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# ADVISING CLIENTS TO APOLOGIZE

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## I. INTRODUCTION

Imagine that a child damages his neighbor's house. Playing baseball after school, Hank, age eleven, hits a ball hard but foul, flying from his bat toward and then through a window of his neighbor Mr. Cleary's house. What should Hank do? Sneak into Mr. Cleary's house and retrieve the ball before Mr. Cleary gets home from work? Hope that Mr. Cleary won't notice? In tears, Hank enters his own home to tell his mother what has happened. They talk about it and decide that the right thing for Hank to do is to apologize and make amends. Upon seeing Mr. Cleary arrive home, Hank is to go directly to Mr. Cleary's house, say he is sorry for breaking the window, offer to pay for a new window, and promise that he won't play ball in a way that might risk damaging Mr. Cleary's house again.

Imagine instead that an adult damages his neighbor's house. Mr. Tiller has long dreamed of converting the flat grass of his back lawn into an elegant rock garden accented by a small hill. One spring weekend, he hires a gardener to relandscape. Using light machinery, the gardener digs into the lawn and piles soil to form a small hill. Several weeks later, a torrential rain shower hits. Peering out his living room window, Mr. Tiller sees that his yard contains not only a small hill, but also a large pool of water. This pool stretches from the foot of the new hill into his neighbor Ms. Jones' lawn. It reaches up to her back porch—or what used to be her back

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porch! Mr. Tiller can see that one of the corner posts of that back porch has collapsed, apparently slipping at its base. Further, the pool of water covers that spot. What should he do? Mr. Tiller knows that Ms. Jones, who lives alone, has recently left for a two-week vacation. Distraught, Mr. Tiller phones his lawyer.

“Whatever you do,” says the lawyer, “don’t run over and apologize when Jones gets back from vacation. That would just make you look bad. Also, don’t call your gardener to have him flatten the hill before Jones gets back. That too would just make you look bad. Who knows, maybe the post’s collapsing had nothing to do with your hill. Perhaps the severity of the rain was the root cause of the damage, or maybe the wood supporting the porch was simply rotten. By the time Jones gets back from vacation, the pool may have cleared. Just wait and see what happens. Jones might not even suspect that your hill was involved with the damage to her porch, but even if she does, it’s likely she won’t be able to prove it.”

How different are the ways we counsel children and adults to act when they have injured others. Parents, or at least good parents, teach children to take responsibility when they have wronged another: *Apologize and make amends*. In contrast, lawyers typically counsel the opposite. Most lawyers focus on how to *deny* responsibility, including what defenses a client might have against a charge and what counterclaims. If a lawyer contemplates an apology, it may well be with a skeptical eye: Don’t risk apology, it will just create liability. While the lawyer-client relationship is of course different from the parent-child relationship, the fact that parents frequently advise children to apologize, but that lawyers rarely advise clients to apologize,<sup>1</sup> ought to give us pause.<sup>2</sup> If apology is often in the best interest of children, could it often be in the best interest of adults?

The failure to apologize can also be a central factor in escalating conflict. A friend’s account of a restaurant incident conveys this well. “I was having lunch at a small cafe several years ago and found a small piece of glass in my food. I called the waiter to tell him about it, so that they would know about it in case they had other food in their kitchen containing glass. I thought that they would say they were sorry for serving me food with glass in it, but they wouldn’t. Perhaps they thought that they had a poten-

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1. I know of no empirical study describing how frequently lawyers discuss apology with clients. However, from many conversations with lawyers and clients, and from my own time in legal practice, my sense is that discussing apology with a client is rare, though not nonexistent.

2. A factor behind this difference may be that parents generally care about the character and moral development of their children far more than lawyers care about the character and moral development of their clients.

tial lawsuit on their hands. I had no intention of suing, but when they said that there was no way the glass could have come from their kitchen, I became incensed. How dare they not apologize for serving me food with broken glass in it!" In the extreme, one hears of examples where an injured party never would have brought suit had the offender apologized<sup>3</sup> or would have dropped the suit had the offender apologized.<sup>4</sup>

At times a vicious cycle may arise. An offender who wants to apologize, but fears being sued, may refrain from apologizing—and the absence of an apology is precisely what triggers the suit. The medical malpractice setting provides a striking example. Although a physician may wish to tell a patient when he has made a mistake, lawyers often order doctors to say nothing.<sup>5</sup> The physician's silence may then trigger the patient's anger. "[Patients] . . . want to know why their trusted caregiver is suddenly not talking to them, and why they're seeing the hospital lawyer or risk manager [instead of the physician] . . . That's an incredibly divisive wedge to put between a patient and a health-care provider . . ." <sup>6</sup> This alienation may then prompt the patient to sue. For example, a study of families who sued their physicians following prenatal injuries found that twenty-four percent filed medical malpractice claims when "they realized that physicians had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them."<sup>7</sup>

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3. Colleague Doug Stone reports that in years of teaching hundreds of lawyers a negotiation exercise of a "borderline" sexual harassment case in which a female employee thought that her termination may have resulted from her rejections of a male supervisor's friendly overtures, none of the lawyers would have brought suit if the offender-supervisor had apologized for those overtures, but if the offender-supervisor had not apologized, many would have brought suit. See DOUGLAS STONE, WEATHERS AND EVANS (1996).

4. See, e.g., Robert H. Mnookin & Lee Ross, *Introduction to BARRIERS TO CONFLICT RESOLUTION 5-6* (Kenneth Arrow, Robert Mnookin, Lee Ross, Amos Tversky & Robert Wilson eds., 1995) (describing a dispute between Art Buchwald and Paramount Pictures which Buchwald would have settled for "a minimal sum of money and . . . an apology," but, as Paramount would not apologize, three years of bitter litigation ensued). See also Stephen B. Goldberg, Eric D. Green, & Frank E.A. Sander, *Saying You're Sorry*, 3 NEGOTIATION J. 221 (1987), who state that,

[m]any mediators have had one or more experiences in which an apology was the key to a settlement that might otherwise not have been attainable. At times, all the injured party wants is an admission by the other party that he or she did wrong; no more is necessary to achieve a settlement.

5. See Denise Grady, *Doctors Urged to Admit Mistakes*, N.Y. TIMES, Dec. 9, 1997, at F9.

6. *Id.*

7. Gerald B. Hickson, Ellen Wright Clayton, Penny B. Githens & Frank A. Sloan, *Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992) [hereinafter Hickson]. Further, 19% of those filing suit said they did so out of "a desire to deter subsequent malpractice by the physician and/or seek revenge." *Id.* Such filings also may have been prevented by an apology. Other studies report similar results. See Charles Vincent, Magi Young & Angela Phillips, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (study of British patients and families finding

Given these reasons for filing suit, one would think that a sincere apology could have prevented many of those suits. Aside from the serious questions of medical ethics involved with doctors putting their interests ahead of their patients',<sup>8</sup> surely something is amiss when physicians want to apologize, when patients would appreciate receiving a apologies, but the fear of liability stops physicians from apologizing—which in turn prompts a lawsuit.

And what of morality? Respect for others would seem to require that when an offender has hurt someone, she should apologize to the extent that she feels at fault. As a mother whose ten-year old son was injured by a reckless driver said to me recently, "What a jerk! He never even said that he was sorry." Though failing to apologize for an injury that one has committed is common, it is nevertheless morally offensive. While a significant fraction of civil defendants are at bottom guilty of having wrongfully injured another, I would expect that only a *very* small fraction ever apologized or were ever advised by their lawyers to apologize. To the contrary, often offenders are explicitly instructed by their lawyers, or their insurance companies, *not* to apologize.<sup>9</sup> This stands in stark contrast to

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37% may not have brought malpractice suits had there been a full explanation and apology, more significant factors than monetary compensation); Amy B. Witman, Derek M. Park & Steven B. Hardin, *How Do Patients Want Physicians to Handle Mistakes*, 156 ARCHIVES OF INTERNAL MED. 2565, 2568 (1996) (survey finding that in cases of moderate physician error, only 12% would sue if physician informed patient of error, but if physician did not inform patient of error, 20% would sue if later learning of error); LaRae I. Huycke & Mark M. Huycke, *Characteristics of Potential Plaintiffs in Malpractice Litigation*, 120 ANNALS OF INTERNAL MED. 792, 792 (1994) (finding poor relationship with health care provider and impression of not being kept appropriately informed by health care provider significant factors prompting patients to contact plaintiff's attorneys). See also Ann J. Kellett, Comment, *Healing Angry Wounds: The Role of Apology and Mediation in Disputes Between Patients and Physicians*, 1987 MISS. J. DISP. RESOL. 111, 126-27 (stressing the importance of apology in managing patient-physician disputes); Francis H. Miller, *Medical Malpractice Litigation: Do the British Have a Better Remedy?* 11 AM. J.L. & MED. 433, 434-35 (1986) (describing the markedly lower incidence of malpractice suits and much greater role of apology in cases of medical error in Great Britain as compared to the U.S.); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 68 (1994) ("When physicians are more forthright about what has occurred and assume responsibility for it, patients are less likely to sue.").

8. See Daniel Finkelstein, Albert W. Wu, Neil A. Holtzman & Melanie K. Smith, *When a Physician Harms a Patient by Medical Error: Ethical, Legal, and Risk Management Considerations*, 8 J. CLINICAL ETHICS 330 (1997); Albert W. Wu, Thomas A. Cavanaugh, Stephen J. McPhee, Bernard Lo & Guy P. Micco, *To Tell the Truth: Ethical and Practical Issues in Disclosing Medical Mistakes to Patients*, 12 J. GEN. INTERNAL MED. 770 (1997); Michael R. Robin, Dana D. Brian & Timothy J. Rumsey, *Truth-Telling, Apology and Medical Mistakes*, 7 MED. J. ALLINA 3 (Summer 1998). Such questions include the extent of a patient's right to know information about his health and whether a physician has a professional duty to put his patient's interests before her own.

9. Counseling denial extends well beyond lawyers. A friend's insurance company provided him with a small, wallet-sized card titled, "What to do when [you are] involved in a car accident." The bottom line of the card reads, "Keep calm, don't argue, accuse anyone, or admit guilt." See also

practices in other societies, such as Japan, where apology plays a central role, if not the dominant role, in dispute resolution.<sup>10</sup>

Such factors prompt a question: Should lawyers discuss the possibility of apology with clients more often? In this Article I argue that, in civil cases, lawyers should discuss with clients the possibility of apology more often than they now do.<sup>11</sup> Not only is apology morally right and socially beneficial, but in many cases making an apology is in the client's (defendant's) best interest. This is not to say that there are no risks associated with apology, not the least of which is the fear that an apology can be used against one's client in court as an admission of fault. However, when attention is paid to the context in which an apology is offered and how it is made, often "safe" apologies posing relatively little risk of increased liability can be offered. Further, the possible benefits of apology to the client (defendant) are under-recognized.

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Grady, *supra* note 5 (describing hospital managers, lawyers, and insurance companies that advise doctors not to admit mistakes to patients). Even the police appear to have entered the business of advising against apology. A colleague reports a car accident in which his sister, when turning at an intersection, failed to notice a car in front of her and rammed into it from behind. When the police arrived, the sister was profusely apologizing to the driver of the car that she hit. A police officer interrupted, pulling the sister to the side, and told her that she shouldn't say anything—it could just be used against her in court.

10. On the centrality of apology to dispute resolution in Japan, see Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 464 (1986) ("[In Japan,] [t]he availability of social restorative mechanisms like apology obviates formal legal sanction in many cases."); John O. Haley, *Comment: The Implications of Apology*, 20 L. & SOC'Y REV. 499 (1986); Robert B. Leflar, *Beyond Compensation: Personal Injury Compensation in Japan: Values Advanced and Values Undermined*, 15 U. HAW. L. REV. 742 (1993). See also Ken-ichi Ohbuchi, Masuyo Kameda & Nariyuki Agarie, *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 2, 219-27 (1989) (psychological experiments using Japanese subjects demonstrating the importance of apology to injured party). On the significance of apology in other societies, see Letitia Hickson, *The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study*, 25 ETHNOLOGY 4, 283 (1986) (describing a cross-cultural, anthropological study with special emphasis on Fiji suggesting a correlation between apology and social hierarchy); Carol LaPrairie, *Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice*, 6 CRIM. L.F. 576, 584 (1995) (emphasizing the importance of apology in resolving criminal disputes in aboriginal communities in Canada, New Zealand, and Australia); Miller, *supra* note 7, at 434-35; Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J. INT'L L. 1, 26 (1994).

11. The criminal setting raises many interesting, but often distinct, issues related to apology, such as the role of admissions of guilt in plea bargaining and the fact that the plaintiff in a criminal case is the state, rather than the injured party. Accordingly, I limit my analysis to civil cases. For related discussions in criminal law, see Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1888 (1991); Richard Lowell Nygaard, *On the Role of Forgiveness in Criminal Sentencing*, 27 SETON HALL L. REV. 980 (1997); Wagatsuma & Rosett, *supra* note 10, at 481-83. See also *infra* note 63 (citing Victim-Offender Reconciliation Programs).

After briefly defining apology, Part II of this Article examines benefits and costs of apology to a client, avenues for “safe” apology which prevent an apology from being used against the client to prove the client’s liability, and reasons that lawyers neglect discussing apology with clients. The main lesson here is that, under the existing legal rules, apology could be utilized much more than it now is. Part III discusses factors to which lawyers who discuss apology with clients should be sensitive and offers four examples of apology in the common civil settings of divorce, employment, car accident, and medical malpractice. Part IV explores legal reforms to create more avenues for “safe” apology. Part V addresses two ethical questions related to advising clients to apologize, namely (i) is it wrong for an unremorseful offender to make an insincere apology with the aim of gaining a strategic advantage, and (ii) is it wrong to make a “safe” apology? Part VI concludes.

## II. BENEFITS AND COSTS OF APOLOGY

### A. DEFINITIONS

The word “apology” derives from the Greek root *logos*, meaning “speech” or “word.” Though originally associated with a formal justification, defense or explanation (as in Plato’s *Apologia*<sup>12</sup>), apology also refers to remarks made following an injury, whether intentional or unintentional. In this latter usage, an apology is defined as, “an acknowledgment intended as an atonement for some improper or injurious remark or act: an admission to another of a wrong or discourtesy done him accompanied by an expression of regret,”<sup>13</sup> or, “[a]n explanation offered to a person affected by one’s action that no offense was intended, coupled with the expression of regret for any that may have been given; or, a frank acknowledgment of the offense with expression of regret for it, by way of reparation.”<sup>14</sup>

The hallmark of an apology are the words, “I’m sorry.” “I’m sorry that my baseball smashed your window.” “I’m sorry that my re-landscaping may have caused your back porch to collapse.” Yet the words “I’m sorry,” like apologies more generally, can have many possible interpretations, and it is helpful to differentiate three elements often included in an apology: (i) admitting one’s fault, (ii) expressing regret for the injurious

12. See PLATO’S APOLOGY OF SOCRATES (Thomas G. West trans., Cornell Univ. Press 1979).

13. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1961).

14. OXFORD ENGLISH DICTIONARY (2d ed. 1989).

action, and (iii) expressing sympathy for the other's injury.<sup>15</sup> The first element addresses liability or culpability, while the second and third elements address the offender's feelings. For example, after a car accident, the offender might say, "I am sorry about what happened. [i] It was my fault: I wasn't paying attention to the road. [ii] I terribly regret that my car hit yours from behind, and [iii] I hope that you and your family recover quickly." Similarly, apology's counterpart—forgiveness—can be defined in at least two ways: (i) releasing from liability and (ii) ceasing resentment.<sup>16</sup>

Unless otherwise noted, I shall use the term "apology" to incorporate all three of the elements above, that is, *an apology is an admission of one's fault combined with an expression of regret for having injured another as well as an expression of sympathy for the other's injury. However, by the term "forgiveness," I mean only the cessation of resentment against the injurer, but not a release from liability.* Accordingly, an offender may apologize for the harm he has done, and the injured party forgive him, but the offender may still be obligated to compensate the injured party for the harm done.

#### B. BENEFITS TO THE CLIENT

After an injury, it is easy for parties to see the world in zero-sum terms. Having been harmed, the injured party may view the offender as an adversary, and expect that what will be one side's gain will be the other side's loss. The offender may fear such hostility from the injured party, and may also adopt a zero-sum mind set. Further, post-injury negotiations, like all negotiations, inevitably involve a distributive element. Often that distributive element is quite large. For example, following a car accident, the central question may be how much compensation the defendant's insurance company will pay to the injured party.

In contrast, apology and forgiveness can be value-creating. If I apologize for having injured you, and you accept this apology, both of us are likely to be better off. This does not mean that when an apology occurs

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15. Some describe the step of admitting one's fault as accepting responsibility for the injury. See, e.g., SUSAN HEITLER, *THE POWER OF TWO* 174 (1997). When the offender is not morally culpable (as in a non-negligent accident), this alternative terminology is particularly useful.

16. See OXFORD ENGLISH DICTIONARY, *supra* note 14 (defining "forgive" as, "[1] to give up resentment against, pardon (an offender) . . . [2] to abandon one's claim against (a debtor)"). Parallel to the subject of this Article, the question exists of whether lawyers should discuss the possibility of forgiveness with clients more often (e.g., "This is the fourth action against your former spouse you've brought in the past two years. Might you be better off 'moving on'?").

distributive elements disappear. After an apology, the parties still may need to settle on a level of compensation for the injury. For instance, after Hank apologizes to Mr. Cleary, Hank still needs to pay for replacing the broken window.<sup>17</sup> Rather, to say that apology and forgiveness can be value-creating simply means that apology and forgiveness offer avenues that can be beneficial to *both* parties. If the parties knew one another before the injury, an apology may be an important first step toward repairing their relationship. Even in highly distributive, post-car accident negotiations, an apology may help the injured party to feel less angry and the injurer to feel less guilty. Below, I expand upon some of the potential benefits of apology to one's client. However, let me first note several of an apology's distinctive features.

