 10.1111/j.1742-9536.2011.00013.x>.

<sup>7</sup> *Ibid.* at 84.

<sup>8</sup> *Oxford Canadian Dictionary* (Toronto: Oxford University Press, 2004) at 37.

<sup>9</sup> Aaron Lazure. *On Apology* (New York: Oxford University Press, 2004) at 32.

<sup>10</sup> Carl D. Schneider. “What It Means to Be Sorry: The Power if Mediation” (2000) *Mediation Quarterly*, vol. 17, no. 3 at 266.

espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.”<sup>11</sup>

The background of the author appears to have a great deal of influence on how apology is defined. For Lazure, a psychiatrist, apology refers to an encounter between two parties in which the offender acknowledges responsibility for an offense or grievance and expresses regret or remorse to the other party.<sup>12</sup> For Tavuchis, a sociologist, whatever else is said or conveyed, an apology must express sorrow.<sup>13</sup> Despite these differences, all definitions seem to suggest that an apology is a process that incorporates one or more elements. As a process, apology is considered a speech act, defined as any of the acts that may be performed by a speaker in making an utterance, as stating, asking, requesting, advising, warning or persuading. The act is considered in terms of the content of the message, the intention of the speaker and the effect on the listener.<sup>14</sup> An apology speaks to an act that cannot be undone but cannot go unnoticed without compromising the current and future relationship of the parties.<sup>15</sup>

### **Elements of an Apology**

The above definitions capture what some consider to be the core elements of an apology; acknowledgement, affect and vulnerability. Acknowledgement, the first step in a successful apology, is the recognition by the offending party that an injury has

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<sup>11</sup> Slocum et al., *supra* note 6 at 84.

<sup>12</sup> Lazure, *supra* note 9 at 23.

<sup>13</sup> Nicholas Tavuchis. *Mea Culpa* (Stanford, C.A.: Stanford University Press, 1991) at 36.

<sup>14</sup> *Ibid.* at 22.

<sup>15</sup> *Ibid.*

occurred that damages the bonds between the offending and the offended party.<sup>16</sup> The offender must acknowledge that a norm has been violated; that they understand what implications that violation has in the broader context and in particular, what impact it has on the offended party.<sup>17</sup> Without this acknowledgement, the receiving party will be sceptical of the sincerity of the apology. Affect addresses the notion of the empty or hollow apology which so often is associated with a badly executed apology. Critics of President Bill Clinton's apology following the Monica Lewinsky affair suggested that he never actually used the words "I'm sorry". He in fact made it quite clear that the only thing he was really sorry for was getting caught. Clinton's apology was fraught with countless excuses for his behaviour leaving commentators quick to judge and suggest that American's could accept lying and adultery, but not being sorry, especially after being caught, was unacceptable.<sup>18</sup> In a successful apology, the offending party must be visibly affected by what they have done.<sup>19</sup> A good apology must provide an explanation for why the offence was committed in the first place and, some would argue, a reassurance that the behaviour will not be repeated.<sup>20</sup> The apologizer has to feel the pain of the victim and express genuine regret for their transgression. In addition, an apology should be the result of some introspection on the part of the offender.<sup>21</sup> Finally, the apology must place the offender in a position of vulnerability by offering the apology without defence. In this way, the balance of power shifts as the apology may not be

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<sup>16</sup> Schneider, *supra* note 10 at 266.

<sup>17</sup> Aaron Lazure. "Go ahead, say you're sorry" (1995) *Psychology Today*, 28.1 at 41.

<sup>18</sup> Schneider, *supra* note 10 at 266.

<sup>19</sup> *Ibid.*

<sup>20</sup> Lazure, *supra* note 9 at 23.

