



Clifton N. Smoot

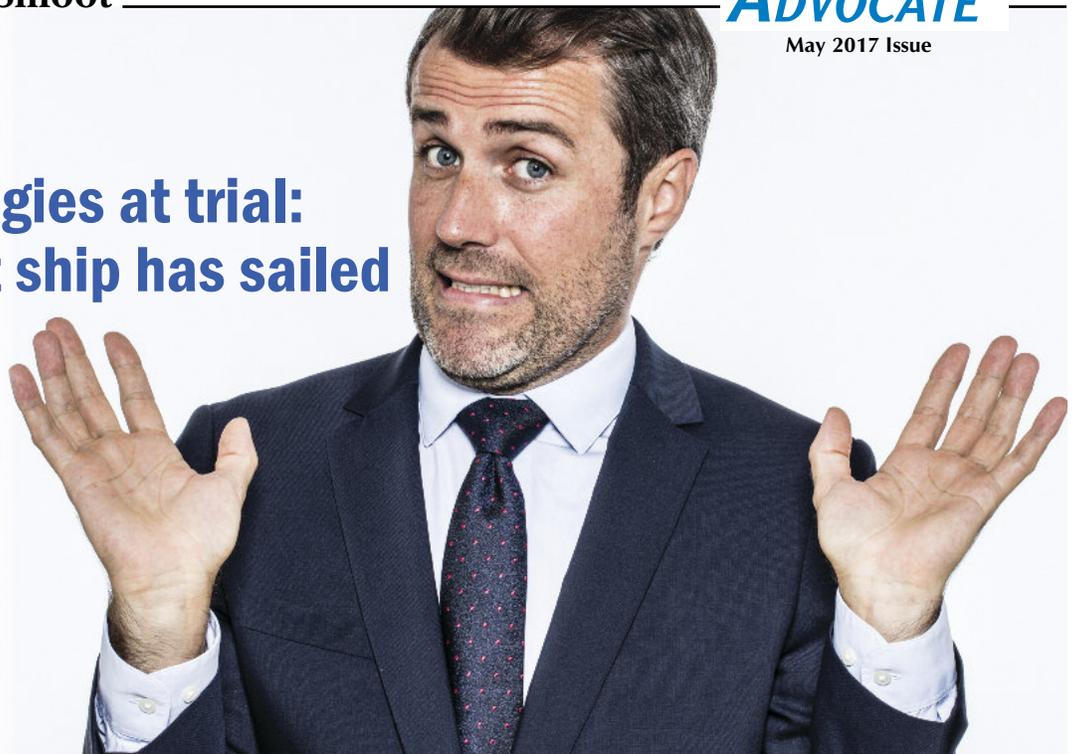
THE VEEN FIRM, P.C.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE

May 2017 Issue

Defense apologies at trial: Sorry, but that ship has sailed

A LOOK AT THE
ELEMENTS OF A REAL
APOLOGY, AND HOW
TO AVOID A TACTICAL
APOLOGY AT TRIAL



What makes a “Real” apology?

When a defendant says “sorry” for harming your client, look closely at the content and context of the apology. Early in a case, a defendant’s apology may benefit your client. If the apology is genuine and complete (i.e., accompanied by a fair settlement offer), it is likely to give your client emotional closure. In some cases, a client may need emotional closure before considering a fair settlement offer in the first place. The apology may help mend the relationship between parties.

Alternatively, even when the defendant’s apology is not accompanied by a fair settlement offer, the apology may signal that the defendant would like to settle. Or, the apology itself may contain factual admissions useful to guide your discovery. But once you reach trial, it is too late to apologize; “sorry” becomes strategy, and these potential benefits disappear.

When the defense apologizes at trial, it is not for your client’s benefit. It is a performance for the jury, with strategic and rhetorical goals. This is known as a “tactical apology” or “sham apology.” (Debora Levi, *Note: The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. 1165, 1173 (1997).) It is the defense’s bid to appear remorseful and humble, and thereby gain the moral high ground. Without your intervention, some jurors may find this convincing. It will be your job to explain why the defense’s apology is fraudulent, and falls short of a “real apology.”