Unlike many aspects of settlement, an apology is a "commodity" which only the offender can produce. While Ms. Jones can hire many people to repair her porch, if she wants an apology, only Mr. Tiller can offer one.<sup>18</sup> In economic terms, the "market" for apology is monopolistic—the injured party cannot get that apology elsewhere. The same applies to forgiveness: It is a commodity best obtained from the injured party.<sup>19</sup>

Some cases of apology raise what one might call issues of standing: What right does the person offering the apology have to offer it, and what right does the person receiving it have to receive it? Examples such as the Japanese Prime Minister's apology to Korean "comfort women" forced to be prostitutes in World War II<sup>20</sup> and the recent proposal that President Clinton make an apology for slavery<sup>21</sup> spring to mind. Can the Japanese Prime Minister or the American President apologize for national policies which they played no part in developing? And who exactly would receive

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17. For the tort of defamation, an apology plays a special role within American law by serving to mitigate damages; however, an apology does not provide a defense to the cause of action itself. See Wagatsuma & Rosett, *supra* note 10, at 479-81.

18. Sometimes offenders use agents to offer apologies. However, the authority to make the apology must still come from the offender. Such a delegated apology may lack the force of a non-delegated apology, as the sincerity behind the apology may be in question.

19. In general, one would think that the power of forgiveness lies primarily with the injured party. At the minimum, it is up to the injured party to determine whether to accept that apology. Some may feel that, in a deeper, religious sense, forgiveness lies not with the injured party, or, at least not exclusively with the injured party, but with God. Forgiveness, like apology, raises standing issues.

20. See Yvonne Chang, *Japanese Leader Writes Apology to 'Comfort Women,'* WASHINGTON POST, Aug. 15, 1996, at A34. For a historical review and criticism of the Japanese government's failure to admit and apologize for World War II atrocities, see IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* ch. 10 (1997).

21. Compare Charles Krauthammer, *Let's Shackle the Slavery Apology Idea,* NEWSDAY (New York), June 29, 1997, at G4, with DeWayne Wickham, *Why Clinton Must Stop Dodging Slavery Apology,* USA TODAY, Dec. 16, 1997, at A15.



the apology? In the Japanese example, former “comfort women” still living would be the clearest recipients, but in the American case of slavery, there are no former slaves still living. Standing issues often arise in the organizational context.<sup>22</sup> For example, if a male supervisor sexually harasses a female employee, the 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? The president could certainly express sympathy on behalf of both himself and the company, but the president would be hard-pressed to admit fault if the company had no fault to admit.

For an apology to comfort the injured party, it must be *sincere*, or at least perceived to be sincere.<sup>23</sup> As to why sincerity should be so important, different theories may exist (such as sincerity indicating that (i) the harmful act will not recur, (ii) the offender has incurred a psychic “penalty” of anguish for the harm she caused, (iii) the offender wishes to have friendly, rather than hostile relations, and (iv) the offender respects the injured party), but when an apology is given too cavalierly, the listener may question its meaning.<sup>24</sup> I am reminded of a conversation with one of my high school teachers. A father of two boys, this teacher said that his older son found apologizing gut-wrenching, but that his younger son found apology quite easy. The younger son would, as it were, apologize at the drop of a hat. Was one approach better than the other? The teacher reported that an aggrieved party—typically the mother—preferred receiving some apology rather than none. However, when an apology came from the older son, she knew that it “meant something.”

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22. See NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* chs. 3, 4 (1991).

23. See Sim B. Sitkin & Robert J. Bies, *Social Accounts in Conflict Situations: Using Explanation to Manage Conflict*, 46 *HUM. REL.* 349, 359 (1993) (discussing how psychological studies demonstrate the importance of the perceived sincerity of the person offering an explanatory account). See also TAVUCHIS, *supra* note 22, at 19 (discussing authenticity in apology); THOMAS J. SCHEFF, *BLOODY REVENGE: EMOTIONS, NATIONALISM, AND WAR* 131-37 (1994). I do not advocate Machiavellian attempts at insincere apology. See *infra* Part V. Many have lamented the recent use, and possible rise, of insincere apologies, especially in politics. See, e.g., Meg Greenfield, *The No-Fault Confession*, *NEWSWEEK*, June 15, 1987, at 80; Ellen Goodman, *Nobody's Truly Sorry Anymore*, *CHARLESTON GAZETTE & DAILY MAIL* (W. Va.), May 18, 1995, at 4A; Deborah Sontag, *Too Busy Apologizing to be Sorry*, *N.Y. TIMES*, June 29, 1997, at E3; Louis Menand, *Making Nice: Why Politics Means Always Having to Say You're Sorry*, *NEW YORKER*, Apr. 13, 1998, at 5.

24. There is a tendency within economic analysis to think of goods (or commodities) in physical terms and downplay nonphysical aspects of consumption. For critiques, see Thomas C. Schelling, *The Mind as a Consuming Organ*, in *CHOICE AND CONSEQUENCE* 328 (1984), and Jonathan R. Cohen, *On Reasoned Choice* 93-99 (1993) (unpublished Ph.D. dissertation, Harvard University) (on file with author). Similarly, when analyzing settlements there may be a tendency to focus on pecuniary elements, and ignore nonpecuniary ones, such as apology.

For an apology to be most effective, it must also be *voluntary*—made of a party’s own free will. Apologies are sometimes brought about from external pressures rather than internal remorse, as when a child is forced by a parent to apologize. However, in general, the more an apology is coerced, the less meaning it carries, for the less sincere is the regret it expresses. In this regard, it is worth noting that even if court-ordered apology were legal within the United States, which due to free-speech concerns it is not,<sup>25</sup> an ordered apology would carry little meaning. As Justice Pomeroy reasoned:

An apology is a communication of the emotion of remorse for one’s past acts. To order up that particular emotion, or any other emotion, is beyond the reach of any government; to assert the contrary is to advocate tyranny. If, perchance, the Commission, in ordering a public manifestation of remorse, should be indifferent as to whether remorse in fact exists but instead should desire only the outward act, then it would be either extracting a lie from those willing to lie (“I’m sorry”, but I’m really not) or asking the courts of this State to hold in contempt those who will not lie (“I’m not sorry and I will not say that I am”). Given the choice, I would rather hold in contempt the former, not the latter. But in my view the Commission should eschew purporting to order the expression of an emotion, whether or not the emotion is in fact entertained by the one so ordered.<sup>26</sup>

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25. See *Pacific Gas & Elec. Co. v. Public Utilities Comm’n of Cal.*, 475 U.S. 1 (1986) (holding freedom of speech includes freedom not to speak); *Griffith v. Smith*, No. LT-460-2, 1993 Va. Cir. LEXIS 41, 37 (Cir. Ct. City of Richmond Mar. 4, 1993) (“First Amendment concerns preclude the Court from ordering the apology suggested . . .”); Deborah K. Hepler, *Providing Creative Remedies to Bystander Emotional Distress Victims: A Feminist Perspective*, 14 N. ILL. U. L. REV. 71, 88 (1994) (holding that court-ordered apology would be “analogous to specific performance of a personal service contract, which is frowned upon in the law as akin to involuntary servitude”). See also *United States v. Acevedo*, 117 F.3d 1429 (6th Cir. 1997) (holding that a judge’s conditioning criminal’s reduction in sentence upon criminal’s offering apology to victim an abuse of discretion).

An interesting contrast exists between Japan and Korea, where court-ordered apology exists as a remedy in defamation cases and has been constitutionally upheld. See James J. Nelson, *Culture, Commerce, and the Constitution: Legal and Extra-Legal Restraints on Freedom of Expression in the Japanese Publishing Industry*, 15 UCLA PAC. BASIN L.J. 45, 57 (1996); Youm, *supra* note 10, at 26. In America, an apology may be a mitigating factor in a defamation case, but is not a legal remedy. Cultural differences help explain this contrast in the availability of apology as a legal remedy. As Wagatsuma and Rosett write, “Apology may be given a lower legal priority in the United States [than in Japan] because American society does not place as high a value on group membership, conformity, and harmonious relationships among people as Japanese society does.” Wagatsuma & Rosett, *supra* note 10, at 493. See also TAVUCHIS, *supra* note 22, at 7-14, 37-44 (discussing the significance of apology to group membership and social order and its role in Japan).

26. *Pennsylvania Hum. Rel. Comm. v. Alto-Reste Park Cemetery Ass’n*, 306 A.2d 881, 891 (1973) (Pomeroy, J., concurring). See also Deborah Tussey, Annotation, *Requiring Apology as “Affirmative Action” or Other Form of Redress Under State Civil Rights Act*, 85 A.L.R. 3d 402 (1978).

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With these comments in mind, let me now address more specifically some of the value-creating benefits of apology.

1. *Subtract Insult from Injury*

An apology may help prevent piling insult onto injury, something both parties may want. An injured party usually wants to receive an apology, for absent an apology she may be angered to think that the offender was glad to have caused the injury. Moreover, failing to apologize following an injury can be a deeply disrespectful act and thus become a second injury. Indeed, some injured parties attach far more value to an apology than to compensation for their injuries. Further, many offenders want to apologize to show respect for the person harmed and to try to make amends.

2. *Prevent Antagonistic Behavior*

An apology can be an important step in preventing future antagonistic behavior, including litigation. When an injury has occurred, there is a root question to be resolved: Are you (the offender) my friend or my foe? An apology signals that the offender wishes to establish or re-establish a friendly relationship. It is a way of saying to the injured party: "I am your friend, not your foe." Implicit in this statement is often a second one, "I want to have constructive future interactions, not destructive ones." As one might expect, this approach frequently works: The offender's apology often catalyzes the injured party's forgiveness.<sup>27</sup>

Indicating that one wants friendly relations may be one of the greatest benefits of an apology. Even where the parties did not know one another before the injury, the injury creates a relationship in which, if nothing else, the offender and the injured party must address the extent of compensation. There is a certain irony in such injury-generated relationships, for the person the injured party might least wish to deal with is the offender, but the fact of the injury has created a relationship between the two. Even if Bill and Fred were total strangers before Bill drove his car into Fred's, follow-

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27. See generally Michael E. McCullough, Everett L. Worthington, Jr., & Kenneth C. Rachal, *Interpersonal Forgiveness in Close Relationships*, 73 J. PERSONALITY & SOC. PSYCHOL. 321 (1997) (empirical study showing that the offender's apology generates empathy on the part of the injured party, which in turn leads to forgiveness). "It is well established that receiving an apology from one's offender encourages forgiving . . . , particularly when apologies are elaborate and include admission of guilt." *Id.* at 323 (citations omitted). See also Mary B. Harris, *Mediators Between Frustration and Aggression in a Field Experiment*, 10 J. EXPERIMENTAL SOC. PSYCH. 561, 570 (1974) (demonstrating that offenders who said "excuse me" after cutting in front of subjects in line were responded to less aggressively than those who said nothing).

ing the accident Bill and Fred will likely have interactions concerning how Bill should compensate Fred. Apologizing after an injury can be essential to making that relationship a constructive one.

### 3. *Repair Damaged Relationship*

An apology may also help restore a damaged relationship between parties. Many legal disputes arise in the context of a pre-existing relationship (family, workplace, or commercial). Often these relationships are very close ones. If a friend harms another friend, the injured friend may well ask, "If we were friends, why did you injure me?" Absent an apology, it may be impossible for parties to put a problem behind them and restore their normal functioning. One aspect of this is the need to construct an explanation for what has occurred.<sup>28</sup> Paying monetary damages may help take care of the financial consequences of an injury, but it may take an apology to "wipe the moral ledger" clean and construct understandings of the injury and the relationship which both parties can accept. In this regard, the tendency of some persons to make reciprocating apologies should be noted. At least in situations where both parties bear some fault, some injured parties, if apologized to, almost automatically apologize back. Similarly, parties who have reached an agreement following a dispute will often conclude their conversations with a mutual exchange of apologies.<sup>29</sup>

### 4. *Permit Serious Settlement Negotiations*

Indignity can be a large barrier to compromise, and in many cases, an apology is needed before other aspects of the dispute, such as monetary compensation, can be settled. As Goldberg, Green, and Sander write, "[At] times, an apology alone is insufficient to resolve a dispute, but will so reduce tension and ease the relationship between the parties that the issues separating them are resolved with dispatch."<sup>30</sup> This observation has a public policy corollary to which I shall return later: If we want to encour-

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28. Parties in relationships often use accounts to understand their relationships. An injury may not only damage a party, it can also damage the viability of the account(s) by which the parties understand one another. Offering an apology can be an important step in creating a new account acceptable to both parties. See generally Sitkin & Bies, *supra* note 23. See also ERVING GOFFMAN, RELATIONS IN PUBLIC 113 (1972) ("[A]pologies represent a splitting of the self into a blameworthy part and a part that stands back and sympathizes with the blame giving, and, by implication, is worthy of being brought back into the fold."); SCHEFF, *supra* note 23, at 135-37.

29. See Deborah Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1174 (1997) (discussing "happy-ending" apologies).

30. Goldberg et al., *supra* note 4, at 221.

age the private settlement of, rather than the litigation of, disputes, allowing parties to make apologies *soon* after an injury is critical.

### 5. *Spiritual and Psychological Growth*

Apology and forgiveness may also offer paths for spiritual and psychological growth. By apologizing for, rather than denying or avoiding, the damage he caused to his neighbor's window, Hank becomes a better person. By failing to apologize, Mr. Tiller may no longer be able to look at himself in the mirror, or, should he meet her again, look Ms. Jones in the eye. Responsibility and respect, rather than denial and avoidance, lie at apology's core. Within many religious and ethical systems, offering an apology for one's wrongdoing is an important part of moral behavior, as is forgiving those who have caused offense.<sup>31</sup>

Psychological evidence also supports the importance of apology, both for the offender and for the injured party.<sup>32</sup> An offender who fails to apologize may suffer by harboring guilt, and an injured party who does not receive an apology,<sup>33</sup> or who fails to forgive after receiving an apology, may suffer the corrosive effects of storing anger. While the psychological benefit to the injured party of receiving an apology is well-recognized, the psychological benefit to the offender of apologizing is often overlooked, especially by lawyers.<sup>34</sup> This is not to say that making an apology should fully assuage an offender's guilt or that following an apology all injured parties should fully cease resentment. Nor is it to say that all persons feel

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31. For references to philosophical and religious discussions of forgiveness, see McCullough et al., *supra* note 27. See also Peter A. Kirkup, *Some Religious Perspectives on Forgiveness and Settling Difference*, 11 *MEDIATION Q.* 79 (1993); Kenneth Cloke, *Revenge, Forgiveness, and the Magic of Mediation*, 11 *MEDIATION Q.* 67 (1993); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 *J. DISP. RESOL.* 1; Nygaard, *supra* note 11.

32. See generally Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 *J. PERSONALITY & SOC. PSYCHOL.* 742 (1982); Marty H. Gonzales, Julie A. Hagen & Debra J. Manning, *Victims As "Narrative Critics" Factors Influencing Rejoinders and Evaluative Responses to Offenders' Accounts*, 20 *PERSONALITY & SOC. PSYCHOL. BULL.* 691 (1994); Michael N. O'Malley & Jerald Greenberg, *Sex Differences in Restoring Justice: The Down Payment Effect*, 17 *J. RES. IN PERSONALITY* 174 (1983); McCullough et al., *supra* note 27; Ohbuchi et al., *supra* note 10. See also Cloke, *supra* note 31; Harris, *supra* note 27; Aaron Lazare, *Go Ahead, Say You're Sorry*, *PSYCHOL. TODAY*, Jan./Feb. 1995, at 45; Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 *U. KAN. L. REV.* 39 (1994); Williams, *supra* note 31, at 3-4, 53.

33. An injured party can always forgive (in the sense of ceasing resentment) the offender absent the offender's apology, an important option for many.

34. As Gerald Williams writes:  
[W]e usually think the lawyers' role, when representing defendants, is to protect their clients from having to admit wrongdoing or having to make legal compensation for harms they cause. But . . . just as there are negative psychological consequences to people who are harmed, there are psychological consequences to those who do the harming . . . .  
Williams, *supra* note 31, at 53 (citations omitted).

guilty if they fail to apologize for having injured another. However, many offenders do feel guilty. Though often overlooked by lawyers, such spiritual and psychological benefits may be central to a client's well-being, especially in the long run.<sup>35</sup>

#### 6. *Strategic and Distributive Benefits*

Making an apology can also benefit an offender in ways that are largely strategic or distributive, rather than value-creating.

One strategic benefit of an apology is that, if the injured party receives the apology early enough, she may decide not to sue. For a legal dispute to occur, injury alone is not sufficient. The injured party must also decide to bring a legal claim.<sup>36</sup> Taking the step to make a legal claim is often triggered by the injured party's anger. An early apology can help defuse that anger and thereby prevent a legal dispute.<sup>37</sup> The lesson here is an important one. While there are risks to making an apology, there are also risks to not making an apology. Accordingly, even if an apology could be used against the offender at trial as proof of the offender's liability (a topic I will address shortly), in some cases it may still make sense for the offender to apologize. The economically oriented might describe such an apology as a gamble that an offender should take if and only if the expected benefits from doing so, which depend upon the extent to which an apology would decrease the likelihood of suit, exceed the expected costs, which depend upon the extent to which an apology would harm the offender's case at trial.

