Bar Insider

Lawyers Suck at Apologies:

Empathy Reform in Legal Writing

BY MARK LEWIS

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A meaningful apology entails at least three ingredients. First, we sincerely express our remorse. Second, we admit our fault and the resulting harm we caused. Third, we make it right. These three ingredients – remorse, admission and reparation – create the conditions for contrition and acceptance, without which neither party is likely to feel satisfied. From sincere remorse can come understanding and, if we are fortunate, forgiveness. This concept of apology ultimately rests on our empathy, our ability to understand and feel the other person's emotions. Both sides must empathize with the other. Mutuality is key.

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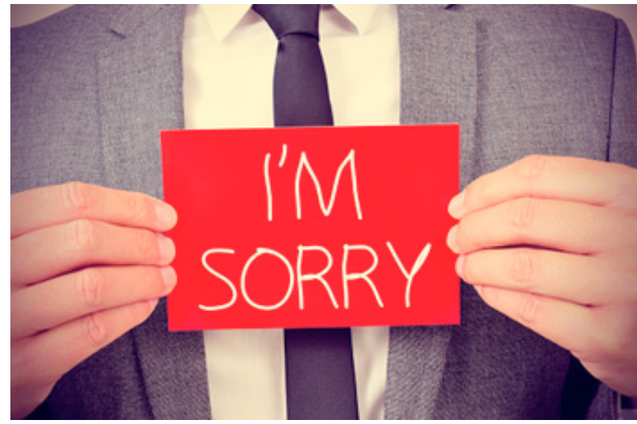
Naturally, we all stumble with apologies. Whether giving or receiving an apology, we often feel angry, offended, indignant. We deny our misstep. We impute bad motives to the other. We might even relish our own resentment, holding onto the hurt too long for all its bitter-sweet salve. As much as this is true of human nature generally, it becomes even more pronounced in the fraught arena of legal practice, where emotions run hotter and consequences more dire. As a result, lawyers suffer special propensity to trip over the remorse, admission and reparation needed to successfully land their or their clients' apologies. Failure to set the conditions for apology is not typically the result of character defects but rather the consequence of some unfortunate side effects or professional hazards in law practice.

We know those hazards all too well. For starters, we carry the heavy burden of agency responsibility for our clients. That agency responsibility is our ethical calling. It requires attention, care and diligence. Someone's wellbeing rests in our hands. The consequences of our inattention can be devastating to the client. Making matters even more stressful is that we don't control most of the important variables that determine the outcome in any given case. We have little dominion over the facts, the parties, the court, the law and the jury in those rare cases that go to trial. This profound

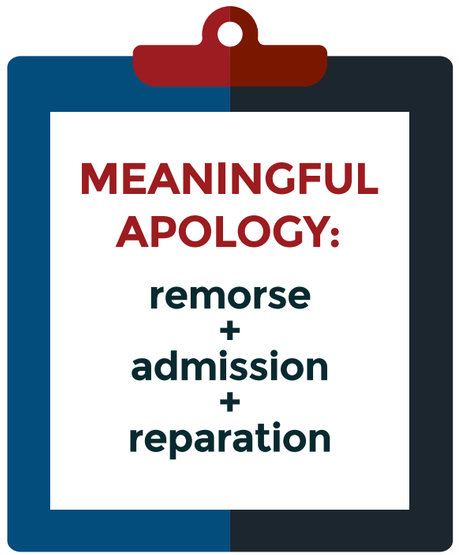


agency responsibility combined with little to no control over the outcome makes for potentially unhealthy emotional mixtures. And we can't ignore the reality that clients often come to lawyers carrying heavy emotional axes to grind against their perceived legal enemies.

Lawyers also struggle with apologies because there are many professional and institutional incentives for detachment, denial and disrepair in our legal system, especially in the way we write to and about one another. The usual dynamic of legal writing in contested matters is to trade blame in highly formalized legal language that paints the other party as stupid, foolish or mean. This detached, stylized name-calling ignores the inevitable and often poisonous emotional valence that accompanies such accusations for both sides. We

objectify and diminish the other side and vice versa, with both sides reacting defensively. Of course, none of us wants to believe we or our clients are the bad people depicted in the legal briefs. Yet we are often too quick to attribute depravity to the other side in our own writing. And so goes the verbal blame game, a contest that is now set for its zero-sum conclusion: only we virtuous can win, the wicked other must lose. None of which helps with apologies.

In light of these troubling dynamics, how then can lawyers become better at apologies? We can start by acknowledging that apologies don't come easy in our business, and that we're very often hemmed in by our client's legal interests that can remain at odds with any admissions of error. It is an unfortunate reality of many disputes that an apology can too easily be interpreted as an admission of legal liability or weakness, neither of which are true.



To reform our legal writing, we begin with a counter-intuitive first principle: Lawyers must start acting less lawyerly when they write. We should seek to imagine the most charitable version of the other side's motives and interests, and then *how they would feel* when reading our writing. We should tune our ethical imaginations to the likely emotional response of both the lawyer and client to whom we write. By so doing, we seek a kind of "empathy reform" in our legal writing, the quality of understanding and even sharing the feelings of another. We reflect back to our audience their feelings. Such empathy is the basis for many, if not all, of our moral sensibilities. It is what makes us decent.

Some might argue that empathy reform in legal writing threatens our duty of loyalty or advocacy to the client. It does not. It fosters the opposite. Empathy makes us better advocates. Empathy is another way of reminding us to simultaneously "know our audience" and the other side of the argument or case. Both are hallmarks of effective advocacy. Empathy helps us understand what motivates and drives the other parties in any legal transaction or conflict. Only through such understanding can we hope to resolve the conflict or transaction on emotionally satisfying terms, in addition to legal, factual or financial ones. And it is the emotional dimension that most often undergirds the possibility of remorse and repair.

As we apply this mindset to our legal writing, we might begin our next email, letter or brief by stating the most favorable version of the opposition's *emotions*. Let's be as charitable as possible. Let's attribute good faith, good will and good meaning to the other side. Let's place ourselves in their emotional space. Consider beginning with, "You are right to feel . . ." or "I understand your feeling of . . ." or similar expressions of sincere, well-considered empathy. We can also describe what feelings animate our own writing or the emotional valence of our client, not as a perch from which to preach our moral or legal rectitude, but as an invitation to mutual empathy. Nothing further should be said until we're clear on how each side *feels*. We should still advocate, argue and solve problems in our writing as needed, among the other reasons we write as lawyers. Only now we do so from the perspective that invites all sides to emotional understanding even while they might disagree. We thereby presuppose the conditions for apology even if one never comes. In the heart of the disagreement or problem to be solved, we frame our legal writing with the implied preconditions for remorse, admission and repair. We seek to give and receive empathy.

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