Social science and legal scholars agree that a real apology contains a combination of elements. Five main elements are listed and discussed below. The more elements present, the more sincere and full the apology. When defense says “sorry” at trial, use this list to assess and neutralize whatever “sham apology” they offer.

Element 1: Standing

“Standing” is the set of qualifications of *who* may give and receive an apology. It is the relational basis for the speaker and

listener to exchange an apology. In other words, “What right does the person offering the apology have to offer it, and what right does the person receiving it have to receive it?” (Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. Cal. L. Rev. 1009, 1017 (1999).) For the plaintiff, standing boils down to who is legally responsible and who is capable of compensating the plaintiff. (*Ibid.*)

Consider, for instance, a motor-vehicle collision involving a driver negligently crashing into a pedestrian. Countless facts of the incident connect the two parties: sharing the road on the day of the accident, trusting one another to follow the community’s safety rules, and the driver making decisions that lead to the pedestrian’s injuries. By alleging these facts in a civil complaint, the pedestrian formally declares that the driver has standing to apologize, and that the pedestrian has standing to receive it.

The pedestrian-driver example of standing is simple. Do corporate representatives or trial attorneys have standing to apologize to tort victims? Not always. In an employment case arising out of employee-employee sexual harassment, for instance, “[T]he president of the company may wish to apologize to the employee, but may lack the standing to do so. Unless the company was lax in preventing or stopping the sexual harassment, what does the president have to apologize for?” (*Ibid.*)

From the perspective of the plaintiff, the attorney had no factual connection to the harm suffered. As Jonathan Cohen advises, “[I]t is the client, rather than the lawyer, who should apologize.” (*Id.* at 1050.) A defense attorney apologizing for the company may lack standing to apologize. At most, a *high status* representative might have standing to apologize. A “hired gun,” brought in after the fact to clean up others’ mistakes, does not.

Additionally, there are solid legal grounds to exclude attorney apologies via motion in limine. Statements that defense counsel feels “sorry” for the plaintiff, sympathizes with the

Smoot, Next Page

plaintiff, or feels bad for the plaintiff are irrelevant, improper personal opinions. (See *Hawk v. Super. Ct. (People)* (1974) 42 Cal.App.3d 108, 119; ABA Model Rule 3.4(e); ABA Code of Prof. Resp. DR 7-106(C)(1)-(4).)

Element 2: Sympathy for the plaintiff

The next component is an expression of sympathy for the plaintiff's injury. In an apology, the defendant may recognize that the plaintiff has suffered, and may reveal feeling sad for having been involved in an incident that harmed someone else, regardless of the defendant's culpability. This is known as "agent regret," and is generally inadmissible at trial.

• "Agent Regret," defined

Bernard Williams coined the term "agent regret" to describe the unique, negative reaction to being a central player in a tragic accident. (Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980* 20, 27-29 (1981).) He gives the example of a car crash, in which a truck driver blamelessly runs over a child who had dashed into the street, hidden from view. Although all witnesses on the scene regard the crash as terrible, only the truck driver experiences agent regret. (*Id.* at 20, 28.)

Agent regret is distinct from conventional regret because no admission of fault or self-criticism is required. (*Id.* at 27-29.) When it is part of an apology, it typically sounds like this: "Plaintiff has been through a lot, and I'm sorry this happened to her." Defense attorneys deliver this type of "agent regret" apology without hesitation at trial. It is a statement that acknowledges plaintiff's suffering (and arguably concedes damages), but deflects attention from the defendant's role in causing it. Most commentators agree that an apology of this sort is an incomplete or "botched apology." (Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?* 14 Ann. Health L. 55, 74 (2005).) Acknowledging plaintiff's suffering is a good start. But without the other elements, an "agent regret" apology is a mere platitude.

• CEC § 1160 excludes "Agent Regret"

Section 1160 of the California Evidence Code excludes "agent regret" type apologies, in which the apologizer acknowledges regret for the other person's injury but does not admit liability. The Evidence Code refers to these as "benevolent gestures":

The 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 that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action.