Even if a suit occurs, apologizing may still be to the offender's strategic benefit. Offenders who apologize often look sympathetic to a judge or jury. Further, where punitive damages are at issue, apologizing can be strategically effective.<sup>38</sup> Although an apology is formally a factor mitigating against punitive damages in only a few areas of legal doctrine (such

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35. Apology offers benefits for organizations analogous to the psychological and spiritual benefits it offers for individuals. For example, an organization which apologizes for a wrongdoing may be able to correct it, but one which does not may face both decreased morale and the inability to prevent similar wrongdoings in the future. See, e.g., Eric May, *Today's Army Could Take Lesson from Gen. Lee*, HOUS. CHRON., Dec. 10, 1996, at A23 (describing the U.S. Army's lengthy struggles to correct internal sexual harassment problems).

36. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631, 647-48 (1980-81) [hereinafter Felstiner].

37. See Hickson, *supra* note 7, at 1359 (indicating that, in the perinatal setting, an early apology may induce the injured party to forgo legal redress).

38. See Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. DISP. RESOL. 115, 122-26 (1996).

as, defamation<sup>39</sup> and invasion of privacy by use of plaintiff's name or likeness<sup>40</sup>), punitive damages are often awarded in response to a defendant's lack of contrition.<sup>41</sup> Hence, where the offender has apologized, judges and juries may be less inclined to award punitive damages.<sup>42</sup> As Williams writes:

[H]uman nature being what it is, we can probably assume that judges and juries, if they were influenced by [an apology], would be inclined to award lesser damages against a remorseful defendant and greater damages against a defendant who refuses to acknowledge, much less to apologize for, the harm caused to the plaintiff.<sup>43</sup>

### C. RISKS TO THE CLIENT

The risks of apology need to be weighed against its possible benefits. Below I discuss four such risks to the client to which I attach the labels psychological, strategic, void insurance coverage, and legal liability.

#### 1. *Psychological*

Some clients may find making an apology to be demeaning, a psychic cost that they do not wish to pay. Apology requires humbling oneself before another and admitting a wrongdoing. While one could argue that it is precisely those clients who find apology most difficult who have the most to gain spiritually and psychologically from apologizing, the lawyer must remember that her attitude toward apology may differ from that of her client's. Further, when apologizing there is always the chance of being re-

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39. See *supra* note 17.

40. See Annotation, *Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising*, 23 A.L.R. 3d 865, §8, at 892 (1969).

41. Apologies can mitigate an offender's punishment. See *Groppi v. Leslie*, 404 U.S. 496, 506 n.11 (1972) ("Modification of contempt penalties is common where the contemnor apologizes or presents matters in mitigation."); Donald H. Kennedy, 75 M.S.P.B. 281, 286 (1997) (allowing supervisor's genuine expression of remorse for using racist language as a mitigating factor in supervisor's discipline); John J. Michalik, Annotation, *Attorney's Addressing Allegedly Insulting Remarks to Court During Course of Trial as Contempt*, 68 A.L.R. 3d 273, § 4b, at 282-84; Rehm & Beatty, *supra* note 38, at 122-27 (discussing the effect of an apology as mitigating factor in attorney discipline cases); However, using apology to mitigate an offender's punishment differs from using it to limit the injured parties' damages.

42. See *Johnson v. Smith*, 890 F. Supp. 726, 729 n.6 (1995) (holding that a racial attacker's prompt apology was a significant factor in limiting punitive damages). Some may wonder whether it is wrong for an offender to apologize, or for his lawyer to counsel him to apologize, motivated by the hope of gaining strategic benefits rather than from feeling internal remorse. I discuss this ethical issue in Part V.A *infra*.

43. Williams, *supra* note 31, at 52-53 n.147.

buffed. Though having one's apology rejected may be rare, when it happens, it may be painful.

A lawyer can discuss such concerns with a client directly to try to make them seem less daunting. For example, a lawyer might say, "Even if you find apologizing demeaning, you might feel better in the long run for having apologized," or, "In the rare event that your apology is rejected, you might feel better knowing that you tried your best to do what you thought was right." However, these psychological concerns should not be discounted.

## 2. *Strategic*

Strategic risks, either in the case at hand or in one's other dealings, may also inhibit apology. Though apology may help one develop "internal strength" and "character," others may see apology as a sign of weakness. For example, consider the position of President Clinton when he was first charged with sexually harassing Paula Jones. Even if, *arguendo*, President Clinton did sexually harass Paula Jones, and even if he wished to make full and sincere apologies for it, Clinton may have believed that the political costs of such admissions were prohibitive: His enemies could use such apologies to force his impeachment.<sup>44</sup> Similarly, when Liggett tobacco company "came clean" about past wrongdoings in the tobacco industry, it risked incurring, and did incur, the wrath of the larger tobacco companies.<sup>45</sup>

However, the possibility that an apology will be perceived as a sign of strength should not be overlooked. The leader of an organization may fear the appearance of weakness in admitting to a mistake, when often the reverse is true: Admitting to the mistake—particularly if everyone already knows about it—will make the leader look strong. Strength can have many different meanings. If being strong means never making a mistake, then an apology will be a sign of weakness, for it reveals that one has made a mistake. If instead being strong means being able to admit and correct the mistakes one has made, then an apology can be a sign of such mature strength. Put differently, it is the secure person, rather than the insecure person, who finds apologizing easiest. Hence, apologizing can be a sign of security.<sup>46</sup>

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44. Clinton eventually settled with Jones for \$850,000 but without an apology. See Neil A. Lewis, *Clinton Settles Jones Lawsuit with a Check for \$850,000*, N.Y. TIMES, Jan. 13, 1999, at A14.

45. See Gail DeGeorge & Lori Bongiorno, *How Badly Is Liggett Getting Burned?*, BUS. WK., July 7, 1997, at 34.

46. Lawyers in particular may overlook this potential benefit to apology, as lawyers often benefit



### 3. *Void Insurance Coverage*

In some cases, such as car accidents or medical malpractice, offenders possess insurance coverage. At first, one might think that such insured offenders should feel particularly free to apologize: If it is the insurance company, rather than the offender, that will pay for the damages, what does the offender risk by apologizing? There is much truth to this. However, the matter is not as simple as it might first appear, for a question arises: Will making an apology void the offender's insurance coverage?

Most insurance contracts impose upon the insured a general duty of cooperation with the insurance company in the defense of the claim.<sup>47</sup> Some insurance contracts also specifically prohibit the insured from voluntarily assuming liability,<sup>48</sup> a restriction courts have taken as a condition precedent to the contract.<sup>49</sup> Accordingly, two questions arise. Would the insured's apology be considered a breach of the insured's general duty of cooperation? And, if the insurance contract specifically forbids the insured from assuming liability, would the insured's apology be taken as a breach of (a condition precedent to) that contract?

The answer to the first question is no. For the insurer to prevail by asserting the insured breached the general duty of cooperation, the insurer must show that the insured acted in bad faith<sup>50</sup> and that the insured's action substantially or materially prejudiced the insurer.<sup>51</sup> Short of a case of collusion between the insured and the injured party, showing bad faith seems most unlikely.<sup>52</sup> Indeed, the insured may even argue that he was trying to help minimize the loss to the insurance company by apologizing.<sup>53</sup> Further, if when apologizing the insured simply tells the truth, while some damage may be done to the insurance company's bargaining power, gener-

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from reputations for being relentless fighters who don't "give in." See *infra* Part II.E.9.

47. See 8 JOHN A. APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4771 (1981) [hereinafter 8 APPLEMAN]; JEFFREY W. STEMPEL, *INTERPRETATION OF INSURANCE CONTRACTS* §31.9 (1994).

48. See KENNETH ABRAHAM, *INSURANCE LAW AND REGULATION* 450 (1990). Stempel notes that the duty to cooperate under such general commercial liability policies "is at least as stringent as that contained in the usual auto policy . . . ." STEMPEL, *supra* note 47, at 769.

49. See 8 APPLEMAN, *supra* note 47, at § 4780; 14 COUCH ON INSURANCE § 51:22 (2d ed. 1981).

50. See 8 APPLEMAN, *supra* note 47, at § 4776.

51. See *id.* at §§ 4772, 4773.

52. Cases on the duty of cooperation typically concern matters quite different from apology. See 8 APPLEMAN, *supra* note 47, at § 4774 (insured's failure to answer insurer's questions), § 4779 (collusion between insured and plaintiff), § 4782 (insured's nondisclosure of facts), § 4783 (insured's variant testimony at trial), and § 4784 (insured's attendance at trial).

53. The insured could point to studies indicating that injured parties who receive apologies are less likely to file suit than those who do not. See *supra* note 7.

ally speaking, one would think that this prejudice would not be substantial, for the insured is offering information that he would likely have to admit later during discovery or at trial.

The trickier case for the injured party wishing to apologize is when the insurance contract specifically forbids the insured from assuming liability absent the insurance company's consent. Would an apology that admits fault then void the insurance coverage? There are few cases on this, usually arising from automobile accidents, and the law is not well-settled.<sup>54</sup> Most courts have maintained the insured's coverage, but some have not.<sup>55</sup> At root, the reasoning seems to be that to void the insured's coverage simply because she apologizes is contrary to public policy.<sup>56</sup> The purpose of insurance, after all, is to pay for damages when a mishap has occurred rather than to discourage moral behavior following the mishap. As one court reasoned:

[Suppose] A is injured by B. A, without thinking of whether or not B is protected by insurance, says to B, "I think you were at fault." B truthfully answers, "Yes, I was at fault." A makes demand on B. B refers the matter to his insurer. The insurer, after investigating, finds that B was at fault, but that he has admitted his fault. The insurer, therefore, refuses to make payment because of B's statement admitting fault. *We cannot bring ourself [sic] to bring about such a result.*<sup>57</sup>

One distinction courts draw is between statements by the insured that (truthfully) admit fault and statements that assume (financial) liability. The latter voids the insured's coverage, but the former does not. Writes Appleman, "[A] policy provision [against assuming liability] does not prohibit the insured from giving the injured person a truthful explanation of the accident and circumstances thereof."<sup>58</sup> This seems a sound approach:

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54. See *Cohen v. Employers' Liab. Assurance Corp.*, 187 F. Supp. 25, 28 (1960), *aff'd* 289 F.2d 319 (4th Cir. 1961).

55. See Annotation, *Validity, Construction, and Effect of "No-Consent-to-Settlement" Exclusion Clauses in Automobile Insurance Policies*, 18 A.L.R. 4th 249, § 4 (1981).

56. Such policies might include encouraging private settlement of disputes or preventing people from being penalized for making sincere, truthful statements.

57. *U-Drive-It Car Co., Inc. v. Friedman*, 153 So. 500, 501 (1934) (holding that driver's signed affidavit admitting fault following car accident did not void insurance coverage despite contract clauses requiring "that 'the assured shall at all times render to the [insurance] corporation all cooperation within his power,' and 'shall not voluntarily assume any liability . . . without the consent of the corporation previously given in writing'"). See also *id.* at 503 ("[T]here is something contrary to our ideas as to what should be an established public policy for an insurer to require from the assured that he, the assured, shall not make a statement about the facts of an accident in which he may be involved."). *Id.* at 504 ("[The] failure to co-operate could not be said to result from the making of a truthful statement.").

58. 8 APPLEMAN, *supra* note 47, at § 4780.

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Don't bind the insurance company to a financial settlement to which it has not consented, but don't prevent the insured from telling the truth either.

I have four final notes: First, the concern that the insured might void his insurance coverage through an apology should not be overstated. For example, despite the many medical mistakes that do occur and the many physicians who do apologize for those mistakes, my research has yielded no case in which a physician's insurance coverage has been voided on the basis of her apology. Similarly, car accident cases where insurance coverage is contested because the insured apologized are exceedingly rare. Second, if the insured party contacts the insurer before apologizing and obtains the insurer's approval, coverage will be maintained. This may be cumbersome, but where the insured decides to apologize well after the injury, it is not implausible. Third, if the insured apologizes without obtaining the insurer's approval, it is prudent to focus on admitting fault while steering clear of assuming liability (e.g., expressing a willingness to pay compensation). As discussed above, this helps to protect the insurance coverage. Fourth, if offenders refrain from apologizing out of fear of voiding their insurance coverage, this does not mean that apology has no role to play. Rather, it is the insurance company that must now think seriously about apology. For example, if many patients would not sue physicians were they to apologize for their mistakes,<sup>59</sup> but physicians who make mistakes don't apologize for fear that apologizing will jeopardize their insurance coverage or otherwise backfire against them,<sup>60</sup> a forward-looking insurance company might do well to encourage physicians to apologize. Though the insurance company would likely not concern itself with psychology or spiritual benefits that could accrue to the physician from apology, it ought to at least weigh the possible financial benefits (dropping of suit, reducing legal costs by facilitating settlement, or the like) which an apology could engender.

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59. See *supra* Part I.

60. At times, the medical establishment helps foster such fears. See, e.g., AMERICAN MEDICAL ASSOCIATION, OFFICE OF THE GENERAL COUNSEL, DIVISION OF HEALTH LAW, MEDICAL PROFESSIONAL LIABILITY INSURANCE 133 (1998) (including on their "physician's checklist [for] what to do when a claim or potential claim occurs . . . Do not contact the patient . . . Avoid all impulses to try to negotiate or discuss the matter with the patient or the patient's family. If an attorney is involved on behalf of the patient or the patient's family, do not discuss the case with that attorney either, even if you feel that you did nothing wrong or that your care and treatment were successful. Anything that you say can and will be held against you. Even mentioning that you are covered by liability insurance could encourage a patient to file a claim.").

#### 4. *Liability*

Yet it is liability, or the fear of liability, that forms the central barrier to apology in most disputes. If one apologizes, isn't one admitting that one is liable? More specifically, can one's apology be used against oneself as an admission in court? The short answer to these questions is that much depends upon the context in which one offers the apology. Before attempting a longer answer, let me make several observations.

For some clients, accepting responsibility, including financial responsibility, for an injury they caused is a cost they *are* willing to incur. For example, Hank may believe that it is his moral responsibility to pay for Mr. Cleary's broken window and be happy to make amends. Of course, Hank would rather that he had not broken the window in the first place. However, given that he broke it, Hank may accept that he should pay to replace it.

For other clients, accepting responsibility, including financial responsibility, comes less from a sense of moral obligation than from the "costlessness" to the client of paying the compensation. For example, the major tobacco companies may be quite willing to pay a multi-billion dollar settlement—as indicated by the rise in their stock prices following the announcement of a proposed settlement—because the companies can readily pass along that cost to consumers while remaining competitive, for all the major companies will face that cost, and because reaching any final settlement would remove the ominous cloud of indeterminate liability that interferes with their ability to conduct business.<sup>61</sup> Similarly, some clients may see insurance coverage as insulating the client from the cost of paying damages.<sup>62</sup>

Where one's culpability can readily be proved by independent evidence other than an apology, admitting one's fault when making an apology will also have little impact on the plaintiff's ability to prove his case, for he already can. If a host of eyewitnesses sees the defendant smash his car into the plaintiff's after running a red light, the plaintiff will be able to prove the case irrespective of an apology. Similarly, after a settlement is reached and executed, the offender may risk little by apologizing, but both

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61. See Hubert H. Humphrey, III, *Don't Let Big Tobacco off the Hook*, NEWSDAY (New York), Apr. 30, 1997, at A41.

62. Hickson et al. relay a noteworthy example of medical malpractice in which a physician "tipped off" a couple to the physician's *own* malpractice on the couple's child. "He said that the [child's] arm would never get any better, but that he had malpractice insurance and that was what it was for." Hickson, *supra* note 7, at 1362. One should remember, however, the possible risks to insurance coverage posed by such statements. See *supra* Part II.C.3.

sides may have much to gain. A striking example comes from the criminal setting, where fine work has been done within Victim-Offender Reconciliation Programs (VORP) to reconcile victims and offenders *after* the judge's sentence has been given.<sup>63</sup> Offenders, already in jail, have little to lose by apologizing, but they may benefit from decreased feelings of guilt and the possibility of earlier parole. A parallel approach may also work in many civil disputes, that is to say, after the parties reach a settlement including a total release from liability but not an apology, might the offender then apologize?<sup>64</sup>

These provisos aside, any discussion of the interplay between apology and liability must recognize that unless care is taken to ensure otherwise, an apology *can* be used as evidence of liability. Although courts may be hesitant to find guilt upon an apology alone, an apology can be used as evidence against the defendant.<sup>65</sup> Despite the fact an apology would normally be excluded as hearsay, in a case against the offender, the offender's apology falls under the exception for admissions by a party opponent.<sup>66</sup> The cautions given against apology are not without basis. An "unprotected" apology *can* backlash against the offender. If, following an accident, the offender says to the victim, "I am sorry. It was all my fault. I regret having injured you," the victim can use that statement against the offender in court.<sup>67</sup> Hence, clients and lawyers may rightly ask whether there are ways to apologize "safely," such that the apology cannot be used against the client as proof of liability.<sup>68</sup> Put differently, can a client obtain

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63. See generally MARK S. UMBREIT, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (1994); MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME* (1991); LaPrairie, *supra* note 10. Some VORP programs attempt reconciliation before legal proceedings have begun. For example, before reaching a decision on whether to prosecute, a district attorney may refer a case to a VORP with the understanding that if the victim is satisfied with the outcome of the VORP, the district attorney will not prosecute.

64. See Howard Raiffa, *Post-Settlement Settlements*, in *NEGOTIATION THEORY AND PRACTICE* 323 (J. William Breslin & Jeffrey Z. Rubin eds., 1991) (suggesting that after disputing parties have reached a settlement, mutually beneficial trades may still be possible).

65. See Rehm & Beatty, *supra* note 38, at 119-22 (reviewing medical malpractice cases where apology alone was insufficient to prove fault).

