

2-15-2013

When More Than Sorry Matters

Lee Taft

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Dispute Resolution and Arbitration Commons](#), [Law and Psychology Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Lee Taft, *When More Than Sorry Matters*, 13 Pepp. Disp. Resol. L.J. Iss. 1 (2013)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol13/iss1/6>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

When More Than Sorry Matters

Lee Taft*

I. INTRODUCTION

Apology in the legal setting began gaining momentum in 1986, when Hiroshi Wagatsuma and Arthur Rossett published their seminal work on the implications of apologies in legal contexts.¹ This interest exploded in the past decade partly because of the legislative movement to “protect” some forms of apology from traditional evidentiary rules.² Under traditional evidentiary rules, an apology could be ruled an admission against interest, making it admissible as an exception to the rule against hearsay. In 1999, when I first wrote on apology, only Massachusetts and Texas had statutes “protecting” apologies from the traditional evidentiary rule;³ today, thirty-seven states have such statutes.⁴ Over the past ten years, scholars and commenta-

* This is an original but integrated article. I have written several essays on apology and its reparative qualities and have borrowed from those essays in this article. Yet here I borrow from the theoretical discussions in the earlier essays; I do not concentrate on the themes addressed in earlier essays. For those interested in exploring a deeper understanding of the healing possibilities of apology in mediated contexts, see Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 *YALE L.J.* 1135 (2000); to consider how apology has the capacity to exacerbate a tort claimant’s suffering, see Lee Taft, *On Bended Knee (With Fingers Crossed)*, 55 *DEPAUL L. REV.* 601 (2006); for an essay on the role of apology in healthcare (more particularly the role of apology in the disclosure of unanticipated outcomes in care), see Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 *ANNALS HEALTH L.* 55 (2005); and for the potential legal dangers of coupling apology with disclosure, see Lee Taft, *Disclosure Danger: The Overlooked Case of the Cooperation Clause*, 8 *HARV. HEALTH POL’Y REV.* 150 (2007). I am grateful to Raija Churchill and Jory Canfield for their editorial guidance, persistence, and commitment—to me and this important subject. Any errors in this article are mine alone.

1. Hiroshi Wagatsuma & Arthur Rossett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 *LAW & SOC’Y REV.* 461 (1986).

2. See, e.g., FED. R. EVID. 408. The legislative movement is being propelled by a movement in healthcare regarding the disclosure of unanticipated outcomes in patient care. See *infra* p. 189 and accompanying notes.

3. MASS. GEN. LAWS. ANN. ch. 233, § 23D (West 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 2008).

4. Anna C. Mastroianni et al., *The Flaws in State “Apology” and “Disclosure” Law Dilute Their Intended Impact on Malpractice Suits*, *HEALTH AFFAIRS*, Sept. 2010, at 1611 (2010). Three different evidentiary categories for apology have evolved in the state legislatures: (1) states like Arkansas that adhere to the traditional evidentiary rule where an apology may also be an admission against interest; (2) states like Massachusetts and Texas where apologies have been granted partial

tors have debated the merits of these statutes, yielding a considerable body of scholarship beyond legislative considerations. Today, apology has been analyzed in economic, biological, psychological, and moral terms.⁵ The utility of apology—in both promoting settlement and keeping suits from being filed at all—has also been considered.⁶

Mediated settings are fertile ground for reparative processes like apology because parties often have opportunities for interactions that extend beyond the narrow conversations typically encouraged at the courthouse. In mediation, especially interest-based mediation, parties have the opportunity to discuss moral and interpersonal obligations in addition to legal rights and remedies. This openness creates space for parties to venture in apologetic discourse, a process that itself invites “forays into moral and emotional expression.”⁷ Anecdotal and empirical research find that some apologies positively influence claimants’ decisions regarding settlement, so that settlement is more likely after an apology is offered.⁸ Yet recent empirical research indicates that there is both convergence and divergence on how claimants and lawyers interpret apologies.⁹ It is, then, no wonder that lawyers involved in mediation seek—and need—training on apology and on its place in resolving disputes.

protection from evidentiary rules so that expressions of benevolence and sympathy are protected from the traditional rule, but expressions of fault or responsibility are not; and (3) states where the apologies of health care providers are granted complete immunity from traditional evidentiary rules so that both statements of sympathy and fault are protected as they are in states like Colorado. *See, e.g.*, COLO. REV. STAT. § 13-25-135 (2003).