<sup>21</sup> Jennifer Gerarda Brown. "The Role of Apology in Negotiation" (2003-2004) 87 *Marq. L. Rev.*, at 669, online:<Heinonline>.

accepted.<sup>22</sup> A comprehensive apology can contain as many as eight distinguishable elements; remorse, acceptance of responsibility, admission or wrong doing, acknowledgement of harm, promise to behave better, request for forgiveness, and an offer of repair and explanation.<sup>23</sup> The culture and values of North American society are focused on winning, success and perfection. These are in direct contrast to the elements of a successful apology which requires empathy, security and the strength of character to admit fault, failure and weakness.<sup>24</sup> One of the most common causes of a failed apology is the offenders' pride, fear and shame at having to acknowledge they made a mistake and that they have failed to live up to the shared values of sensitivity, thoughtfulness, faithfulness, fairness and honesty.<sup>25</sup>

In studies conducted by Slocum et al.<sup>26</sup> with intimate partners who had been betrayed in one way or another, the participants believed that an appropriate apology had one or more of the elements of affect, affirmation and action. These categories were further broken down based on the wrong doers focus, self or self-other.<sup>27</sup> Affect on the self side meant the wrong doer expressed regret. "I am sorry you are feeling hurt", rather than the self-other focus of remorse, "I am sorry that I hurt you and you are in pain". Regret focuses on the wrong doers, and their discomfort about the circumstances they find themselves in. Remorse comes from an empathic concern and an understanding of the shared norm or principle that has been violated. The wronged

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<sup>22</sup> Schneider, *supra* note 10 at 267.

<sup>23</sup> Karina Schumann & Michael Ross. "Why Women Apologize More Than men: Gender Differences in Thresholds for Perceiving Offensive Behaviour" (2010) *Psychological Science*, 21, at 1650, online:<DOI 10.1177/0956797610384150>.

<sup>24</sup> Lazure, *supra* note 17 at 43.

<sup>25</sup> *Ibid.*

<sup>26</sup> Slocum et al., *supra* note 6.

<sup>27</sup> *Ibid.* at 87.



individual wants to see visible, physical signs in the wrongdoer that they share in the wronged individual's pain.<sup>28</sup> The affirmation component is broken down into admission and acknowledgement again, with the division being self versus self-other. The distinction in this area derives from the notion that one can regret something but not feel responsible for it or think it is wrong. As a wronged person, individuals want to understand what happened and want the offender to share in that understanding. If he or she simply admits the offense and then attempts to explain the behaviour, they not only distance themselves from their behaviour, but they deny responsibility and answerability.<sup>29</sup> Finally, the study looked at the action component of apology and divided it in to restitution and reparation. Restitution involves an attempt by the wrong doer to reverse any tangible consequences of their behaviour. Reparation, on the other hand, is an attempt by the wrongdoer to address the tangible and intangible needs of the wronged party. True reparation is achieved when the wrongdoer's actions show they are willing to go out of their way to repair the violated trust and ensure they will never hurt the other party again.<sup>30</sup>

### **Motivations to Apologize**

There are many reasons an individual may consider apologizing, not all of them altruistic. Apologies can be motivated by the desire to salvage or restore a relationship; by purely empathic concerns that one has caused suffering to another; to relieve a guilty conscience; or in extreme circumstances, to escape punishment.<sup>31</sup> Regardless of the

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at 88.

<sup>30</sup> *Ibid.* at 90.

<sup>31</sup> Lazure, *supra* note 17 at 41.

motive, all apologies can work if there is an exchange of shame and power between the offender and the offended.<sup>32</sup> In acknowledging their shame, the offender gives the offended; the one whose self concept has been injured, the power to forgive. The apologizer puts herself in the weaker position and risks that her apology may not be accepted. It is clear that if the goal is to move forward in any relationship, an apology is an important part of the process.