66. See FED. R. EVID. 801(d)(2).

67. See Wagatsuma & Rosett, *supra* note 10, at 484 (providing a striking example of apologies and cultural contrast). Before coming to the United States, Japanese executives sometimes take brief courses to become familiar with American culture. One topic addressed is what to do if you are in an accident. The answer: Don't apologize, for it will just be used to prove your liability. See *id.*

68. In contrasting Japanese and American approaches to injury, Prof. McKenna states, I think that it's pretty clear that because statements made by defendants in American tort actions can be used as evidence against them at the time of trial, it's a major disincentive for a defendant to make any type of statement that can even be construed as close to an apology.

*International Workshop Discussion: Beyond Compensation: Dealing with Accidents in the 21st Century—The Japanese Experience*, 15 U. HAW. L. REV. 757, 761 (1993) [hereinafter *International Work-*

some of the many possible benefits of apology without incurring the cost of cementing his liability?

One response is to offer a partial apology. For example, an offender might express sympathy for the injured party's condition, but not admit fault or express regret for the defendant's actions. Following a car accident, the offender might visit the injured party in the hospital and state simply, "I am very sorry that your leg is broken, and I hope that you feel better soon." While it is remotely possible that such an expression of sympathy could be interpreted as an admission of fault, many, though not all, cases looking at sympathetic acts following an injury have found such acts inadmissible as proof of liability.<sup>69</sup> One state, Massachusetts, has even statutorily prohibited such expressions of sympathy from being used as proof of fault in accident cases.<sup>70</sup> Further, most judges and juries are good at distinguishing between expressions of sympathy and expressions of fault or regret,<sup>71</sup> and may even be favorably disposed toward defendants who express sympathy.

Yet often partial expressions will be insufficient to satisfy the injured party, and it is worth looking at the legally most difficult case in which an injured party will only be satisfied with a full apology. The question remains: Can one apologize fully—admitting fault, expressing regret for one's action, and expressing sympathy for the injured party's condition—without cementing one's liability? Put differently, is there a "safe" way to apologize fully?<sup>72</sup>

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shop]. See also Rehm & Beatty, *supra* note 38, at 118 n.28 (citing such routine cases).

69. See Karl H. Larsen, Annotation, *Admissibility of Evidence Showing Payment, or Offer or Promise of Payment, of Medical, Hospital, and Similar Expenses of Injured Party by Opposing Party*, 65 A.L.R. 3d 932 (1996) (showing evidence of payment, or an offer or promise of payment, of the medical, hospital, and similar expenses of a party who has sustained personal injuries is generally not admissible to establish the payer's liability).

70. See MASS. GEN. LAWS ch. 233, § 23D (1992) provides in part:

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

71. See Rehm & Beatty, *supra* note 38, at 129 (concluding from a review of case law that, "[J]udges and juries understand that expression of sympathy, regret, remorse and apology are not necessarily admissions of responsibility or liability.").

72. I later argue that often there are ways for clients to apologize "safely," such that one's apology cannot be used against one as proof of liability. Note, however, that a certain relational risk may attach to an offender who first apologizes "safely," and then seeks to exclude that apology at trial. "If you said you were sorry before, why are you denying that now at trial?" an injured party might ask. By later seeking to exclude a "safe" apology, an offender does risk offending the injured party. However, as I argue in Part V.B *infra*, this is not an inevitable response, for offenders offering apologies which they do not want used against them are in a morally intelligible position. Further, if despite the "safe" apology, the parties are nevertheless unable to reach an agreement and proceed to trial, their relation-

## D. "SAFE" APOLOGY

1. *The Legal Tension*

The central legal tension in seeking to apologize "safely" is an evidentiary one. The law has two competing goals. On the one hand, courts want to admit all probative evidence, and what could be more probative than a party's own admission of fault? On the other hand, courts want to encourage private settlement, and what could be a greater impediment to private settlement than the fear that if one offers words of apology they will be turned against one to prove one's guilt?<sup>73</sup> As Wagatsuma and Rosett explain:

[T]he law of evidence in America is torn between the pull to encourage compromise settlement of disputes by a process that is likely to include an apology and the countervailing attraction to a common lawyer of an admission, that "queen of proof," which can be used to prove the claim despite the hearsay rule and other artificial strictures that make proof at common law so complex.<sup>74</sup>

In American law, three main avenues exist to protect a client who makes an apology before or at the time of litigation from having that apology used against him: rules of evidence, mediation, and confidentiality agreements. As I shall describe below, none of these methods provides a perfectly safe protection. However, mediation often offers a useful and very safe space for making an apology. By contrast, rules of evidence and confidentiality agreements provide weaker, though different, protection. For litigation that is already well under way, protective judicial orders provide a fourth avenue for "safe" apology, and I will discuss this option briefly.<sup>75</sup>

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ship at that point will likely be quite antagonistic irrespective of the offender's effort to exclude the "safe" apology.

73. This tension is by no means limited to apologies. Consider the basic evidentiary question of whether settlement offers should be admissible as proof of liability. On the one hand, many, though not all, parties who make offers of settlement believe that they are at fault, for if they believed they were innocent, they would be less likely to have made a settlement offer. On the other hand, if settlement offers were admissible to prove liability, very few settlement offers would be made. The law has consistently seen the second need as more compelling and found settlement offers inadmissible. See FED. R. EVID. 408 advisory committee's note; Fred S. Hjelmeset, *Impeachment of Party by Prior Inconsistent Statement in Compromise Negotiations: Admissibility Under Federal Rule of Evidence 408*, 43 CLEV. ST. L. REV. 75, 86-87 (1995); 2 MCCORMICK, ON EVIDENCE §§ 76, 251 (4th ed. 1992); 23 WRIGHT & GRAHAM, FED. PRAC. & PROC.: EVID. § 5301 (1980); 4 WIGMORE, EVIDENCE § 1061 (Chadborn rev. 1972).

74. Wagatsuma & Rosett, *supra* note 10, at 479.

75. For an excellent overview of these four methods, see Wayne D. Brazil, *Protecting the Confi-*

Before beginning, it is worth noting that when asking whether a party can apologize “safely,” it is important to ask, *safe from what?* The paradigmatic example is whether an injured party-plaintiff can use an apology by the offender-defendant against the offender-defendant in subsequent litigation as proof of fault. However, there are many other ways in which an apology could be used against an offender-defendant. For example, if the plaintiff cannot use the apology in court to prove fault, could it be used in court to prove something other than fault, such as to impeach the defendant if the defendant were later to deny fault? Could it be revealed to the public-at-large? What if a third party, such as a co-plaintiff or a co-defendant, wanted to make use of the defendant’s apology? Could the third party introduce the apology to prove the defendant’s fault? Below, I focus on the simple, paradigmatic case; however, practitioners should bear in mind complications of the kind noted.

Relatedly, when discussing topics like settlement negotiations, mediation, confidentiality agreements, and judicial orders, it is common to use terms such as “privilege” and “confidential” loosely. However, a proper understanding of these topics requires asking precise questions, such as who holds the privilege, against whom can it be asserted, and what is its scope. We may describe mediation as “confidential,” but confidentiality can mean different things. Does confidentiality mean that both the parties and the mediator are forbidden to reveal the contents of the mediation, or simply that the mediator is forbidden to reveal them? What would happen if fraud were to occur during the mediation—would the contents of the mediation still remain confidential? Lawyers who discuss apology with a client must be careful in analyzing the specifics of their case and the applicable legal rules.

## 2. *Rules of Evidence*

Rules of evidence that create evidentiary exclusions for statements made during settlement negotiations provide an important avenue for excluding an apology at trial. However, it is an avenue with many potholes. Such rules vary by jurisdiction, and for simplicity I will analyze here only Federal Rule of Evidence 408 (“F.R.E. 408”) as it illustrates many of the essential tensions.<sup>76</sup>

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*Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988).

76. While many states have rules of evidence quite similar to F.R.E. 408, practitioners are advised that state rules vary and that they should be aware of the particular applicable statutes.



The easiest way to understand both F.R.E. 408 and its limitations is to begin with the common law rules that it superseded.<sup>77</sup> Under the common law, statements made in the course of settlement negotiations were admissible in court unless they were made in hypothetical form (“Let’s assume, solely for the sake of argument, that the defendant were to admit that he was responsible for . . .”), preceded by prophylactic buzz-words “without prejudice” (“Without prejudice to any of his rights, the defendant admits that his car crashed into the plaintiff’s car . . .”), or so intertwined with an offer of settlement as to be inseparable from it.<sup>78</sup>

The difficulties with these common law rules were several. As noted by the F.R.E. 408 Advisory Committee:

An inevitable effect [of these common law rules] is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area . . . Further, [rules like those which would act] by protecting hypothetically phrased statements . . . constituted a preference for the sophisticated, and a trap for the unwary.<sup>79</sup>

Under the common law rules, to protect oneself from having one’s statement made in settlement negotiations from being used against one in court, one had to invoke legal formalisms, and even then the risk remained that the statement would be found independent of the settlement offer and hence unprotected.

F.R.E. 408 sought to change this.<sup>80</sup> Instead of using the benchmark that statements made in settlement negotiations were admissible unless legal formalisms were invoked, F.R.E. 408 sought to set the benchmark that

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77. On F.R.E. 408 generally, see WRIGHT & GRAHAM, *supra* note 73, § 5308; MCCORMICK, *supra* note 73, § 266; WIGMORE, *supra* note 73, § 1061. For a discussion of the common law backdrop of F.R.E. 408, see George M. Bell, *Admissions Arising out of Compromise—Are They Irrelevant?*, 31 TEX. L. REV. 239 (1953).

78. See FED. R. EVID. 408 advisory committee’s note. See also MCCORMICK, *supra* note 73, § 251, at 540-41.

79. FED. R. EVID. 408 advisory committee’s note.

80. The rule states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. *Evidence of conduct or statements made in compromise negotiations is likewise not admissible.* This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. (emphasis added).

FED. R. EVID. 408.

settlement negotiations were inadmissible, with or without such legal formalisms, and make the law follow human practice rather than the converse.<sup>81</sup>

The purpose of F.R.E. 408 was straightforward: Create a protected space so as to encourage private settlements. As the F.R.E. 408 Advisory Committee explained, "The purpose of this rule is to encourage private settlements which would be discouraged if such evidence were admissible."<sup>82</sup> However, in many respects, F.R.E. 408 has fallen short of this goal. The limitations of F.R.E. 408 are several, and, as many commentators have noted, they are significant.<sup>83</sup> Let me point out a few of the main ones.

The first sentence of F.R.E. 408 states that evidence is inadmissible under the rule only when used, "to prove liability for or the invalidity of the claim or its amount." But could the same evidence be admissible for other purposes? The answer is clearly yes. The last sentence of the rule expressly provides that evidence may be "offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or proceeding."<sup>84</sup> Some courts have found that such evidence is admissible to impeach a witness. This loophole may de facto swallow the rule. For example, if a defendant who admitted his guilt when apologizing during settlement negotiations were later to deny his guilt at trial, the earlier ad-

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81. Note that a settlement offer made following a served claim is inadmissible under Federal Rule of Civil Procedure 68 ("An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs") and analogous state provisions. However, such rules cover only the settlement offer itself and may not protect conduct or statements made during settlement negotiations. See Brazil, *supra* note 75, at 1022-23 ("Since neither rule 68 nor [the applicable state provision] purports to extend protection to evidence of 'conduct or statements made in the course of compromise negotiations' counsel cannot be sure to what extent these rules of procedure can be invoked to protect communications that accompany and explain protected offers."). Hence, an apology offered in conjunction with an offer of settlement may well fall outside of the scope of Federal Rule of Civil Procedure 68.

82. FED. R. EVID. 408 advisory committee's note.

83. See Brazil, *supra* note 75; Hjelmeset, *supra* note 73, at 75; Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 40 (1986); Christopher H. Macturk, Note, *Confidentiality in Mediation: The Best Protection Has Exceptions*, 19 AM. J. TRIAL ADVO. 419, 441 (1995); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 449 (1984); Jon R. Waltz & J. Patrick Huston, *The Rules of Evidence in Settlement*, 5 LITIGATION 1, 11-15 (1978).

84. This is not to say that such evidence would not have to clear hurdles such as FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .") or that strict limiting instructions could not be given by the judge concerning the use of that evidence. See WRIGHT & GRAHAM, *supra* note 73, § 5315, at 292-93; MCCORMICK, *supra* note 73, § 59.

mission likely could be used against him for impeachment.<sup>85</sup> Accordingly, if a goal of F.R.E. 408 is to provide parties with enough certainty that their statements will be inadmissible at trial so that they feel free to speak uninhibitedly, F.R.E. 408 fails in this goal.

Second, even if F.R.E. 408 were to bar an apology made during settlement negotiations from admission at trial, F.R.E. 408 does not preclude such evidence from pre-trial discovery, nor does it prevent such evidence from being revealed to third parties. Such loopholes can be significant deterrents to making an apology. For example, if in the course of settlement negotiations President Clinton offered Paula Jones a full apology, F.R.E. 408 might stop Jones from introducing it at trial, but it would not stop her from revealing the apology to the world. This issue can be particularly tricky when there are multiple plaintiffs or defendants,<sup>86</sup> or when there are both civil and criminal charges.<sup>87</sup>

Third, F.R.E. 408 only protects conduct or statements made "in compromise negotiations," and in some cases there may be a question as to whether "compromise negotiations" have begun. Put differently, how developed must the dispute be before the protections afforded by F.R.E. 408 attach?<sup>88</sup> Once a legal claim has been filed, F.R.E. 408 will clearly apply, but before a claim has been filed, it may be unclear whether a statement was made in the course of compromise negotiations.<sup>89</sup> Often an offender will want to apologize immediately after the injury; however, F.R.E. 408 may not cover such an apology.

Some may ask whether the common law protections have any value following the adoption of F.R.E. 408. For example, is there benefit to be had from invoking the prophylactic buzz-words "without prejudice" before making an apology or other statements in settlement negotiations?<sup>90</sup> The

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85. See Hjelmset, *supra* note 73, at 109 (describing impeachment by prior inconsistent statement as the "vacuum" that puts the entire rule in jeopardy). See also Brazil, *supra* note 75, at 966-67, 975 (citing WRIGHT & GRAHAM, *supra* note 73, § 5302, at 227) ("Admission of statements merely because they are inconsistent with the trial testimony threatens to reduce 'the second sentence of Rule 408 to a cipher.'").

86. See Carney v. Santa Cruz Women Against Rape, 271 Cal. Rptr. 30 (1990) (holding letter of apology admissible to prove liability of third party, not the writer).

87. See United States v. Gonzalez, 748 F.2d 74, 78 (1984) (holding defendant's offer to compromise in civil suit admissible against defendant in criminal case).

88. See MCCORMICK, *supra* note 73, at § 266; Brazil, *supra* note 75, at 963.

89. See Brazil, *supra* note 75, at 963.

90. One might ask an analogous question of what remains of the common law trick of phrasing statements in hypothetical form since the adoption of F.R.E. 408. As hypothetical statements by nature have little to no probative value, a hypothetically phrased apology should still be effective at preventing its introduction into evidence. Yet a hypothetically phrased apology ("assuming, solely for the sake of

answer seems to be both no and yes. While the case law is scant, it would appear that, in seeking to expand the common law protections, F.R.E. 408 also superseded them, for the F.R.E. 408 Advisory Committee criticized the rationales behind the common law rules.<sup>91</sup> However, prefacing a statement with the invocation “without prejudice” may be strong evidence that the speaker intended the statement to be part of compromise negotiations, and the statement may be so interpreted by courts.<sup>92</sup> Accordingly, invoking the phrase “without prejudice” may help make a statement “safer,” but it should not be taken as one hundred percent effective, and one should not be lulled into a false sense of security by doing so. Similarly, making an explicit reference to F.R.E. 408 before making an apology (for instance, writing at the top of a letter of apology that it is, “a confidential communication protected by F.R.E. 408”) may help to persuade a court that the letter is inadmissible to prove fault, but it will not be dispositive.

### 3. *In Mediation*

Mediation offers a second possible avenue toward a “safe” apology, and here the protection is *much* stronger.<sup>93</sup> As mediation confidentiality

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argument, that I were to admit that I was at fault”) has a severe drawback: It may carry little meaning to the recipient. At times hypothetical phrasing may be useful in “sounding out” whether an injured party would be receptive toward receiving an apology, and what, if any, response an apology might effect in the injured party’s behavior.

91. See *Harmonay, Inc. v. Binks Mfg. Co.*, 597 F. Supp. 1014, 1023 (1984), *aff’d* 762 F.2d 990.

92. See *supra* note 90, and *infra* note 93 and accompanying text.

93. On confidentiality protections for statements made during mediation, see Note, *Protecting Confidentiality in Mediation*, *supra* note 83; Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986); Freedman & Prigoff, *supra* note 83; Karen L. Liepmann, *Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?*, 14 B.C. ENVTL. AFF. L. REV. 93 (1986); Macturk, *supra* note 83; Brazil, *supra* note 75, at 1023; Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315 (1989); Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5 (1989); Robert B. McKay, *Ethical Considerations in Alternative Dispute Resolution*, 45 ARB. J. 15 (1990); Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157 (1994); Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1; James M. Assey, Jr., *Mum’s the Word on Mediation: Confidentiality and Snyder-Falkinham v. Stockburger*, 9 GEORGETOWN J. LEG. ETHICS 991 (1996); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715.

Parallel to this essay’s question of whether lawyers should discuss apology with clients is the question of whether mediators should discuss apology with parties, and, if so, how. For example, is a mediator better off raising apology in a joint session (so all is “out in the open”) or in a private caucus (so as to avoid putting a party “on the spot”)? On the importance of apology within mediation, see

provisions are created by state statutes and court rules, they vary widely;<sup>94</sup> however, where they do afford protection, often the protection they afford is quite strong.<sup>95</sup> Accordingly, lawyers must know the particular mediation statute applicable in a case. As most lawyers are repeat players in one locale, this should not be burdensome.