5. *See, e.g.*, Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003); Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000); Taft, *Apology Subverted*, *supra* note 1..

6. *See, e.g.*, Lee Taft, *Apology Within a Moral Dialectic: A Reply to Professor Robbennolt*, 103 MICH. L. REV. 1010 (2005); Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999); Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137 (2000).

7. Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1171 (1997).

8. Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349 (2008).

9. *Id.* at 384.

II. FRAMEWORK

A. *Rationale*

It is critical for those involved in apologetic discourse to recognize that apology is not a monolithic concept. Rather, it is a nuanced and contextually dependent expression informed by gender, religion, culture, and politics. What apology means to X may be different to Y. To X, Z's simple "I'm sorry" may constitute an apology, while to Y, Z may need to couple "I'm sorry" with an unequivocal statement accepting responsibility. X may not care whether Z is sincere in her apology: the words alone may be enough for X, while sincerity may be essential to Y. These distinctions have been noted by legal scholars,¹⁰ yet to date, no uniform legal (or cultural) typology of apology has been established.¹¹ It is, then, important for those guiding apologies in mediated settings not to assume a shared understanding of what constitutes an apology, but rather to determine what each party's own understanding of apology is and to then create a discourse that addresses apology as understood by the parties.

B. *Definitional Framework*

Sociologist Nicholas Tavuchis's *Mea Culpa* is a seminal text on apology.¹² Tavuchis's typology of apology distinguishes between authentic and inauthentic apologies. To him, an authentic apology must follow a precise formula whereby the party offering the apology (1) acknowledges through speech the legitimacy of the violated rule, (2) admits fault for its violation, and (3) expresses genuine remorse and regret for the harm caused by the violation.¹³

Recent legal scholarship differentiates between "partial" and "full" apologies.¹⁴ A partial apology is one in which the offending party expresses sympathy and hope for a rapid recovery, but does not accept responsibility

10. See, e.g., Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006) where White distinguishes between public and private apology and argues that words alone matter in a public apology. *Id.* at 1295.

11. For the typology I have developed in my work, see *infra* note 21.

12. NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* (1991).

13. *Id.* at 3.

14. E.g., Robbennolt, *supra* note 5.

for the event causing the injury.¹⁵ A full apology includes the expression of sympathy contained in the partial apology and, importantly, adds an acknowledgment of responsibility: “I am sorry you were hurt. The accident was all my fault. I was going too fast and not watching where I was going until it was too late.”¹⁶

In contrast to the authentic or full apology, there is the botched apology. This is the apology that not only fails to effectively communicate the offender’s remorse, but creates further harm that can strain relationships and fuel vengeance.¹⁷ Perhaps the most famous botched apology was offered by Richard Nixon:

I regret deeply any injuries that may have been done in the course of the events that have led to this decision [to resign]. I would say only that if some of my judgments were wrong, and some were wrong, they were made in what I believed at the time to be in the best interests of the nation.¹⁸

Nixon’s failure to acknowledge his offense, coupled with his assertion that he acted for the greater good, made this a botched apology. It is the kind of apology those of us living in the United States have become used to hearing from politicians and from other public figures—the kind of apology destined to invite impasse if launched in a mediated setting.

The most common explanation for a botched or failed apology is the offender’s pride, which acts as a wall between the offensive act and the feeling of shame for having violated social norms.¹⁹ This wall of pride is a psychologically driven defensive strategy, designed to protect against negative feelings associated with knowing one has caused harm to another through negligence, incompetency, or ethical lapse. It is the confrontation a person experiences when his behavior contradicts his self perception—the loss of “face” he experiences when his view of his competency, intelligence, or morality does not match his behavior.²⁰ Aversion to seeing one’s behavior truthfully explains why apologies are so often expressed in language like “I am sorry you were hurt,” instead of “I am sorry I hurt you.”

Understanding how easy it is to botch an apology and seeing our inclination to avoid authentic apologies point to the moral dimension of apology. Authentic apology requires the person who violated a social norm to

15. *Id.* at 484 n.12.

16. *Id.*

17. AARON LAZARE, ON APOLOGY (2004).

18. Aaron Lazare, *Go Ahead and Say You’re Sorry*, PSYCHOL. TODAY, Jan.–Feb. 1995, at 40.

19. *Id.* at 76 (quoting President Nixon’s resignation speech of August 8, 1974).