### **Personality Traits**

In research done examining personality correlates of the disposition to apologize, Howell et al.<sup>33</sup> found that the seeking of forgiveness involves apology accompanied by empathy toward the offended party, in addition to emotions of guilt or sorrow. Negative personality correlates of the seeking of forgiveness include narcissism and self-focus attention; hardness of heart, and the belief that no wrongdoing occurred. Positive correlates of the disposition to apologize include agreeableness, regret, concern, relationship closeness and guilt. Those prone to apologize are characterized by a strong orientation towards others, humility, empathy, a positive self-image mindset of acceptance and a belief in the possibility of self improvement. Apology proclivity requires psychological health (capacity for empathy, appropriate regulation of guilt, concern for the plight of others) where as negative correlates of the disposition to apologize include several attributes of self-focus i.e. narcissism attributes that may

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<sup>32</sup> Schneider, *supra* note 10 at 267.

<sup>33</sup> Andrew J. Howell, Raelyne L. Dopko, Jessica B. Turowksi, & Karen Buro. "The Disposition to Apologize" (2011) *Personality and Individual Differences*, 51, at 509.

impede one's inclination to apologize.<sup>34</sup> Egocentricity also factors in to the ability of one to apologize. Those who cannot look outside of themselves will apologize by saying "I am sorry you are upset with me" rather than "I am sorry I hurt you". The difference is subtle but powerful.<sup>35</sup> Unless both parties involved in a conflict reach beyond his or her self-centred world, a successful resolution of the conflict may be impossible.<sup>36</sup> While clients will inevitably fall in to all of the categories outlined above, it is the role of the mediator to allow both parties to see the value an apology will bring to the mediation process.

## **Gender**

It is no surprise that men and women treat the act of apologizing differently. Women tend to focus more on the question "is this conversation bringing us closer or pushing us farther apart" whereas men focus on whether the conversation is putting them in a one up or one down position.<sup>37</sup> Apologies reduce anger and aggression and promote forgiveness and relationship wellbeing which is of primary importance for relationship focused women. But looking deeper at the issue, research suggests that although women do apologize more frequently than men, it is not always for the reason most assume i.e. real men don't apologize. What may be happening is that women do not in fact apologize more; men just have a higher threshold for what is offensive

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<sup>34</sup> *Ibid.* at 513.

<sup>35</sup> Lazure, *supra* note 17 at 43.

<sup>36</sup> Seiji Takaku, Bernard Weiner, & Ken-Ichi Ohbuchi. "A Cross-Cultural Examination of the Effects of Apology and Perspective Taking on Forgiveness" (2001) *Journal of Language and Social Psychology*, Vol. 20, Nos. 1 & 2, at 163, online:<jls.sagepub.com>.

<sup>37</sup> Lazure, *supra* note 9 at 29.

behaviour and in need of apology. Women were more likely than men to judge their offenses as meriting an apology as women in general are more focused on maintaining harmony in their relationships and report more guilt when they are the wrongdoer.<sup>38</sup> They have greater empathy for the victim and are more willing to forgive. It has also been suggested that men resist apology as a sign of weakness and concession where as women embrace apology as a step towards reconstituting broken relationships.<sup>39</sup>

## **Culture**

In collective societies as in Japan, people's behaviours are seen as being influenced more by their cultural norms and/or culturally defined roles than their own personal choice as in North American society.<sup>40</sup> Research suggests that Japanese apologies are focused primarily on restoring the relationship with the offended party, rather than on relieving an internal state of mind such as guilt which is more characteristic of person-to-person American apologies.<sup>41</sup> In Japan, the culture of apology is such that as a cultural group, they generously and frequently use apology to maintain harmony and social cohesion in a group even to the point of apologizing for things they themselves have not done simply to maintain the group balance.<sup>42</sup> Communicating and receiving effective apologies to and from people of different

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<sup>38</sup> Schumann and Ross, *supra* note 23 at 1654.

<sup>39</sup> Deborah L. Levi. "The Role of Apology in Mediation" (1997) 72, N.Y.U.L. Rev., at 1185, online:<Heinonline>.

<sup>40</sup> Takaku et al., *supra* note 36 at 161.