Indeed, some commentators have criticized these protections as being too strong, and prone to abuses such as fraud or coercion.<sup>96</sup> While such confidentiality provisions may occasionally come into conflict with other provisions (such as the Freedom of Information Act in environmental mediation cases where the government plays a role)<sup>97</sup> or face conflict of laws challenges (as to whether one jurisdiction will honor another jurisdiction's mediation confidentiality rules)<sup>98</sup> or Supremacy Clause challenges (such

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generally Levi, *supra* note 29, at 1165.

94. See Kentra, *supra* note 93, at 733 (reviewing mediation confidentiality statutes state by state). Writes Kentra, "[N]early every jurisdiction in the United States has different statutes or local court rules establishing the parameters of the particular mediation programs . . . . As a result, confidentiality policies differ significantly from one program to another and from one jurisdiction to another." *Id.* at 724-25. See also Macturk, *supra* note 83, at 423.

95. Though they vary by state, the statutory protections afforded mediation are often quite strong. In Nebraska, for example,

[n]o records, notes, or other documentation, written or electronic, of the mediation process, except the contents of a final agreement between the parties, shall be examined in any judicial or administrative proceeding. Any communications made confidential by the act which become subject to judicial or administrative process requiring the disclosure of such communications shall not be disclosed.

NEB. REV. STAT. § 43-2908 (1997). The Washington law states that

[a]ll memoranda, work notes or products, or case files of [mediation] centers established under this chapter are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant to the center for the purpose of avoiding discovery of the material in a subsequent proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding unless all parties to the communication waive the privilege. The foregoing privilege and limitation on evidentiary use does not apply to any communication of a threat that injury or damage may be inflicted on any person or on the property of a party to the dispute, to the extent the communication may be relevant evidence in a criminal matter.

WASH. REV. CODE ANN. § 7.75.050 (West 1997).

Some commentators have suggested that the work-product doctrine, as developed in *Hickman v. Taylor*, 329 U.S. 495 (1947) and codified in FED. R. CIV. P. 26(b)(3), might offer protection for a lawyer-mediator seeking to keep her mediations confidential. However, it seems unlikely that such an argument will carry much force. See Feinberg, *supra* note 93, at S36-37; Harter, *supra* note 93, at 332. Even were this doctrine to apply, the confidentiality privilege would rest with the lawyer-mediator, and not the parties.

96. See Green, *supra* note 93; Note, *Protecting Confidentiality in Mediation*, *supra* note 83, at 453 ("[By being overbroad], the new [mediation confidentiality] statutes may detract from the very climate of truthfulness that confidentiality should foster.").

97. See Harter, *supra* note 93, at 335-40; Liepmann, *supra* note 93.

98. See Rosenberg, *supra* note 93 (arguing for creating a uniform mediation privilege on federal

as, will Federal agency's subpoena override a state confidentiality statute),<sup>99</sup> absent extreme circumstances, such confidentiality statutes are routinely upheld. Writes Pamela Kentra, "Legislatively created mediation privileges . . . provide comprehensive confidentiality protection to the mediation process. Courts have generally upheld such statutes in litigation."<sup>100</sup> Hence, mediation often provides a legally protected space for making a "safe" apology.<sup>101</sup>

Mediation is also a natural place for apology, for a main goal of mediation is to help the parties work out their differences. Apologies often do take place in mediation.<sup>102</sup> Not only are many mediators experienced at fostering apologies, but making an apology during mediation may fit well with the expectations the parties bring to the mediation process. Further, many types of disputes (family, employment, neighborhood, and the like) are commonly mediated, making mediation a feasible option in many cases.

However, mediation is not without some drawbacks. First, not all jurisdictions have strong mediation confidentiality statutes, which makes mediation an avenue available to some, not all.<sup>103</sup> Second, parties typically go to mediation only *after* the dispute has escalated, but, from a relational viewpoint, making an apology very soon after the injury may be most helpful. Though an apology at a late stage can at times transform a seemingly intractable dispute, one would generally think that the earlier the apology is made, the better. While in some cases very early mediation is provided for institutionally, as in doctor-patient disputes before a hospital mediation board, or contractually, as in some labor disputes, in many cases, mediation occurs well after the injury. An offender wanting to apologize "early

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and state levels because of conflict of laws concerns). Conflict of laws concerns become most relevant where the parties have some choice over the forum.

99. Compare *United States v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987) (government's showing inadequate for grand jury subpoena to overcome state ADR confidentiality law), and *In re March 1994—Special Grand Jury*, 897 F. Supp. 1170 (S.D. Ind. 1995) (grand jury subpoena overrode mediation confidentiality privilege created by state law). See also David Hoffman, *Protecting Confidentiality in Mediation*, MASS. LAW. WKLY, April 17, 1995, at SB2.

100. Kentra, *supra* note 93, at 729.

101. For an excellent review of possible challenges to mediation confidentiality in one state (Massachusetts), see Hoffman, *supra* note 99.

102. See Levi, *supra* note 29 (discussing the frequent use of apology in mediation). Mediator David Hoffman reported to me that the tactic of using mediation to make a "safe" apology is used by some. For example, one defense attorney begins most mediations of meritorious employment disputes before Hoffman by offering an apology from the employer corporation (but not necessarily the individual offender) to the employee. No doubt the "safety" afforded by mediation is critical to this.

103. Note, however, the possible use of protective judicial orders in conjunction with mediation discussed *infra* Part II.D.5.

on” could request that the injured party accompany her to mediation. However, this might strike the injured party as unusual, especially if the injured party has not yet brought a claim. Third, not all cases are well-suited to mediation,<sup>104</sup> and for some disputes neither of the parties may see mediation as a plausible option.<sup>105</sup>

#### 4. *By Contract*

Confidentiality agreements, which are often used in conjunction with mediation, provide a third avenue for making a “safe” apology.<sup>106</sup> This avenue has both strengths and weaknesses. A main strength is that, unlike the statutory protections for settlement negotiations and mediations which typically address whether statements will be admissible in court, confidentiality agreements allow parties to limit more broadly the uses of statements. For example, if an offender is concerned that the injured party not reveal the offender’s apology to the public or to other co-plaintiffs (topics neither F.R.E. 408 nor mediation statutes may cover), a confidentiality agreement can provide penalties for such actions. As a contract, a confidentiality agreement can be tailored to address such diverse concerns.

Yet confidentiality agreements have weaknesses, and for a party wishing to make a “safe” apology inadmissible in court, one weakness is particularly severe. Courts usually disregard clauses within confidentiality agreements that purport to preclude a court from hearing evidence as being contrary to public policy. What right, after all, do two private parties have to write a contract that precludes a court from hearing evidence? None, most courts reason. Hence, one should not be lulled into a false sense of security by a confidentiality agreement. While courts may occasionally show sympathy toward a party seeking to rely upon such an agreement to exclude evidence, on the whole they do not.<sup>107</sup>

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104. See Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994).

105. For cases where free mediation services are unavailable, there is also the issue of the mediator’s fee. Though meager relative to the costs of protracted litigation, paying this fee may present a tricky issue. If the offender wants to apologize “early on”—say before the injured party has even approached the offender about compensation—it might strike the injured party as odd to split that fee, for it may seem odd to be going to mediation in the first place. Yet, were the offender to offer to pay the whole of the mediator’s fee, that could cast doubt on the mediator’s neutrality. All that said, paying for the mediation is a minor issue, unlikely to pose a significant obstacle in most cases.

106. See KENNETH CLOKE, *MEDIATION: REVENGE AND THE MAGIC OF FORGIVENESS* 169 (2d ed. 1994) (providing an illustrative pre-mediation agreement).

107. See Note, *Protecting Confidentiality in Mediation*, *supra* note 83, at 451; Brazil, *supra* note 75, at 1026; STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 180 (1992); Macturk, *supra* note 83, at 417-18.

Nevertheless, confidentiality agreements may still provide some benefit for parties wishing to exclude evidence from a court's purview. Similar to how, after the adoption of F.R.E. 408, a court might look at the common law invocation "without prejudice" as evidence that statements made following that invocation were in the course of compromise negotiations (and thereby excludable under F.R.E. 408, but not the common law), a court can look to a confidentiality agreement as evidence that statements made following that agreement were in the course of settlement negotiations, and thus protected under F.R.E. 408. However, it must be recognized that F.R.E. 408 offers only limited protection.

##### 5. *By Judicial Order*

Once litigation is well under way, judicial orders provide a fourth potential avenue for "safe" apology. Federal Rule of Civil Procedure 26(c) provides that a court may, "for good cause shown . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Courts can order statements made in settlement negotiations, like an apology, to be kept confidential.<sup>108</sup> Possible uses of such orders include preventing the disclosure of mediation proceedings or settlement negotiations, or the revelation of the settlement agreement reached.<sup>109</sup> An advantage of such an order is the judge's ability to tailor it to parties' specific needs. Another advantage of an order is the weight of judicial force: A party who would not fear breaking a private confidentiality agreement may well fear violating a judicial order.

As a vehicle for "safe" apology, however, judicial orders have several drawbacks. First, obtaining a judicial order, if it comes at all, usually comes quite "late in the game," after litigation is well under way. Second, obtaining a judicial order can be difficult. Unlike the protections afforded by F.R.E. 408, mediation, or confidentiality agreements which the parties may invoke themselves, a judicial order requires a judge's approval, and judges may be hesitant to grant that approval. Federal Rule of Civil Procedure 26(c) provides that a judge has discretion to grant a protective order "for good cause shown." However, generally speaking, "in interpreting

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108. See Richard J. Vangelisti, *Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What It Means and How It Operates*, 48 BAYLOR L. REV. 163, 164-65 (1996) ("Courts enter protective orders to protect parties . . . from [inter alia] . . . disclosure of highly personal or private information. Courts exercise broad discretion in determining whether to issue protective orders, and courts routinely enter protective orders when parties agree that an order is necessary to facilitate their litigation.").

109. See Brazil, *supra* note 75, at 1011; Assey, *supra* note 93, at 997.



this rule courts have *not* considered the public policy behind the rule to be the promotion of settlements.”<sup>110</sup> Accordingly, arguing that one needs a protective order so as to make a “safe” apology may be a difficult road. Third, courts have the power to modify their orders and allow disclosure in later proceedings, raising the specter that what one had hoped would be a confidential communication will not remain so.<sup>111</sup>

Despite these drawbacks, protective orders are a noteworthy option in an important set of cases.<sup>112</sup> In jurisdictions in which mediation confidentiality statutes provide minimal protection, upon the request of the parties to enter mediation, a judge could issue an order providing strong confidentiality protection for the mediation proceedings.

#### 6. *Overlapping Protection*

Parties can use different legal devices in an overlapping manner to make a “safe” apology “safer.” For example, a party seeking to apologize might do so during a mediation preceded by a confidentiality agreement which states that all statements made during the mediation are part of F.R.E. 408 settlement negotiations between the parties and made without prejudice to any of the parties’ rights. Such an agreement might also provide for penalties for revealing the contents of the mediation to a third party.

#### 7. *Summary*

Under the existing law, it *is* often possible for a client to make a “safe” apology that fully admits fault. Generally speaking, mediation offers the “safest” and most practical way to do this. Rules of evidence, confidentiality agreements, and protective judicial orders (especially in jurisdictions with weak mediation confidentiality statutes) can also be important devices in many cases, and can be used in conjunction with mediation. Practitioners must be aware of the particular statutes which apply

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110. Assey, *supra* note 93, at 996 [emphasis added]. See also McKay, *supra* note 93, at 26.

111. See Feinberg, *supra* note 93, at S37. See also Kentra, *supra* note 93, at 732 n.76. Kentra states:

Parties may later seek to have the protective order modified or challenge the validity of a protective order. Courts would ordinarily require the moving party to show that the order was improvidently granted or to demonstrate a compelling need for the information . . . . Parties and their attorneys can increase the chance that orders will be upheld if they are certain to include an acceptable justification for the order in the body of the order and restrict its scope to those materials for which the order is justified.

*Id.*

112. I thank David Hoffman for this suggestion.

to their case as statutes, especially mediation confidentiality statutes, vary widely among jurisdictions.

#### E. REASONS LAWYERS NEGLECT APOLOGY

If apology has so much to offer and the risks of apology can often be minimized, why don't lawyers discuss apology with clients more than they do? Let me suggest several reasons, beginning with the benign and working toward the not-so-benign.

##### 1. *Don't Think of It*

Many lawyers simply may not think of discussing apology with clients. This may come in part from legal training. In my three years in law school, apology was hardly ever discussed.<sup>113</sup> The legal system focuses on adjudicating rights, rather than on repairing relationships. An apology is not a legal remedy one can seek in an American court.<sup>114</sup> As such, many lawyers may never consider it.

##### 2. *Unaware "Safe" Apology Exists*

Many lawyers do not realize that there are legally "safe" ways to apologize. While lawyers may know that a "bald" apology can be used against one's client as an admission of liability, they may not know that "safe" avenues for making an apology exist.

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113. A teaching experience of Professor Kenny Hegland conveys this well:

In my first year Contracts class, I wished to review various doctrines we had recently studied. I put the following:

In a long-term installment contract, seller promises buyer to deliver widgets at the rate of 1,000 a month. The first two deliveries are perfect. However, in the third month seller delivers only 990 widgets. Buyer becomes so incensed that he rejects delivery and refuses to pay for the widgets already delivered.

After stating the problem, I asked, "If you were Seller, what would you say?" What I was looking for was a discussion of the various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for canceling the remaining deliveries. In short, I wanted the class to come up with the legal doctrines which would allow Seller to crush Buyer.

After asking the question, I looked around the room for a volunteer. As is so often the case with first year students, I found there were . . . [none]. There was, however, one eager face, that of an eight-year-old son of one of my students. It seems that he was suffering through Contracts due to his mother's sin of failing to find a sitter. Suddenly he raised his hand. Such behavior, even from an eight-year-old, must be rewarded.

"OK," I said, "What would you say if you were the seller?"

"I'd say, 'I'm sorry.'"

Kenny Hegland, *Why Teach Trial Advocacy? An Essay on Never Ask Why*, in HUMANISTIC EDUCATION IN LAW (J. Himmelstein & H. Lesnick eds., 1982).

114. See *supra* notes 17 & 25.

### 3. *Appearance of Disloyalty*

Lawyers may fear that if they raise the topic of apology with a client-offender, the client will think the lawyer disloyal, too sympathetic to the *other* party's case.<sup>115</sup> No doubt many alleged offenders will feel uneasy when the subject of apology is first raised. Accordingly, before discussing apology with a client, the lawyer needs to build a good enough relationship with the client so that the client will understand that, when the lawyer raises the possibility of apology, the lawyer *is* acting in the client's best interest. As is often the case, discussing subjects that are difficult for the client to hear (e.g., reality checking) is an important part of good lawyering.

### 4. *Role Expectations*

Discussing apology may run counter to the role expectations which both lawyers and clients bring to their relationship. "If I wanted someone to tell me to apologize," says the client, "I would have gone to my minister, not my lawyer. What I want from you is to help me win." This logic can be self-fulfilling. A lawyer may think, "I don't talk with my clients about apology, because lawyers don't do that with clients," and a client may think similarly. However, I see no good reason to think that lawyers and clients, or at least some lawyers and some clients, cannot have different role expectations which would include the lawyer discussing apology.

### 5. *It's Too Late*

Lawyers, and many clients as well, may think that by the time a client comes to the lawyer, it's too late for an apology to do much good. Once the other side has threatened or begun to sue, what good will an apology do? If the relationship between the parties has already turned so hostile, is apology a moot issue? I think not.

First, often offenders approach lawyers quite soon after an injury. Second, even when an offender comes to a lawyer well after the injury, apology can still play an important role. Social psychologists have shown that parties tend to view their adversaries as more extreme and unreasonable than they actually are.<sup>116</sup> "He'll never accept my apology," the client

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115. Relatedly, some lawyers may fear looking self-righteous or paternalistic toward their clients if they initiate conversations about apology.

116. See LEE ROSS & ANDREW WARD, NAIVE REALISM IN EVERYDAY LIFE: IMPLICATIONS FOR SOCIAL CONFLICT AND MISUNDERSTANDING (Stanford Center on Conflict and Negotiation Working Paper No. 48, 1995). See also Linda Babcock & George Loewenstein, *Explaining Bargaining Im-*

might say, “so why should I do it?” In actuality, one’s adversary is often more flexible than one thinks, so that, even when one is highly skeptical that an apology will “do any good,” it often does.

Many practitioners report that apologies often work “magic” or “miracles”<sup>117</sup>—that an apology creates a sudden thaw in what had previously been an icy, apparently intractable dispute.<sup>118</sup> The psychological dynamic of misperceiving one’s adversary may help explain why apology often seems magical in its ability to transform apparently intractable disputes and why an apology may be more efficacious than a party or his lawyer may expect. It is hard to think of many cases where an offender says, “I would like to apologize,” and the injured party is unwilling to listen. Indeed, often an apology triggers like conduct from the recipient.

#### 6. “Macho” Lawyering

Many lawyers like to act “macho.” “We don’t apologize, we defeat our adversaries in courtroom battle.” Apology runs counter to this ethos. Apology requires humility, and if one lacks the humility to admit that one made a mistake, one cannot apologize. Accordingly, to discuss apology with a client, a “macho” lawyer will need to break out of that mind set and be capable of envisioning how an apology could be made.<sup>119</sup>

#### 7. Loss Aversion

Loss aversion may also lead clients not to apologize.<sup>120</sup> When faced with the choice between taking (i) a certain, but small, loss or (ii) a gamble with a chance of a very large loss and a chance of no loss, many people choose the gamble. An apology is similar to a certain, but small, loss—it requires that the offender take an immediate, humbling step. Many people would rather gamble than take a certain loss, and may hence avoid apology.