20. See Brent T. White, *Saving Face: The Benefits of Not Saying I’m Sorry*, 72 LAW AND CONTEMP. PROBLEMS 261, 264 (2009); Taft, *Apology Subverted*, *supra* note 1 at 1141.

acknowledge the breach of that norm, to accept responsibility for that breach, and to communicate sorrow for the harm caused. The person who apologizes must hurdle the barriers of fear and pride that protect “face” and, at the same time, subject himself to the consequences that flow from accepting responsibility for the harm caused. When the difficulty of apology is considered—along with the strength and courage that its performance requires—it becomes clear that apology is indeed a moral activity, one moral simply in its expression. That is, the offering of an authentic apology is itself a moral act, regardless of its efficacy.

It is important, then, for those guiding apologetic discourse to distinguish between types of apologies²¹ and to recognize the markers of a botched apology. It is especially important to note that the botched apology will likely exacerbate tensions between the parties. A misfired apology hampers negotiation and invites impasse. As discussed below, if the party who caused harm cannot overcome the barriers to communicating an authentic apology, it may be more prudent to issue none at all.²²

21. I typologize apologies as follows.

Legal Categories (objective):

1. Full apology: an apology in which the party offering the apology accepts legal responsibility for both the harm caused and the suffering tied to that harm;
2. Partial apology: an apology in which the party offering the apology expresses sympathy for the suffering another has endured but does not accept legal responsibility for the harm caused.

Moral Categories (subjective):

1. Authentic apology: the party offering the apology is sincere in his remorse and the apology offered is informed and propelled by that sincere remorse. It is an apology prompted by an inner desire to account for harm caused.
2. Inauthentic apology: the party offering the apology is motivated by the utility of apology and its capacity to manipulate the party receiving the apology. It is an apology prompted by an inner desire to manipulate another’s experience, perception, choice, or a combination of these three.

Failed/Botched Apologies: an apology that misfires for any number of reasons (failure of party to accept responsibility, failure in semantics, etc.).

It is important to note that the objective legal category and the subjective moral category can be mixed and matched. For example, a full apology can be either authentic or inauthentic depending on the subjective intention of the offeror. That is, X can accept legal responsibility for the harm caused, but do so because of a desire to manipulate Y, so that Y might accept less compensation. This would be a full inauthentic apology. As White notes, the authenticity may or may not matter to Y. See Brent T. White, *supra* note 10. Any of these apologies can also be protected so that it cannot be used as evidence of legal liability. See *infra* pp. 186–89.

22. See *infra* p. 189.

It is also important to recognize that apology is not usually an end in itself. Instead, it is a piece of a larger reparative process, a process some have described as a redemptive sequence beginning with transgression and ending in redemption.²³ For others it is the centerpiece of rituals designed to humiliate and shame.²⁴ For me, apology is the voice of a reparative ritual within a larger reconciliation sequence, a sequence beginning with harm and ending in reconciliation.

C. Reconciliation Model

Modern tort law is rooted in the legal system's search for an alternative to the blood feud.²⁵ In blood feud cultures, rituals were created to resolve disputes, "elaborate ceremonies of reconciliation and peacemaking."²⁶ If X's misconduct triggered a feud with Y, the ceremony might end with X having to lay his head on Y's knee and plead with Y to give it back.²⁷ In this culture, there was an inseparable link between apology, compensation, and forgiveness.

As an alternative to the blood feud, modern tort law is only an experiment—what has been called a "civilizing effort."²⁸ Yet within our elaborate system of compensation, rituals of reconciliation and peacemaking have all but disappeared. When cases are settled, we have no elaborate displays inviting reconciliation. A driver who has killed another does not lay her head on the knee of the surviving spouse and beg for her head. Doctors do not kneel before a patient and beg for forgiveness.²⁹ This civilizing effort extends beyond the tort system. There is no legal ritual for an unfaithful spouse to amend for moral lapse, so families squander fortunes acting out vengeance in courtrooms across the country. Somewhere in this civilizing effort we have forgotten the importance of ritual, and in our forgetfulness an essential human need has been lost. Collaborative processes offer an opportunity for correction.

23. Danielle Celermajer, *Apology and the Possibility of Ethical Politics*, J. OF CULTURAL & RELIGIOUS THEORY, Winter 2008, at 14.