<sup>41</sup> Lazure, *supra* note 9 at 32.

<sup>42</sup> *Ibid.* at 33.

cultures and languages is a complex and challenging process that requires an understanding of a culture as well as the precise use of the language.<sup>43</sup>

## **Forgiveness and Reconciliation**

The goal of mediation in general is to resolve conflicts so that each party feels they have achieved their goals in the process. Depending on the nature of the conflict, the continuance of an ongoing relationship may, or may not, be of significance. In the case of separating couples, it is often of primary importance particularly when there are children involved or when parties have a shared history of family and friends that will remain intertwined for years to come. Because of this, one of the objectives of a mediator is to attempt to move the parties to the point of forgiveness and reconciliation. Reconciliation in this context is not in the sense of restoring the parties' relationship as intimate partners, but ensuring they can both move forward once the mediation process has ended. An apology is often a key factor in moving the parties towards this goal.

For an apology to be successful, the aggrieved party needs to reclaim their loss of humanity at the hands of the other.<sup>44</sup> In research done with intimate partners, results found the perpetrators attempts at making amends and the victim's willingness to forgive played a key role in the successful resolution of betrayal incidents.<sup>45</sup> Betrayal in this context is described as the perceived violation of an implicit or explicit relationship-relevant norm.<sup>46</sup> Amends describes the act of the perpetrator, accepting responsibility

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<sup>43</sup> *Ibid.* at 34.

<sup>44</sup> Michael B. Rainey, Kit Chan & Judith Begin. "For Practical and Legal Reasons, An Apology When things Go Awry Is a Good Idea, but beware of the Dangers" (2008) *Alternatives*, Vol. 26, No. 6, at 116.

<sup>45</sup> Peggy A. Hannon, Caryl E. Rusbult, Eli J. Finkel, Eli J. & Madoka Kamashiro. "In the wake of betrayal: Amends, forgiveness, and the resolution of betrayal" (2010) *Personal Relationships*, 17, at 255.

<sup>46</sup> *Ibid.*

for the betrayal and offering genuine atonement for one's actions. The literature in this area clearly supports the notion that apology is positively associated with forgiveness which in turn leads to reconciliation. Successful betrayal resolution is further associated with healthy couple function while a failure to resolve leads to harmful behaviour patterns.<sup>47</sup> Making amends so that the betrayal has been dealt with thoroughly allows couples to move forward in a positive manner. This, in turn, promotes a broader healing process, re-establishes relationship norms and promotes recovery of trust and commitment. Conversely, the failure to apologize can be a central factor in the escalation of the conflict.

Although most responses to genuine apologies are expressions of gratitude, often fears about potential consequences; a person's negative reaction towards us; fear of losing power or authority or, being viewed as weak or incompetent, preclude a successful apology.<sup>48</sup> Apology seeks forgiveness and while the forgiver is not minimizing the wrong, they are acknowledging the past, confronting their offense and its damage and indicating a willingness to move on in a new way for the benefit of both parties. The forgiver gets the first benefit of this process as it presents an act of closure. Apology is the beginning of the progression towards reconciliation, but this progression can only begin when the transgressions can be heard, i.e. the transgression needs to be acknowledged before the progression can move forward.<sup>49</sup> A good apology:

“has to make you suffer. You have to express genuine, soul searching regret for your apology to be taken as sincere. Unless you communicate

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<sup>47</sup> *Ibid.* at 277.

<sup>48</sup> Angela M. Eastman. “The Power of Apology and Forgiveness” (2010) 36 *Vt. B.J.*, at 55, online:<Heinonline>.