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*passee: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997).

117. See Cloke, *supra* note 31; Goldberg, Green & Sander, *supra* note 4, at 221.

118. Ross and Ward’s naive realism provides a helpful way to understand why those “miracles” are to some degree expected. See ROSS & WARD, *supra* note 116. See also SCHEFF, *supra* note 23, at 134-35 (arguing that the surfacing of shame is the key to the transformative power of apology).

119. See *infra* Part III.B. See also Goldberg et al., *supra* note 4, at 223 (offering a sample apology of what President Reagan might have said following the Iran-Contra affair).

120. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

### 8. *Pattern of Denial*

A pattern of denial often takes hold early in the course of litigation, and once begun, it may generate a momentum of its own. Faced with a claim, a defendant's answers are typically due quickly, say, within twenty days. Such answers almost invariably deny any wrongdoing, the logic being that one can always concede a point of liability later, but having conceded it, one cannot "take it back." Further, claims frequently use inflated and highly antagonistic rhetoric. Accordingly, a denial-oriented mind set may develop at the start of many legal disputes, and apology may be nowhere to be seen.

### 9. *Divergent Interests*

Divergent interests between lawyers and clients, frequently given the economic label of "principal-agent" problems,<sup>121</sup> may also play an important part in lawyers' neglect of apology.<sup>122</sup> Consider a plaintiff's lawyer hired on a one-third, contingency-fee basis. A million dollar settlement or jury award earns such a lawyer a fee of over three hundred thousand dollars, but an apology, which could be worth just as much to the client, may earn the same lawyer nothing.<sup>123</sup> Indeed, to the extent that the apology reduces the level of the financial settlement, plaintiffs' lawyers have an incentive to avoid it. If lawyers could monetize the value of an apology and take a cut of it, I expect that we would see many more apologies occurring in legal disputes.<sup>124</sup>

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121. See generally PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS (John W. Pratt & Richard J. Zeckhauser eds., 1985).

122. Insurance companies also have quite divergent interests from clients when it comes to apology. If the insurance company is to pay the damages, the insurance company may have a strong interest that the client not apologize. By contrast, knowing that she has insurance, the client may feel much freer to apologize.

123. The break between Paula Jones and her first set of attorneys in her sexual harassment suit against President Clinton illustrates this tension well. Apparently, Jones' first set of lawyers believed they could get a large financial settlement for Jones of approximately \$700,000, in essence the money she sought, but without an admission of fault from Clinton. Jones insisted that she wanted a full apology from Clinton, including an admission of fault. At that point the first set of lawyers resigned. See, e.g., David G. Savage & Robert L. Jackson, *Paula Jones's Lawyers Quit, Citing Disagreement*, L.A. TIMES, Sept. 9, 1997, at A7. Clinton eventually settled with Jones for \$850,000 but no apology. See also Lewis, *supra* note 44.

124. To extend this argument to defense lawyers—generally paid by the hour rather than by contingency fee—one needs a richer account. Two possibilities might be that (i) many lawyers "play both sides of the fence," at times representing plaintiffs and at other times defendants, and do well on the whole by neglecting apology, and (ii) that the defendant's lawyer knows that the plaintiff's lawyer will not be interested in an apology, so he is less inclined to raise that possibility.

Lawyers derive much income from creating and maintaining litigation. Lawyers generally benefit when disputes escalate. Apologies help bring disputes to an end, and in so doing limit the lawyers' fees.<sup>125</sup> A defendant's lawyer might fail to counsel a client to apologize, for, if an apology occurred, that attorney's hourly fees could end. I am reminded of a joke a senior associate in a Boston law firm once told me. "Our good clients call us before they decide what to do, asking for advice on how to avoid violating the law. Our best clients call us after they have done something wrong." I do not mean to suggest that many lawyers consciously reject the option of advising a client to apologize from self-interest; however, some lawyers may, consistent with their self-interest, passively neglect to discuss that option.

Lawyers also have their reputations to consider. A lawyer who recommends apology to clients may come to be known as a "softie," while a lawyer may benefit from having a reputation for being good at playing "hardball." Clients' reputational interests can be quite different. As most clients are involved in far fewer disputes than most lawyers, a client may be much less afraid of gaining a reputation for being a "softie." Some clients may enjoy it. For example, a business may want its customers to feel that if they have any complaints, the business will respond sensitively.

The fear of committing legal malpractice may also stop some lawyers from counseling apology. From the viewpoint of legal malpractice, a worst-case scenario is when a lawyer gives a client a specific piece of legal advice, the client relies on it, the advice turns out to be wrong, and the client incurs a whopping liability. A lawyer who is thinking about counseling a client to make a "safe" apology may fear just this scenario. For example, if the lawyer tells the client that it's "safe" to make an apology which admits fault during the course of mediation, and the client does so, but it later turns out that the client's apology is admissible in court, the lawyer will be in an awkward position indeed.<sup>126</sup>

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125. Some lawyers may earn potentially profitable reputations for helping to prevent extensive litigation, sacrificing fees on a particular client with the hope that an enhanced reputation will bring in other clients.

126. Each of these "principal-agent" problems whereby an attorney acts in her own best interest rather than the client's best interest raises serious questions of professional ethics violations.

### III. MAKING THE APOLOGY

#### A. FACTORS

When discussing apology with a client, a lawyer should be sensitive to other factors as well. I briefly address six considerations: (1) the appropriateness of the case for apology, (2) the timing of the apology, (3) the scope of the apology, (4) the method of the apology, (5) nuance, and (6) interpersonal variation. Following this, I offer some advice.

##### 1. *Appropriateness*

Perhaps our *presumption* should be that apology has a role to play in most cases.<sup>127</sup> Many legal disputes arise because of injury. From a moral viewpoint, one would hope that whenever an offender causes injury, he would apologize by admitting fault to the extent he feels at fault, and by expressing sympathy and remorse to the extent that he feels such sympathy and remorse. Further, one would think that most injured parties want to receive apologies. Exceptions to this can arise in extreme circumstances. For example, a rape victim may revile the thought of the rapist expressing his sympathy towards her, but may still want to hear the rapist admit his fault.

Are certain cases particularly well-suited to apology? I can offer no rule here, but I suggest that, as a first approximation, the indicators for apology are in many respects similar to the indicators for mediation.<sup>128</sup> Is the injured party very angry? Is there a long-standing relationship between the parties? Do the parties desire a future relationship? Is the root issue between the parties a fundamentally different view of rights (in which case there may be little room for an apology to make a difference), or is the root issue a damaged relationship?

Often a helpful question to ask is whether the injured party has a strong sense of having been “wronged.” By definition, all injured parties suffer injuries. However, not all injured parties suffer moral wrongs. Most victims of car accidents would no doubt appreciate expressions of sympathy and regret by the offender, but, generally they do not have a strong sense of moral indignation (unless the injurer was morally wrong, say, by driving drunk or recklessly). By contrast, a spouse whose partner

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127. I thank Frank Sander for this suggestion.

128. See Sander & Goldberg, *supra* note 104, at 59. See also Levi, *supra* note 29, at 1199-1208 (describing classes of cases well-suited to apology).

has cheated will have a great sense of moral offense from that breach of trust. Where a moral wrong has occurred, an apology may be particularly needed to make a moral accounting and restore the moral "universe" between the parties.<sup>129</sup> This is not to say that apology is unimportant when injury occurs without moral offense, but rather that when moral offense is present, apology is especially important. Finally, the obvious question should not be overlooked: Does the absence of an apology seem to be a significant barrier to resolving the dispute?

## 2. *Scope*

How broad should the apology be? Should one solely express one's sympathy, without addressing issues like remorse or fault? Or should one make a full apology which admits fault and expresses remorse to the extent that one believes oneself at fault and feels remorse? While a full apology will usually be most powerful, "merely" expressing sympathy can often be a large step. A story Roger Fisher related to me about a PLO official who, years before the Oslo accords, visited Auschwitz and Dachau on his two-week summer vacation conveys this well. When Fisher described the official's trip to some Israeli colleagues, many were skeptical at first: "Was the PLO official motivated by some political strategy?" "No," said Fisher, "I know him well. He said he simply went because he wanted to understand better where the Jews came from." Thus assured, most of the Israelis were deeply moved. That PLO official was no longer a faceless enemy, but a person who actually sympathized with their people's suffering.

Expressing one's sympathy without expressing fault or remorse can be a very useful step in those many cases where the extent of each party's fault is unclear.<sup>130</sup> The sewer repair company may be sorry that the pedestrian broke a leg when falling into the company's ditch, but be unsure whether the problem was the pedestrian's lack of attention or the company's failing to have posted more warning signs. The company may fully sympathize with the pedestrian's injury, and may be glad to make an expression of sympathy, but may not want to admit fault or express remorse. Making an early expression of sympathy would track the very common role of apology in Japan, where, following accidents, speedy apologies that express sympathy but are not at root admissions of fault are the norm.<sup>131</sup>

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129. See GOFFMAN, *supra* note 28; Sitkin & Bies, *supra* note 23.

130. I thank Bruce Patton for this suggestion.

131. Comments Marishima, "In Japan, apology may mean an acknowledgment of guilt by the morally guilty. But in most cases . . . it doesn't mean that we are morally guilty, it just expresses sympathy and a promise to deal with this matter with sincerity." *International Workshop*, *supra* note 68, at



### 3. *Timing*

Timing is a critical factor in apology.<sup>132</sup> A basic issue is whether to apologize early (e.g., just after the injury) or late (e.g., once a legal claim has been filed).

From a *psychological* viewpoint, there is much to be said for apologizing early. An early apology may prevent an injury from turning into a dispute, nipping possible conflict in the bud. As Felstiner, Abel, and Sarat have argued, legal disputes evolve in stages, with most injuries, and thus potential disputes, being resolved before a legal claim is ever brought.<sup>133</sup> If, soon after an injury, the injured party receives an apology, the bitterness of *not* receiving an apology may never set in, and the injured party may never bring a legal claim.<sup>134</sup> By subtracting the insult from the injury through apology, litigation can often be avoided.

However, from a *legal* viewpoint, it may often be “safer” to apologize late. As noted earlier, the protections of F.R.E. 408 only apply once “compromise negotiations” have begun, and early on, soon after the injury, that may by no means be clear. Similarly, while protections like mediation and confidentiality agreements could theoretically be used soon after an injury, often such mechanisms are not used until well after the injury has occurred and the relationship between the parties has soured. Judicial protective orders by definition come late into a dispute. Accordingly, apologizing soon after the injury may make the most relational sense, but may have the least legal protection.<sup>135</sup> One approach to consider is for the offender to make an expression of sympathy soon after the injury, and wait until a later stage, such as mediation, to “safely” offer a full apology which admits fault.

### 4. *Method*

There are many methods for making apologies. Two common questions are whether the apology should be made by the client or by the lawyer, and whether it should be spoken or written.

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757-58.

132. See Levi, *supra* note 29, at 1190-99; TAVUCHIS, *supra* note 22, at 87-90.

133. See Felstiner, *supra* note 36.

134. See Levi, *supra* note 29, at 1190. (“Apologizing before a complaint is formalized may derail conflict before it starts. During this key period, the apologizer’s conduct is still a ‘virtual offense’ . . . . If an apology is accepted in this period, the offense will never be realized—the apologizer’s act will be viewed as innocent.”).

135. However, late apologies frequently have dramatic effects, often more than a party might expect. See *supra* Part II.D.5.

Apologies are likely to be more powerful when they come from the client rather than the lawyer. The root issue is sincerity. As an apology is meant to demonstrate, *inter alia*, the offender's sympathy and remorse, an apology by the client should have the greater effect. While there may be occasions necessitating the lawyer's making the apology, such as when the injured party is so antagonistic toward the offender that the party will not listen to anything the offender might say, or when a very linguistically precise apology is needed, on the whole, it is the client, rather than the lawyer, who should apologize. This may run counter to some lawyers' instinct of having their clients remain silent while the lawyer does the talking and writing.

Both spoken or written apologies have merits, and one form need not exclude the other. Hearing words straight from the offender's mouth is a powerful experience, especially when sincerity is at issue, as speaking an insincere apology convincingly face-to-face may be quite hard for many.<sup>136</sup> Eye contact can be especially important. However, signing one's name to a written apology can also be quite powerful, with the signed testament implying a certain deliberation and solemnity.

When choosing between speech and writing, two factors to keep in mind are precision and record. When precision is critical, a written apology can be helpful. For example, if one wishes to be precise about what one is apologizing for and what one is not, or if one wants to minimize the chance one's words will be misconstrued (for instance, that one's sympathetic expression will not be taken as an admission of fault), writing can be better than speech.

A written apology also creates a record. This may work to the offender's detriment, such as when the injured party seeks to introduce it at trial. On the other hand, having a record can be to the offender's benefit. Some offenders want to introduce a written apology at trial with the hope of reducing punitive damages. Other offenders may want to publicize the apology, seeking to exonerate themselves in the public's eye.<sup>137</sup>

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136. Deceiving others in a face-to-face lie is no easy thing, for often involuntary cues will give one away. *See infra* note 164.

137. A notable example is Texaco's "admit all" approach following the release of news accounts of a history of racism at Texaco:

[O]nce the Times story appeared [documenting Texaco's racism], Texaco CEO Peter Bijur quickly adopted a strategy known in public-relations circles as "total contrition." With [a] p.r. maven . . . at his side, Bijur issued a series of tortured apologies. "We care about each and every employee," he said on a satellite broadcast. "I care deeply . . . I am sorry for our employees and both ashamed and angry that such a thing happened in the Texaco family."

Within two weeks, he turned the nightmare into an opportunity for enlightenment. He met with Jesse Jackson and Al Sharpton and asked for their help in making Texaco a "model of

### 5. *Nuance*

As with all behavior subject to close scrutiny, nuance is critical in apology. A slight difference in shading—whether in word, presentation, or timing—can produce a vast difference in perception. Something as “trivial” as speed can determine an apology’s impact: An apology muttered quickly can sound far less sincere than one stated deliberately.

The choice of language is one area in which nuance plays a large role, and from both psychological and legal viewpoints the nuances of language deserve attention. Psychologically speaking, saying “I’m sorry, but . . .” is vastly different from saying “I’m sorry.”<sup>138</sup> The former negates the remorse through excuse or justification. Legally speaking, saying “I’m sorry that I hit your car,” is vastly different from saying “I’m sorry that we had an accident.” The former admits one’s fault, but the latter does not. A slight linguistic shift from active to passive voice (“I’m sorry that I broke your vase” vs. “I’m sorry that your vase broke”) can produce very different meanings and legal consequences.

Lawyers may be drawn toward crafting apologies strategically: Is there a way to give the injured party the psychological satisfaction of having been “apologized to” without making a statement which could be used as proof of the offender’s fault?<sup>139</sup> Yet there is a downside to such crafting. If the injured party perceives the apology as “over-crafted”—each word chosen with legalistic precision to avoid ever admitting fault, then the injured party may doubt the offender’s sincerity. Making an apology is a bit like paying a compliment. A natural expression will sound sincere, but staged sycophancy will ring empty.

### 6. *Interpersonal Variation*

Different people have different attitudes toward apology. Some offenders are comfortable with the idea of apologizing, and others are not. Some injured parties care a great deal about receiving, or not having re-

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diversity.” He bravely shouldered the historical burden. “The moment is now, and the responsibility is ours to demonstrate to the nation that discrimination can be eradicated. That true inclusion can exist. And that equal opportunity can be provided to every man and woman,” he said, sounding totally contrite at a November 15, 1996, press conference. “We will work ceaselessly and tirelessly, day after day, to build a company of undisputed opportunity for all individuals.” Hanna Rosin, *Cultural Revolution at Texaco*, THE NEW REPUBLIC, Feb. 2, 1998, at 18:

138. See, e.g., HEITLER, *supra* note 15, at 171-83 (stressing the role of language in psychological aspects of apology).

139. Some might say this paper’s discussion of “safe” apology falls into the vein of trying to give the injured party maximal psychological satisfaction at the minimal legal exposure to the offender.

ceived, an apology, and others care little. Different people may also understand communications quite differently. An offender who, after days of soul searching, blurts out the words "I'm sorry" when he first sees the injured party may be making what is to him a deep expression of remorse, but the injured party may hear it as a cavalier statement. Hence, a lawyer should try to help the client better understand both how others will interpret the client's communications, and noncommunications, and how to interpret the communications of others. This is not to say that the lawyer knows the right way to understand communication. However, as the lawyer will usually be more detached from the dispute than the client and be more experienced at interpreting such communications than the client, the lawyer may be a good counselor on such matters.

Cultural background may shape a client's attitude toward apology.<sup>140</sup> Perhaps no example is more striking than the contrast between Japanese and American attitudes toward apology. In Japan, a society that places a premium on maintaining social ordering and group cohesiveness, apology is far more prevalent than in the United States.<sup>141</sup> Indeed, Americans going to Japan often need to learn to apologize more freely, and Japanese coming to the United States often need to learn to apologize less freely. Lawyers should be sensitive to such cultural differences. In particular, if the injured party is from a culture that values apology highly, the offender's lawyer should think carefully about whether an apology might help resolve the dispute.