(Evid. Code, § 1160.) Section 1160 has the therapeutic goal of encouraging parties to say "sorry," but not admit any wrongdoing. In other words, the jury should not misinterpret "sorry" as meaning "sorry for making a mistake." This is a fine goal, since defendants and plaintiffs alike may exchange these "humane" pleasantries even when they do not see themselves as at fault. If your client says "sorry" for an incident in which they were harmed, but does not admit fault, section 1160 should exclude your client's apology. However, beware of defense counsel attempting to expand this rule to exclude apologies in which the defendant admitted to making mistakes that caused the incident (e.g., "Sorry, I was on my phone."). (See discussion *infra*, part 3.)

Interestingly, the lawmakers behind section 1160 may have misunderstood what drives lawsuits and what resolves them. Section 1160's stated public policy goal is to stem the tide of the "many lawsuits" that "result from anger," and are caused by one party's failure "to express sympathy or regret." (Cal. Evid. Code, § 1160, cmt. – Assembly Committee on Judiciary, (West Supp. 2015).) With any luck, parties will share messages of sympathy and thereby "promote calming rather than disputatiousness." (*Ibid.*) In reality, we all know that a defendant's expression of sympathy at best may signal the defendant's reality to settle quickly and amicably. But good intentions only carry a case to a point. If there is going

to be any "calming," then the defendant will need to take full responsibility.

Element 3: Regret and self-criticism

A pivotal component of a real apology is the expression of regret for one's wrongdoing. This includes regret for and discomfort with having *caused* the harm suffered by the victim. This element allows the defendant to assure the plaintiff that he intended no harm in his actions, and hopefully remove the "insult" from the injury. (Aaron Lazare, *Go Ahead Say You're Sorry*, Psychology Today Jan.–Feb. 1995, at 40, 42; see also Cohen, *supra*, at 1019.)

Does this mean a *full* admission of liability is required in an apology? Yes. Most commentators agree that an apology must express that (1) the defendant has suffered a "psychic penalty" (Element 2, discussed *supra*); and (2) the defendant knows that his conduct was wrongful. (Cohen, *supra* note 2, at 1017; But see Jeffrey S. Helmreich, *Does 'Sorry' Incriminate? Evidence, Harm and the Protection of Apology*, Cornell J.L. & Pub. Pol'y Vol. 21, No. 3, 570 (2012) [Arguing that an apology may be effective even without admission of fault, so long as it conveys some degree of shame or regret].) Nicholas Tavuchis writes that apology requires "painful embracement of our deeds, coupled with a declaration of regret . . . [w]hatever else is said or conveyed, an apology *must* express sorrow." (Nicholas Tavuchis, *Mea Culpa*, 19, 35 (1991) (emphasis added).) Psychologist Aaron Lazare writes that an apology must include an admission of wrongdoing, and should convey the apologizer's shame for having broken social norms. (Lazare, *supra*, at 40.)

Lee Taft, the preeminent legal theorist concerned with the moral discourse behind apology, describes the admission of faulty conduct as "the central component of apology," and warns that an apology given without contrition, even if successful from a tactical perspective, is nonetheless "corrupt" from a moral perspective. (Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. 1135, 1148-49 (2000).)

Smoot, Next Page

Where liability is contested at trial, a defendant's expression of regret or self-criticism may be admitted as evidence of the defendant's liability. Under Evidence Code section 1160, an apology may be admissible if it contains self-criticism: "A statement of fault, however, which is part of, or in addition to, any of the above [benevolent gestures] shall not be inadmissible pursuant to this section." Along the same lines, the defendant's self-critical apology may qualify as a "declaration against interest," a hearsay exception codified in Evidence Code section 1230.

In admitted liability cases, a defendant's apology at trial may be effective at swaying the jury. If the defendant admits wrongdoing and expresses regret, then there is a risk that the jury will perceive the defendant as a moral agent. This would be a mistake, of course, as the defendant's apology presumably lacks other elements, like numbers 4 and 5 below.

Element 4: Respect for The Safety Rule/improving behavior in the future

The next major component of apology is an expression of respect for the safety rule or standard of reasonable care that the defendant violated. (Tavuchis, *supra*, at 13.) As Donna L. Pavlick explains, the statement should legitimate the "moral norm" or "social relationship" that the defendant previously disrespected. (Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of The Twenty-First Century*, 18 Ohio St. J. on Disp. Resol. 829, 836 (2003).) In the context of a motor vehicle collision, this may mean, for instance, acknowledging the importance of turn signals, the speed limit, or keeping a proper lookout. By affirming a shared belief system in this way, the defendant is saying, "I am your friend, not your foe," and is thereby likely to create credibility. (Cohen, *supra*, at 1019.)