<sup>49</sup> David Gaertner. ““The Climax of Reconciliation”: Transgressions, Apology, Forgiveness and the Body in Conflict Resolution” (2011) *Bioethical Inquiry*, 8, at 248, online:<DOI 10.1007/s11673-011-9317-2>.

guilt, anxiety, and shame, people are going to question the depth or your remorse.”<sup>50</sup>

The question still remains whether an apology can truly repair the damage done. Often it will take some type of redress whether it be financial or not, for true reconciliation to be achieved. Once the proper apology has been heard and reparations offered, the next step is reconciliation. But forgiveness is not something that can be forced and should be considered a power held by the victimized. That power consists solely in the ability to withhold forgiveness. By holding the power to forgive, the victim is granted some measure of control, but it is only in the choice to forgive that this control is present.<sup>51</sup> Kleefeld notes what a survivor of sexual abuse at a residential training school thought an apology should include:

- “It should be addressed to the individual and not be a form letter;
- It should acknowledge the wrong done to the individual and promise this will never happen again; and
- It should ask for forgiveness (but not expect it, because they stripped away all my power and it must be my individual choice whether or not to forgive them).”

“Without this type of apology, I don’t believe forgiveness or reconciliation is truly possible”<sup>52</sup>

If forgiveness is the key to reconciliation, then three types of forgiveness need to be considered. According to psychologist Everett L. Worthington, the three types are hollow, decision-based and emotional.<sup>53</sup> Hollow forgiveness is just that, empty forgiveness that lacks meaning and is often offered with resignation. Decision-based

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<sup>50</sup> *Ibid.* at 249.

<sup>51</sup> *Ibid.* at 251.

<sup>52</sup> John C. Kleefeld. “Thinking Like A Human: British Columbia’s *Apology Act*” (2007) U.B.C. Law Review, VOL. 40:2, at 805.

<sup>53</sup> Gaertner, *supra* note 49 at 252.

forgiveness is more complex and is defined as the cognitive letting go of resentment and bitterness and the need for revenge. Even then, it is not always the end of emotional pain and hurt.<sup>54</sup> To overcome the fear and/or anger you feel towards someone requires emotional forgiveness, which signals your ability to overcome the physical reactions to the perpetrator and to like/trust him again. Often emotional forgiveness is provided for by the space opened up by decision-based forgiveness. One can choose to forgive this person, but cannot choose to do away with the trauma and symptoms induced by the transgression.

Empathy is a key aspect in the promotion of forgiveness. Empathy as an emotion is both affective, a feeling of concern for others, and cognitive, an awareness of others experiences.<sup>55</sup> Empathy in forgiveness is about putting oneself in the place of the perpetrator, about seeing the transgression not only through a new point of view but through the eyes of the torturer.<sup>56</sup> Transgression, apology and forgiveness can all be seen as necessary components of the reconciliation process. Reconciliation is in itself an ongoing conversation, a means of opening up communication between parties.<sup>57</sup>

## **Implications for Mediation**

Mediation is the process whereby two people involved in a dispute negotiate with the assistance of a third party. This intervention is done with an impartial, neutral third party who has no decision making power but is there to assist disputing parties to

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<sup>54</sup> *Ibid.*

<sup>55</sup> Bruce Maxwell & S. DesRoches, "Empathy and social-emotional learning: Pitfalls and touchstones for school-based programs," in Brigitte Latzko & Tina Malti, eds., *Children's Moral emotions and moral cognition: Developmental and educational perspectives. New Directions for Child and Adolescent Development*, (San Francisco: Jossey-Bass, 2010) at 35.

<sup>56</sup> Gaertner, *supra* note 49 at 253.

<sup>57</sup> *Ibid.* at 254.



voluntarily reach their own mutually acceptable settlement.<sup>58</sup> While there are numerous forms of mediation, the mediator's role in all cases is to help guide clients to find their own solutions and thus satisfy needs on all sides.