Gender differences may also play a role in apology, however, at this point that role is not well-understood. There is some, albeit scant, empirical research suggesting that women put greater emphasis on apology than men.<sup>142</sup> The argument appears to be that women tend to be more relation-

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140. See Jeffrey Z. Rubin & Frank E.A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEG. J. 249 (1991). See also DAVID W. AUGSBURGER, CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS 259 (1992). Apologetic gestures exist among animals as well. See Joan B. Silk, *Making Amends: Adaptive Perspectives on Conflict Remediation in Monkeys, Apes, and Humans*, 9 HUM. NATURE 4, 341-68 (1998).

141. See Wagatsuma & Rosett, *supra* note 10, at 493; Haley, *supra* note 10, at 502-03.

142. See O'Malley & Greenberg, *supra* note 32 (finding women tend to be more forgiving than men once an apology is offered); Gonzales et al., *supra* note 32, at 698-99 (suggesting that women may on average be more sensitive to interpersonal transgressions than men). But see Levi, *supra* note 29, at 1185-86. "Despite this [theoretical] speculation there is little data to support the proposition that women are more likely to apologize. One study of apologetic strategies found that, '[c]ontrary to popular stereotype,' women do not apologize more frequently than men." *Id.* at 1185 (citing Bruce Fraser, *On Apologizing*, in CONVERSATIONAL ROUTINE: EXPLORATIONS IN STANDARDIZED COMMUNICATION SITUATIONS AND PREPATTERNED SPEECH 259, 261 (Florian Coulman ed., 1981)). Note that the critical issue here is not whether women and men tend to apologize at different frequencies in routine conversations, but rather once an injury significant to raise legal concerns has occurred.

ally oriented than men, and thus more disposed toward apology, for apology is often essential to maintaining or repairing a relationship.<sup>143</sup> Perhaps the lesson to draw is not one about gender per se, but rather about interpersonal differences in approaches to relationships: Those who value relationships highly may be more ready to offer an apology when they injure another, and more offended by the failure to receive an apology when they are injured.

### 7. *Summary Advice*

In sum, the lawyer and the client-offender ought to think about whether the case is appropriate for apology and, if so, how an apology should be made. In particular, the lawyer might discuss with the client the legal ramifications of apology and, if the client is concerned that an apology will be used in court to show liability, how that risk may be minimized. The lawyer and client should bear in mind that an early apology soon after the injury, while it may be most promising relationally, may also have the least legal protection, and that the “safest” avenue for apology could come later. As mentioned before, one strategy is to make a statement early on which expresses sympathy only, and to wait until a later stage to make a full apology (one which also admits fault and expresses regret) if need be. If such a full apology is to be made, a mediation session preceded by a confidentiality agreement may often be the best place for it. Not only are the statutory protections afforded mediation proceedings generally strong, but mediation is a natural forum for apology. If maintaining insurance coverage is a concern, the possibility of admitting fault without assuming financial liability should also be kept in mind.

### B. FOUR EXAMPLES

To illustrate the application of apology in several common legal disputes, consider four examples from the divorce, employment, car accident, and medical malpractice settings. The first two are purely hypothetical, though unfortunately not unrealistic. The latter two are slightly modified retellings of actual events. For each, imagine being the defense counsel. Consider what factors, legal and otherwise, would influence the advice you might give your client about apology, and, assuming your client wanted your advice on the matter, how you would suggest your client word an apology.

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143. See Levi, *supra* note 29, at 1185-86.

### 1. *Divorce*

Bill and Sharon, both in their mid-thirties, were married eight years ago. They have two children, ages four and six. Bill is a computer software salesman who frequently takes two- to three-day marketing trips. Sharon works mornings at a day care center and spends most afternoons at home with the children. Over the past several years, their marriage has steadily deteriorated, leaving both empty and bitter.

One afternoon, returning a day early from a marketing trip, Bill sees Sharon's car parked in front of Peppers, a local restaurant. Peering inside, he spots Sharon seated at a table with Ted Shuman, a neighbor. They are laughing and giggling together. At one point, Ted caresses her on the cheek. Bill heads home.

A few hours later, Sharon arrives. Bill asks, "Where have you been?" "Just doing errands," Sharon says. "I thought I saw you having lunch at Peppers with Ted Shuman," he says. At first she denies it, but then she admits it. She even admits to having an affair with Ted. Enraged, Bill leaves.

A few days later, Bill phones. "I've talked to a lawyer," Bill says. He adds, "I want a divorce." "Okay," says Sharon.

Sharon comes to you, a divorce lawyer, and relays the facts above. She is quite clear that she too wants a divorce. "Bill's finding out about my affair with Ted—that was just a trigger. The marriage died long ago. I don't hate Bill, but I don't want to be married to him. All I really care about is that the kids are okay."

#### *Analysis*

Sharon has much to gain, and little to lose, by offering an apology. In the short run, she and Bill will need to reach a mutually acceptable divorce agreement, or they will face having a judge decide the details of their divorce. In the long run, she and Bill will have to interact for more than a decade over the rearing of their children. Until Bill can move beyond his anger at Sharon, even minimal cooperation between the two may be impossible. Sharon could apologize for her affair with Ted, and thus take an important step towards a workable divorce agreement and relationship with Bill.

Mediation is a natural place for Sharon to apologize, as divorce settlements are often mediated. Further, local statutes may deem mediation discussions strictly confidential. Bill and Sharon might also sign a confidentiality agreement before the mediation proceedings. If Bill is unwilling

to go to mediation, Sharon should still think seriously about apologizing. She has *already* admitted to Bill that she has had an affair with Ted, so admitting this again will not put her in a worse position. If Bill will hear her out, a face-to-face apology would probably be best.

What might Sharon say? Assuming Sharon's goals are to reduce Bill's anger and to assuage some of her guilt, but not to continue the marriage, she might make an apology along the following lines:

Bill, I'm sorry that I cheated on you. It was the wrong thing to do. My intention was never to hurt you, although I am sure that I have.

We both know that our marriage failed a long time ago. I should have faced up to that before—directly—rather than having an affair with Ted. It was wrong of me. I want you to know that I've been seeing Ted for about three or four months. I'm not saying this to make you feel bad, though I realize it might, but I want you to know the truth. The time you saw me wasn't the first time with Ted. I want to face up to that.

I'm not saying that I want us to get back together. I don't. A divorce is the right thing for both of us. But I do want you to know that I never intended to hurt you, and I think that what I did was wrong. I should have just had the courage to say that I wanted to end the marriage.

What I'd like to be able to do now is to find an agreement that works well for the kids. I'm sure that you're mad at me. I deserve that. But I hope that we won't ruin our kids' lives.

I'd really like to hear what you're thinking and feeling.

Note Sharon's attempt to differentiate the *impact or consequences* of her actions, which include harming Bill, from her *intentions*. ("My intention was never to hurt you, although I am sure that I have.") Often a statement both acknowledging the harm one has caused another and expressing that one did not intend or desire to harm the other can greatly help in defusing conflict.

## 2. *Employment*

Ron Basil, a computer software engineer, has worked for five years at Netware Corp. in the State of Ames. During the first three years of his employment, he received a series of rapid promotions. However, for the past two years, his requests for further advancement have been denied. The change began when he entered a division headed by Cynthia Supreme. Basil believes that Supreme, who is white, discriminated against him because he is black. Basil frequently heard Supreme making what he took as racist comments ("We need the right type of people in management" and "People should stick with people of their own kind"). He complained sev-

eral times to the company's president, Andrea Jefferson. Jefferson spoke with Supreme, who denied any racism. Jefferson took no further action.

Basil recently overheard Supreme stating to another division head, Fred Cogan, "Blacks never do any good work." That was the last straw. Basil quit and promptly filed suit. After receiving notice of the claim, Jefferson launched a thorough investigation. To her shock, the investigation revealed credible evidence of racism not only by Supreme, but by several other managers including Cogan. She then fired Supreme, Cogan, and those other managers. Both because Netware is now understaffed and because of her moral sensibilities, not to mention the legalities, Jefferson would like to have Basil return to the company. Assume that Basil's employment contract included a mandatory mediation clause and that Ames grants strong confidentiality protection to mediation.

#### *Analysis*

This is an excellent case for an apology within the context of mediation. Even with Supreme, Cogan, and several other racist managers fired, an apology by Jefferson would be an important recognition to Basil of the harms that he suffered and could be an essential step to getting him to return to the company.<sup>144</sup> It would not, of course, preclude monetary compensation for past harms, and Basil's attorney should ensure that Basil is aware of that. While Jefferson may not have "standing" to assume responsibility for what racist managers like Supreme actually said and did, she can express her regret that she did not investigate Basil's earlier complaints thoroughly and that she ran a company with a racist work environment. She might even thank Basil for bringing suit. For Basil to feel comfortable returning to Netware, a dialogue about the past seems essential, and mediation is a fine place to initiate it. With the confidentiality protections afforded mediation by the State of Ames, Jefferson can feel free to speak candidly. Further, as the employment contract calls for mediation, both parties should be receptive to that process.

### 3. *Car Accident*

Driving to work in his BMW, Mr. Trendle approached a congested rotary. Looking to his left at the oncoming cars, Mr. Trendle saw a break in the traffic and accelerated into the rotary. Unfortunately, he failed to see the small, red hatchback to his right that had slowed in the rotary traffic, and he crashed into it from behind. Both the hatchback and Mr.

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144. Were Supreme willing, she might also apologize to Basil within the mediation context.



Trendle pulled onto the inner rotary shoulder and stopped. Though Mr. Trendle believed that he was driving at no more than five to ten miles per hour at the time, the rear bumper of the hatchback was clearly dented. A roughly forty-year-old woman, Ms. Reardon, emerged from the hatchback, holding her neck. They swapped addresses and registration and insurance information. Ms. Reardon said that she was on her way to the nearby hospital where she worked, and, though it didn't feel serious, she would get her neck checked out there.

A few days later, Mr. Trendle calls you, his lawyer. Sounding guilt-ridden, he asks, "Should I call Ms. Reardon to see how she is doing? Can I tell her that I'm sorry for having hit her?"

*Analysis*

A lawyer might advise Mr. Trendle as follows: "Whatever you do, don't contact Reardon. Definitely don't apologize to her—that will just make you look bad. If Reardon contacts you, just let me or your insurance company handle it. Maybe Reardon is fine and has forgotten about the whole thing, or maybe Reardon is one of those charlatans who pulls up short in front of an expensive car to cause an accident so that she can sue for whiplash. Let's just wait for now."<sup>145</sup> However, that is not what happened in the actual example. In the actual example, "Mr. Trendle" was himself an attorney. After several days of careful thought, he wrote Ms. Reardon a note. I paraphrase:

Dear Ms. Reardon,

I write to express my wishes that you are doing well following our accident several days ago. I am very sorry to have hit you from behind.

Please let me know if there are any expenses that you incurred in relation to the accident. From what I remember, the bumper on your car was damaged. I would be happy to reimburse you for the cost of repairing it or other damage to the car.

Again, I hope you are doing well.

Sincerely yours,

Mr. Trendle

When I questioned Mr. Trendle about the note, he explained his decision as follows. First, he *did* want to say that he was sorry for having hit Ms. Reardon's car. He felt guilty for having damaged her car and possibly having harmed her, and he wanted to express his sympathy and regret.

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145. Mr. Trendle's insurance company might also discourage apology. See *supra* note 9.

Second, he did not want his insurance premiums raised, and he thought it would be cheaper to pay directly for the small cost of repairing the bumper. He also believed that in the off chance that there were large damages at issue because of personal injury, his insurance company (and not he) would have to pay those damages. Third, he realized that his note, especially the second sentence admitting fault, could be used against him as proof of liability. However, he thought that Ms. Reardon already had ample evidence to prove his liability irrespective of the note, for he hit her car from behind, and he did not think that the note would materially damage his legal position.

A more cautious approach would have been to write a note expressing sympathy for the injury without admitting fault (“Dear Ms. Reardon, I write to express my wishes that you are feeling well following our accident several days ago. Sincerely yours, Mr. Trendle.”) and to wait until later to admit fault (but not assume liability), ideally in a “safe” channel such as mediation. In the off event that Ms. Reardon’s injuries proved severe, this would pose less of a risk, albeit what I would assess as a very slight risk, of voiding his insurance coverage. However, in Mr. Trendle’s case the fuller letter worked quite well. Shortly after receiving his letter, Ms. Reardon called Mr. Trendle to let him know that her neck felt fine. Later she relayed to him the cost of repairing the bumper, and he reimbursed her. Equally important, Mr. Trendle felt good for having offered an apology for the harm he caused. While many persons are not as sensitive as Mr. Trendle, this mattered to him.

#### 4. *Medical Malpractice*

One afternoon an old college friend, who is now an orthopedic surgeon, calls you, a medical malpractice lawyer. He wants to see you as soon as he can. You arrange for him to come to your home that night. He arrives looking disheveled. You exchange pleasantries and offer him a seat. You ask him what’s up, and he states the following:

I was operating this morning on a woman, fifty-two, who had a herniated lumbar disk. I went in to remove it and fuse the adjacent vertebra. It’s a challenging operation, but not uncommon, and I’ve done it many times.

The reason I’m here is that, when I was about halfway through, I accidentally nicked the dura. I had removed most of the disk, when my hand just slipped. The dura is a thin, sheath-like coating that covers the spinal cord and holds in the spinal fluid. Nicking it is something I’ve seen other doctors do occasionally, but they don’t talk about it much. Anyway, I stitched up the dura as best I could to stop the leakage, and finished the rest of the operation.

The odds are that the stitching of the dura will work fine, but it doesn't always, and either of two problems could develop. First, the suturing may have failed to totally shut off the leakage. If this happens, the patient could show strong neurological symptoms in about three or four days, and we'll have to go in and repair the leakage. Second, the patient could develop what's known as a pseudo-meningocele. This means that the spinal fluid is not circulating enough around the wounded area. It usually takes about two to four months to develop. There are neurological symptoms, and again you have to go back in and try to fix it.

My question is whether I should say anything about it. As it is, the patient is scheduled to go home tomorrow by about 11:00 a.m. A herniated disk operation is slated for a twenty-four hour turnaround, meaning they send you home within twenty-four hours of surgery. Usually, this is enough time, and it is good to get the patient back on his feet as soon as possible. However, where you've nicked the dura, it's probably not the best thing to do. Really, the best thing would be for the patient to lie as still as possible for the next three to four days to give the dura as much of a chance as possible to heal. Also, an MRI should probably be done in a few days to check on the condition of the dura. I'm wondering what I should do. Many doctors don't say anything to the patient when this happens and just send the patient home the next day.

#### *Analysis*

The first issue the surgeon faces is whether to say something (and keep the patient in the hospital three or four more days) or to remain silent (and let her be discharged the following day). The arguments for saying something and keeping the patient in the hospital are compelling. First, the patient's health is at greater risk if the physician says nothing and sends her home the next day. Second, making a mistake during an operation is not necessarily malpractice, but failing to disclose an important medical risk to a patient and prescribing what one knows to be a medically sub-optimal course of treatment would likely constitute gross malpractice.<sup>146</sup> Clearly, the doctor must say something.

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146. See Darrell L. Keith, *The Court's Charge in Texas Medical Malpractice Cases*, 48 BAYLOR L. REV. 675, 701, 713 (1996) (defining ordinary negligence under Texas law as the "failure to do that which a physician of reasonable (or ordinary) prudence would have done under the same or similar circumstances or doing that which a physician of reasonable (or ordinary) prudence would not have done under the same or similar circumstances," and defining gross negligence as "such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the person affected by it").

Note that some commentators have argued that physicians should be placed under a general legal duty to disclose errors to their patients, irrespective of whether such disclosure will impact on the patient's health. See Joan Vogel & Richard Delgado, *To Tell the Truth: Physicians' Duty to Disclose Medical Error*, 28 UCLA L. REV. 52 (1980); Theodore R. LeBlang & Jane L. King, *Tort Liability for*

What should the doctor say? One approach is for the doctor to straightforwardly tell the patient the whole truth and apologize for the mistake he made.<sup>147</sup> On the one hand, such honesty will likely boost the patient's respect for the doctor's character and trust in the doctor as a person. On the other hand, this approach may lead the patient to lose confidence in the doctor's medical skills. In addition, there is the very slight risk that such an admission could jeopardize the doctor's malpractice coverage.<sup>148</sup>

A second approach would be to try to reveal the patient's medical condition without revealing the doctor's own mistake or admitting liability. Nuance (or, in political terminology, "spin control") is critical to such an effort. Rather than saying to the patient, "I made a mistake during the operation yesterday and accidentally cut into the casing around your spinal cord," the doctor might say:

I want to let you know that there was a small complication during yesterday's surgery. There was a small tear in what's called the "dura", a thin, sheath-like casing around the spinal cord that holds in the spinal fluid. We stitched it up, and everything should be okay. We want to keep you in the hospital for a few extra days—maybe three or four—to make sure that it heals properly. The main thing for you to do is just lie still, for the more still you are the easier it is for the dura to heal. In a couple of days we'll take another MRI to make sure everything's okay. It's likely you would be fine if we released you today, but I want us to be on the safe side.

By casting his mistake as a "small complication," the doctor may both reveal the patient's medical condition and hope to maintain a positive relationship with the patient. While there is no guarantee whether the patient will sue later, a well-nuanced statement could go a long way toward preventing such an outcome. Further, if suit does occur, the (small) risk that the doctor has voided his insurance coverage by his statement will be reduced.

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*Nondisclosure: The Physician's Legal Obligations to Disclose Patient Illness and Injury*, 89 DICK. L. REV. 1, 35-51 (1984). For a similar discussion on Canadian law, see Gerald Robertson, *Fraudulent Concealment and the Duty to Disclose Medical Mistakes*, 25 ALBERTA L. REV. 215 (1980).