For these reasons, a well-made apology may stimulate some level of forgiveness – or a defense verdict. (See

generally Michael E. McCullough, Everett L. Worthington, Jr., & Kenneth C. Rachal, *Interpersonal Forgiveness in Close Relationships*, 73 J. Personality & Soc. Psychol. 321 (1997) (quantitative research concluding that the apologizer creates empathy and forgiveness).) Respecting the social norm is a powerful element, and may charm jurors. Readers may recognize an influential plaintiff attorney handbook, *Reptile*, at play here. (David Ball & Don Keenan, *Reptile: The 2009 Manual of The Plaintiff's Revolution*, 117 (2009).) David Ball and Don Keenan instruct us to provoke jurors' instincts for self-protection (personified as "the Reptile") by focusing jurors' attention on the threat to community safety. As they explain, a defendant's apologetic posture can defuse jurors' anger by acknowledging respect for community safety standards: "Credible remorse is a powerful way to set the Reptile at rest, because it means the danger is not likely to repeat itself." (*Ibid.*)

There are several ways to rebut a defendant's apologetic claim that he respects the safety rule. In discovery, you may consider propounding requests for admission to draw out a defendant's position on certain safety rules, standards of care, or the effectiveness of remedial measures. When the defendant attempts to claim respect for the safety rule at trial, remind the jury of the defendant's contradictory discovery responses. Additionally, remind jurors that actions speak louder than words. A defendant who truly respects community safety would demonstrate it by conduct. (Ken Blanchard & Margret McBride, *The One Minute Apology*, 50 (2003).) In trial, compare the defendant's apology to his conduct before and after the incident. Comment on how the defendant systematically ignored the safety rule before the subject incident. To the extent possible, point out that the defendant *still* ignores the safety rule today, and has opted not to take subsequent remedial measures. (See e.g., *People v. Lockheed Shipbuilding & Const. Co* (1975) 50 Cal.App.3d Supp. 15, 35 (subsequent remedial measures may be offered for impeachment

purposes).) Establishing either or both of these elements will undercut the defendant's claim to being the guardian of community safety.

Element 5: Repairing the harm

The final and most important element of a real apology is that the defendant must promise to repair the harm she caused. A thoughtful and sincere statement of sympathy or regret has limited or nonexistent value without this element. As William Bartels explains, the apology components discussed above create *psychological* benefits to address emotional needs rather than financial ones:

[A] statement of sympathy does not mend the wound nor restore a party to her pre-injured status. In extreme cases, the injured may have incurred substantial medical bills, loss of current wages, and loss of earning capacity that results in substantial financial hardship that no apology could remedy. While the apology may lead to a psychological remedy, substantial financial hardship could leave the injured in no position to compromise money damages.

(William K. Bartels, *The Stormy Seas Of Apologies: California Evidence Code Section 1160 Provides A Safe Harbor For Apologies Made After Accidents*, 28 W. St. U.L. Rev. 141, 143 (2001).) In other words, a defendant's apology must include a pledge to fully make amends for the plaintiff's losses and suffering. (Blanchard & McBride, *supra* at 24.) Even the most heartfelt apology cannot substitute for actual compensation.

Conclusion

A "real apology" is unlikely to occur in trial. This is because a real apology requires taking full responsibility. If a defendant were ready to take full responsibility in the first place, then the case would not be going to trial. Taking full responsibility means caring about others, admitting fault, fixing the damage, and making sure it will not happen again. Without meeting all of those objectives, the defense has no business pretending to apologize at trial.

Smoot, Next Page

Clifton N. Smoot is an attorney with The Veen Firm, San Francisco, on the Leary Trial Team. His team handles complex cases involving life-altering injuries or death.

His practice area includes products liability, workplace injuries, dangerous conditions of property, and vehicle negligence. He is a member of SFTLA, CAOC, AAJ, and

The Lawyers' Club of San Francisco Inn of Court, and also helps coach the UC Hastings Trial Team. 