The use of apologies in mediation should be viewed not as a discrete event, but as part of the process whereby apologizing becomes embedded in the very nature of the mediation.<sup>59</sup> While parties often come to mediation at different stages along a continuum, they generally follow a similar path. One frame work outlined by Bridges<sup>60</sup> describes the importance of the mediator paying attention to the internal, psychological transitions individuals experience in association with the external changes. During the initial phase, clients are attempting to let go of their old ways of knowing and doing. They next move to a chaotic period during which their future path through the exchange may not yet be apparent. Finally, people begin to internalize the external change and begin putting in place new ways of knowing and doing related to the change. The mediator's role in this context is to help the parties simplify the complex issues to a degree that enables participants to envision a way forward.<sup>61</sup> Apology can play an important part in navigating this path by allowing parties to exchange words that enable closure.

While clients may intuitively know that an apology may provide the best opportunity for a successful resolution of their conflict, they often need help to get there. Formulating an apology is foreign to many and for some, may be something they have

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<sup>58</sup> Gemma Smyth. "Mediation" in Julie Macfarlane. *Dispute Resolution*, 3d ed. (Toronto: Emond Montgomery, 2011) at 261.

<sup>59</sup> Schneider, *supra* note 10 at 269.

<sup>60</sup> Jennifer Pratt Miles. "Examining the Applicability of the Concepts of Apology, Forgiveness and Reconciliation to Multi-Stakeholder Collaborative Problem Solving Processes" (2009) *Law and Contemporary Problems*, Vol. 72, at 196.

<sup>61</sup> *Ibid.*

never considered doing. As outlined above, few of us have a solid understanding of the elements necessary for a successful apology and the damage that can be caused by an unsuccessfully delivered apology. When assessing whether an apology is appropriate during mediation, the mediator needs to be cognizant of the research on personality traits, gender and culture and how they will integrate each of these factors in to their discussions. More importantly, in today's multicultural society, one has to be particularly sensitive if the two parties are from different cultural backgrounds.

Although an apology can only originate with the parties, the power of an apology in mediation is so effective; it has been recommend that mediators suggest an apology even when neither party has discussed the idea.<sup>62</sup> The mediator may do this by focusing the parties on the possibility or opportunity of giving recognition by bringing up the idea of an apology during caucus. This ensures that the wrongdoer does not feel shamed in to apologizing and is free to explain to the mediator his/her rejection of an apology. The mediator can also assist the wrong doer in understanding that it is possible to be sorry for the effects of their behaviour even if the harm was inflicted unintentionally.<sup>63</sup> The act of apology often involves such vulnerability that the client may have to be coached with the words he or she is to speak, or in the alternative, the mediator may actually have to make the apology for wrong doer by way of reframing. In this way, the client simply indicates their assent, but the apology has been made.<sup>64</sup> While this may be the only way in which an apology is solicited in certain circumstances, mediators need to be wary of this method as injured parties may not be moved to

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<sup>62</sup> Levi, *supra* note 39 at 1193.

<sup>63</sup> Kenneth Cloke. *Mediating Dangerously* (San Francisco: Jossey-Bass, 2001) at 138.

<sup>64</sup> Schneider, *supra* note 10 at 269.

forgiveness when the words of remorse come from a third party.<sup>65</sup> In addition, because the temptation to follow an apology with the words “but” is great, mediators need to discuss the mechanics of an apology in detail so the potential damage of an apology followed by excuse is minimized.<sup>66</sup>

In the context of family mediation, a properly executed apology can be nothing short of transformational. As a family law mediator, I have one ground rule that I review with clients at the beginning of the first mediation session. Whoever is speaking must be allowed to finish. I tell my clients this not because I have any expectations that they will not interrupt each other often, but to point out that mediation is often the only time when people can speak to each other and be “heard”. This is their opportunity to have their feelings acknowledged and, it is often the only time that they can actually speak to each other without the discussion spiralling out of control. One way to facilitate a positive outcome is to speak to the parties about how the mediation is not a time to challenge each other but a time to understand and be understood and that if they have any clarifying questions, to ask them during the mediation.<sup>67</sup> Part of the discussion around this understanding is how apologies are vital to this process and may help move both parties forward and facilitate a resolution.