147. As to whether there are legally "safe" avenues (such as in-hospital mediation) that the doctor might use, even if a plausible avenue existed, it would likely be impractical in this case as time is so critical. Further, even were the doctor to apologize within a "safe" avenue, in this case making a "safe" apology still poses a significant risk: Such an apology would *inform* the patient of the doctor's mistake and the patient might then sue.

148. See *supra* Part II.C.3.

Some might say that the second approach, while legally savvy, is deplorable from the viewpoint of medical ethics:<sup>149</sup> The doctor should tell the patient the whole truth—fully confess to having nicked the dura—and not some partial, slanted version of the truth that serves the doctor's, rather than the patient's, best interests.<sup>150</sup> Further, if the doctor really cares about having a positive relationship with the patient, the best foundation is by revealing the whole truth. A doctor who wants to be fully forthcoming should be counted as morally praiseworthy, and a lawyer counseling such a doctor should simply inform her of the relevant legal risks. However, for those unwilling to go that far, offering a well-nuanced explanation is better than offering none.

#### IV. LEGAL REFORM

Shifting from the perspective of a lawyer seeking to advise a client to adopt a legislative or public policy orientation, it is interesting to ask whether our existing legal structures adequately facilitate apologies.

A goal of law in this area should be to permit an offender to make a full and "safe" apology immediately after the injury or at any time thereafter, should he so choose. (An offender who wishes to make an "unsafe" apology that may be used against him in court should also be free to do so.) While some may argue that rules, including existing rules, which allow for "safe" apology cheapen the value of an apology,<sup>151</sup> encouraging apologies to occur early on may prevent many injuries from escalating into legal disputes. An early apology can avoid compounding the insult of not apologizing on top of the injury. Late apologies may in some cases be appropriate, but on the whole the earlier the apology occurs, the better. Further, the law should not penalize the "good" person who, in an effort to make amends, apologizes soon after an injury as compared to the crafty person, who would wait to apologize until any statement she might make was legally "safe."

From such a viewpoint, the state of our current legal rules is poor. Though once disputes are well under way, mechanisms such as mediation, confidentiality agreements, F.R.E. 408, and judicial orders do provide

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149. See Wu et al., *supra* note 8; Finkelstein et al., *supra* note 8; Robin et al., *supra* note 8.

150. Even if, arguendo, the proposed statement serves the patient's medical interests as well as a full confession, it serves the patient's financial interests, which include possible medical malpractice damages, less well.

151. For a response to this position, see *infra* Part V.B (arguing that the bifurcated message of "safe" apology can have much meaning).

some “safety” for making an apology,<sup>152</sup> our existing laws provide scant protection for making a “safe” apology early on. As mechanisms for “safe” apology, confidentiality agreements are quite weak, and judicial orders, by definition, come quite late. While parties could go to mediation quite soon after an injury, this step may often be awkward. While F.R.E. 408 does provide some protection for statements made early on, it has many gaps. Two central gaps are that the statement must be made in the course of, but not before, compromise negotiations, and that statements made in compromise negotiations may be admitted at trial for purposes other than proving liability. The question arises: Could our laws be modified to make it easier for “safe” apology to take place soon, if not immediately, after the injury?

One theoretically appealing approach would be to plug the existing gaps in F.R.E. 408. In response to the first gap, one could make an apology a presumptive trigger for the F.R.E. 408 protections. More specifically, one could modify F.R.E. 408 and analogous state provisions so that the offer of apology raises a rebuttable presumption of compromise negotiations. There is some appeal in this. An apology often indicates that the offender believes that the injury is serious. When an injury is serious, the offender is probably aware that a legal claim is pending when making the apology. If such an approach were taken, the second gap in F.R.E. 408 would also have to be closed. Unfortunately, such modifications to F.R.E. 408 would be difficult to achieve legislatively. Courts, however, could look to such reasoning in their application of F.R.E. 408 and analogous state provisions.

A second and more feasible approach would be to create an evidentiary exclusion for apologies independent of F.R.E. 408.<sup>153</sup> There is a certain irony under the current Federal Rules, which through specific evidentiary exclusions for subsequent remedial measures<sup>154</sup> and payment of

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152. Such laws might be improved by greater standardization, but that is a separate issue.

153. Any rule creating special evidentiary restrictions for apologies will have to face the question of where to draw lines concerning what is and what is not an apology. Would, for example, statements which merely express sympathy but do not admit liability be protected? Would statements which admit liability but do not express regret be protected? Would statements “indirectly” apologizing be covered? And, perhaps most fundamentally, how would one distinguish between apologies and non-apology admissions of fault? When necessary, such issues could be faced and met.

154. Federal Rule of Evidence 407 (“Subsequent Remedial Measures”) provides in part:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction.

FED. R. EVID. 407.

medical and similar expenses,<sup>155</sup> encourage offenders to take steps toward physical repair following an injury but discourage the often more fundamental relational and psychological repair potentially afforded, and only afforded, by an apology. Under the current rules, you can build a fence around the pit into which the plaintiff fell and you can offer to pay the plaintiff's hospital bills, but you cannot say that you are sorry. Yet a root motivation behind these exclusions as well as for F.R.E. 408 is that the law should neither inhibit the practice of "humane impulses" nor "discourage assistance to the injured person."<sup>156</sup> While an apology qua admission differs from these excluded categories, surely this motivation applies with equal, if not greater force, to the case of apology.

What form might a specific evidentiary exclusion for apologies take? Three possibilities are to exclude: (i) any apology, such as a spontaneous apology, which occurred within a certain, brief period after the injury; (ii) any sincere apology; or (iii) any apology.

It is reasonable to think that an apology which occurs just after an injury is sincere. A spontaneous apology is most likely motivated by remorse, not guile, coming from a "good" person who by instinct wants to make amends. While protecting apologies made within a certain, brief period after the injury would not permit "safe" apology to occur at all times following an injury, it would help facilitate an important class of apologies not well-covered by the existing rules. It would also be an easy rule to administer.

As between the second and the third possibilities above, while protecting only sincere apologies may be more appealing theoretically, protecting all apologies may be more practical. If one of the rationales for protecting apologies from evidentiary use is to encourage those who wish to resolve disputes to make sincere, good-faith apologies, why should the law protect those who make insincere, bad-faith apologies?<sup>157</sup> On a theoretical level, distinguishing between insincere and sincere apologies seems appealing; however, it may be unworkable. In many cases, it would be extremely difficult to judge the offender's intent.

This theoretical issue points to a general concern: If our legal mechanisms cannot differentiate between sincere and insincere apologies, does

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155. Federal Rule of Evidence 409 ("Payment of Medical and Similar Expenses") provides, "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." FED. R. EVID. 409.

156. FED. R. EVID. 409 advisory committee's note (commenting on the purposes of Rules 407, 408, and 409).

157. See *infra* Part V.A (discussing insincere apologies).

not any legal mechanism which allows for “safe” apology—including the existing legal mechanisms—run the risk of abuse? Might not some offenders use “safe” channels to offer insincere apologies with the hope of duping the other party and resolving the dispute? Rules that allow for “safe” apology do run this risk; however, it is a risk worth taking. The recipient is always free to judge the sincerity of the apology, and for many offenders making an insincere apology seem sincere is difficult.<sup>158</sup> Further, by not offering “safe” avenues for apology, society may cause many disputes to escalate to litigation which could readily be avoided if only an apology were offered. At times society might also have an “epidemiological” interest in permitting “safe” apology.<sup>159</sup> “Safe” apology encourages people who have made mistakes to reveal those mistakes, and it is only once we know about mistakes that we can work at finding ways to avoid similar mistakes in the future.<sup>160</sup> Some avenues do now exist for offering “safe” apologies; however, often these avenues are only of use fairly late in the dispute. Better public policy would offer earlier avenues for “safe” apology.

## V. ETHICAL CONSIDERATIONS

Some may raise ethical questions about the possible misuse of apology. Below I address two such questions. First, is it wrong for a client who does not feel remorse but thinks apologizing will be strategically advantageous to apologize? Second, is it wrong to make a “safe” apology, or, put differently, is not the willingness to make amends through paying compensation for the harm one has done an integral part of a sincere apology?

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158. See *infra* note 164.

159. See Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, 60 LAW & CONTEMP. PROBS. 185 (1997) (suggesting that using mediation rather than litigation to resolve disputes may provide important information for preventing future medical errors).

160. If a medical resident errs when treating a patient, it is not only important that the patient know of it, it is important that the hospital learn of it in order to prevent similar mistakes in the future. However, mistakes are often unreported, possibly motivated by fears of liability. See Wu et al., *supra* note 8, at 770 (“Even when a definite mistake results in serious injury, the patient often is not told. In one study, house officers reported telling their attending physicians about serious medical mistakes only half the time, and telling the patients and families in less than a quarter of cases.”). But see Miller, *supra* note 7, at 435 (the issue of liability largely removed because in Britain’s national health care system, the focus of both the injured and the system shifts away from liability).



## A. APOLOGY FOR STRATEGIC ADVANTAGE

Some may ask whether I am advocating that a lawyer advise a client who does not feel remorse to apologize in order to obtain a strategic advantage. For example, a lawyer could tell a client, "The plaintiff might drop the suit if you apologize. Even if you are not sorry, you might just say that you are sorry and see what happens." Strict consequentialists may see little harm in this: If the plaintiff takes the apology to be sincere and forgives the defendant, who is worse off? The defendant would be happy to have the case settled, and the plaintiff would be happy to have received what is believed to be a sincere apology.

I take a different view. Advising clients to misrepresent their remorse so as to gain a strategic advantage is, in my opinion, no different from advising clients to lie about any other matter for a strategic advantage. Both are wrong. While some may think that "white" lies do little harm, "white" lies are usually justified by their triviality. Lying to gain a strategic advantage in a dispute is by no means trivial.<sup>161</sup> Lying about such remorse may well constitute fraud, the counseling of which certainly violates legal and professional ethics.<sup>162</sup>

But in some cases, I think that clients will not feel much remorse of their own initiative. However, if the subject of apology is broached by their lawyers, clients may well feel remorse. Accordingly, I think it is fine for lawyers to ask clients questions about apology (such as, "Have you thought about apologizing for any of what took place?" or "Would you consider making a statement expressing sympathy for the plaintiff's medical condition?"). I expect that there are few alleged offenders who, when sensitively asked about the subject, feel absolutely no sympathy for the other side's injury.

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161. On the ethics of lying generally, see SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978). On the ethics of lying in negotiation, see generally Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 76 IOWA L. REV. 1219 (1990) (arguing that a great deal of negotiation involves lying). On white lies, see BOK at 60, and Wetlaufer at 1243.

162. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC-7-9, DR 7-102 (1995) ("In his representation of a client, a lawyer shall not: . . . (5) knowingly make a false statement of law or fact . . . (7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."); ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1992) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . ."). See generally Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447 (1995) (discussing the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct* as they relate to ethics in negotiations).

I also believe that it is acceptable for a lawyer to point out to a client that offering an apology may yield strategic benefits (“You know, if you apologized, they might drop the suit.”). While some may argue that telling people that they may receive financial benefits from apologizing is ethically questionable, I do not.<sup>163</sup> Often people gain financial benefits from doing what is ethically right. For example, a businessperson may gain a profitable reputation for fair dealing by being honest. It is fine to draw business-people’s attention to this. There is no rule saying that morally praiseworthy acts must be self-sacrificing.

Further, making an insincere apology “successfully” may not be as easy as the Machiavellian might think. The listener is always free to assess the sincerity of the apology. An insincere client trying to appear sincere is risky business, especially when apologizing face-to-face.<sup>164</sup> Further dynamics may also come into play. The drive to reduce cognitive dissonance is a powerful psychological force.<sup>165</sup> For some, preparing to make and making an apology may trigger a process of internal remorse. Saying you’re sorry may help you to feel sorry.

I am not suggesting that apology or other such expressions could not be abused by the devious,<sup>166</sup> or that a self-respecting lawyer should help to foster such abuse. However, many clients would, if the possibility of apology were raised with them in a sensitive manner, explore the possibility of apology with integrity and sincerity. When an injury has occurred, apologizing to the extent one believes one is at fault is morally praiseworthy. Perhaps the ethical “burden of proof” falls not on those lawyers who would

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163. More generally, some may feel that any instrumentalization of apology is wrong. If the heart of apology is the feeling of internal remorse, is it not wrong to apologize, or to counsel apology, with other goals in mind? I do not take such a dichotomized view. While remorse may and perhaps should be the central motivating factor behind an apology, I do not believe that it need be the only factor motivating an apology.

164. See ROBERT N. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF EMOTIONS* 126 (1988). See also KATHLEEN VALLEY, JOSEPH MOAG & MAX H. BAZERMAN, *A MATTER OF TRUST: EFFECTS OF COMMUNICATION ON EFFICIENCY AND DISTRIBUTION OF OUTCOMES* (Harvard Business School Working Paper, 1996) (on the importance of face-to-face communication in building trust).

165. See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

166. See Goldberg et al., *supra* note 4, at 222-23 (reporting a particularly distasteful case where, following a 1985 plane crash, Delta Air Lines first approached victims or decedents’ families in a friendly, supportive manner—thereby preventing many lawsuits—only later to take a very hostile stance toward families that did sue, at times using information gained while in the “friendly” posture against such a family in subsequent litigation). “Thus, the attorney alleges, a distraught family member had told a sympathetic adjuster that the victim, a married man, had been having an extramarital affair. ‘They [later] threw it back at us in settlement talks and really took us by surprise.’” *Id.* at 223.

raise the possibility of apology with clients, but on those who fail to do so.<sup>167</sup>

#### B. "SAFE APOLOGY"

Some may feel that "safe" apologies are duplicitous: If you are *really* sorry, should you not be willing to pay for what you have done? To many the message, "I'm sorry, but I don't want anything I'm saying to be used against me to make me pay for it," rings empty. Many may think that if you are unwilling to "put your money where your mouth is" you are insincere. As Wagatsuma and Rosett argue, "An apology without reparation is a hollow form, at least when the injured person has suffered a clear economic loss and when the actor has the capacity to make compensation."<sup>168</sup>

The recipient of an apology may certainly take note of the fact that the apology was made in a "safe" context; however, the fact that the sincerity of a "safe" apology may be discounted does not mean that a "safe" apology is duplicitous. If, as the recipient of an apology, you know that the apologizer has apologized in such a way as to ensure insulation from legal liability, you may attach less worth to that apology than otherwise, and a plaintiff's lawyer should be sure to point this out to her client. However, that does not mean the apologizer is engaged in an ethically unacceptable act. Indeed, it is only when the recipient is unaware that the apology has been so insulated, thinking that a "safe" apology is "unsafe," that I see such an apology as ethically problematic.

"Safe" apology offers an avenue for decoupling the issue of apology from the issue of liability, and as such may help avoid much needless conflict. "Safe" apology helps prevent the insult of not saying one is sorry from adding to the already existing injury. "Safe" apology does not make the issue of liability disappear, but it lets the parties speak with one another without the specter of liability lurking in the background. Indeed, the need to find "safe" avenues for apology may itself be viewed as a response to the impact of the liability system on discourse. If offenders were not afraid that their apologies might be used against them in court, they might be more forthcoming with them.<sup>169</sup>

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167. There is also an ethical challenge to an injured party who would use the offender's apology against the offender in court. If the offender has come in good faith to settle the dispute, is it wrong for the injured party to use the apology to the offender's harm?

168. Wagatsuma & Rosett, *supra* note 10, at 487.

169. See *supra* note 7.

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The motive behind and message within a “safe” apology can be intelligible, meaningful, and morally upright. An offender may well want to express, “I am sorry about the accident—it was my fault, and I feel bad that you are injured,” but at the same time not want to pay more toward that injury than he must. I think that many injured parties can understand this, view a “safe” apology as sincere, and derive benefit from it. Indeed, in much the same way conversations on airplanes between strangers can be candid since they will have no repercussions, there may be much moral power to a “safe” apology whereby the offender offers a bifurcated statement, saying in effect, “I admit that what I did was wrong, and I *am* sorry that you are hurt. Now, let’s have a *different* conversation about liability.”<sup>170</sup>

## VI. CONCLUSION

It is easy to see our world the way it is, and lose sight of the way it should be. When an offender injures another, one would hope that, to the extent that the offender feels at fault, he would apologize. This is not only sound morality, it is a good way to prevent protracted disputes. An apology helps to subtract the insult from the injury, thereby minimizing the injured party’s anger toward the offender. Without an apology, what might have been a minor offense may escalate into a major dispute.

While one could argue that lawyers should discuss the possibility of apology with clients more often because apologizing when one has injured another is the right thing to do, which is true, or because society would be better off if more offenders apologized, which is also true, I have not done so here. Rather, I have argued that lawyers should discuss apology more often with their clients because often doing so would make *their clients* better off. (Discussing apology with clients may make many lawyers worse off, but that is another matter.) In many cases, the potential benefits of apology are great, and when care is taken in how the apology is made—within a “safe” legal mechanism like mediation, and with attention to nuances such as admitting fault without assuming liability if insurance coverage is at issue—the risks of apology are small. While our laws could be and should be reworked to make “safe” apology easier, our existing legal rules allow apologies to play a *much* larger role in legal disputes than they now do.

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170. Lawyers may easily understand the bifurcation of liability and damages as these elements are commonly separated in trials. Clients, however, may find this bifurcation confusing. Plaintiffs’ attorneys in particular should help their clients realize that following a defendant’s offer of apology, the issue of (monetary) damages remains.

Incorporating apology into one's repertoire would be a small change for most lawyers, but it could produce a dramatic change in how we settle disputes. In most disputes, apology has the potential to play an important role. Injuries are frequently unavoidable, but an offender's compounding an injury with the insult of failing to apologize is not. Apology is often a key element, if not *the* key element, to resolving a dispute. Lawyers ought to discuss apology more often with clients.