A goal of mediation is to change the way parties interact and communicate with each other. This can be done by fostering communication skills, empowering individuals

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<sup>65</sup> Deborah Levi. “Why Not Just Apologize? How To Say You’re Sorry In ADR” (2000) *Alternatives*, Vol. 18, No. 8 at 165.

<sup>66</sup> *Ibid* at 163.

<sup>67</sup> Meghan Clarke. “Polarization: The Role of Emotions in Reconciliation Efforts” (2009) *Law and Contemporary Problems*, Vol. 72, at 29.

and encouraging mutual respect amongst the parties.<sup>68</sup> Through the mediation process, the parties are able to define and express their interests and learn to verbally recognize their opponent's point of view. If one party feels that they have been wronged, and no apology flows from the incident/ behaviour, this transformative opportunity will be lost.

One of a mediator's greatest strengths is opening the lines of communication between parties. Often times disputing parties have not listened to each other before as they are formulating their response while the other person talks. When a mediator requires each participant to avoid interruption while the other explains their views, parties start to listen to each other for the first time. It is the mediator's role to listen attentively so that she hears how and when an apologetic gesture is appropriate. By assisting parties to develop new channels of communication, the barriers of hurt are removed sufficiently to allow an apology to be successful.

Mediation can create the space for the expression of emotion.<sup>69</sup> This will be the key to fostering apology and forgiveness. Through guided discussion, the parties begin to clarify their own values and motivations and begin to clearly articulate what they want and need from the mediation process. At this point, parties begin to develop a path for moving forward.<sup>70</sup> Trust is often at the core of disputes between separating spouses. Evidence suggests that trust recovery can be facilitated by promises of future trustworthiness and apologies for prior trust violations.<sup>71</sup> As trust, or lack thereof, can be a significant barrier to parties' finding a resolution to an issue, or even speaking at

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<sup>68</sup> Levi, *supra* note 39 at 1170.

<sup>69</sup> Clarke, *supra* note 61 at 29.

<sup>70</sup> *Ibid.*

<sup>71</sup> Edward C. Tomlinson. "Cheap Talk, Valuable Results? A Causal Attribution Model of The Impact of Promises and Apologies on Short Term Trust Recovery" (2004) Dissertation, Ohio State University at ii.

all, apology takes on an even greater significance in the context of family mediation.<sup>72</sup> When offered with integrity and in a timely manner, an apology can be a critically important moment in mediation. Mediation for separating couples offers an opportunity for clients to acknowledge they have acted in ways to create injury and are sorry for the damage done to their marriage and their spouse. In this way they are acknowledging the relationship is over but that they would like to close the door gently.<sup>73</sup>

## **Conclusion**

Apology; a simple concept to some, but the key to resolving debilitating conflict to others. Mediation offers a forum for couples in conflict to explore opportunities that will allow them to settle their disputes in a manner not afforded to them in litigation. With the aid of a skilled mediator, couples can explore settlement options through open and honest dialogue. When communication is positive, both parties are able to visualize a path for the future that results in forgiveness and reconciliation. Apology is often a pivotal component in this journey and one that mediators need to consider throughout the mediation process. There are few other ADR processes that lend themselves to the discussion of apology as well as mediation. While the act of apologizing must contain the identified elements of a successful apology, mediators can guide clients through this progression if they have an understanding of their role and a solid grounding in the theory of apology. Apology is not simply the speech act that we engaged in as children, but a thoughtful, reflective and sincere exchange of power between the wrong doer and

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<sup>72</sup> Gary T. Furlong. *The Conflict Resolution Toolbox* (Mississauga: John Wiley & sons, 2005) at 127.

<sup>73</sup> Schneider, *supra* note 10 at 278.

the wronged. Only then will separating couples be able to leave their relationship on equal and mutually respectful grounds.

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