24. WILLIAM IAN MILLER, *FAKING IT* 77–78 (2003); *see also infra* pp. 6–7.

25. Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 40 (1994).

26. Miller, *supra* note 24, at 85.

27. *Id.*

28. *See* Shuman, *supra* note 25, at 40.

29. There is a growing movement within healthcare that encourages physician transparency in the wake of preventable medical error. This movement is the disclosure movement discussed in more detail in Section IV.A.

Reparative rituals have received little attention in legal literature. Even in the apology literature, scholars only infrequently attempt to locate apology within larger reparative processes. Here, I offer one model for the reader to consider. The desired end point of the model I present is reconciliation. It is important for the reader to note that another writer might desire a process ending in humiliation.

A few years ago, I was presenting a lecture at Southern Methodist University, and Justice Albie Sachs of the Constitutional Court of South Africa was in the audience. The lecture was a critique of the protected apology in which I argued that protecting apologies from evidentiary rules has the potential to subvert the moral integrity of apology, turning an authentic expression into a strategic act.³⁰ Sachs said that he did not care whether the apology was protected or not; what mattered to him was that the apology brought his enemy to bended knee.³¹

During the lecture I offered no response to Sachs's argument in favor of protecting apologies. I could not imagine that this freedom fighter would value an apology offered behind closed doors, one known to him and no one else, and so I was atypically quiet when he concluded his remarks. It was only after the lecture that I understood what Sachs intended and I experienced a kind of *esprit de l'escalier*. He was not arguing in favor of the secrecy of apology; rather, he was arguing against the idea that its sincerity mattered.³² To him, the value of the apology rested in its utterance, not in his enemy's changed heart. The goal for Sachs was humiliation, not reconciliation.

Still, there is resonance between Sachs's and my views. We both want the apology to have meaning to the parties. For Sachs, the meaning of the apology is that it signals surrender: the apology brings Sachs victory and brings his enemy to bended knee. For me, the meaning of the apology is that, in its full and authentic expression, it has the capacity to restore moral balance between the parties—moral restoration that invites healing and reconciliation. For both Sachs and me, then, there is the potential for apology to have great efficacy.

I pause here to highlight a bias, which may already be apparent, yet one of sufficient importance to warrant an explicit acknowledgment. I am a pro-

30. See also *supra* note 21.

31. Justice Sachs's perspective captures another aspect of "face." See *supra* at 4. From his perspective it is essential that the offender suffer face damage, especially the humiliation of having to appeal to the victim on bended knee. See also White, *supra* note 10.

32. See *infra* note 43 and accompanying text.

ponent of the full, authentic, and unprotected apology. In the wake of serious harm, I find “I’m sorry” an insufficient basis for forgiveness, reconciliation, or both. I have worked with men who have battered their domestic partners, and I have come to distrust superficial expressions like “Baby, I’m sorry” as the basis for the battered spouse to resume relationship. If I had been battered I would need something more than “I’m sorry.” I would need evidence that the apology offered was reliable, that the expressed remorse was coupled with reliable evidence of changed behavior. For me, something more than “I’m sorry” is needed to effect meaningful reconciliation.³³

Little attention has been paid to what is meant by or required for reconciliation. For example, the Texas ADR statute defines mediation as “a forum in which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding between them.”³⁴ Yet the statute does not define reconciliation. In legal scholarship, reconciliation is sometimes conflated and confused with the related reparative processes of repentance and forgiveness.³⁵ While this may not matter in theoretical contexts, it is essential that those facilitating reparative processes understand the distinct movements in a reconciliation sequence and understand the interrelationship among them, if the needs of those at the table are to be truly served.

Overview

A need for reconciliation suggests that something has been broken and that there is a need to repair that brokenness, so something new can come

33. I would need the batterer to demonstrate that the apology was both full and authentic. *See supra* note 21, regarding the typologies of apology. This means that the batterer would accept full responsibility for having caused harm and accept the legal consequences as a result of his having caused that harm. This would provide objective evidence of the apology’s reliability. Yet, I would also want to know that the batterer was authentically remorseful for his behavior, that he was himself committed to behavioral correction so that the conduct was not likely to be repeated. He would need to be committed to interventions such as anger management, talk therapy, empathy training, etc. That is, he would be committed deeply to becoming a different person by embracing the process of repentance described *infra* pp. 184–86.

34. TEX. REM. PRAC. & REM. CODE ANN. § 154.023 (West 1999).

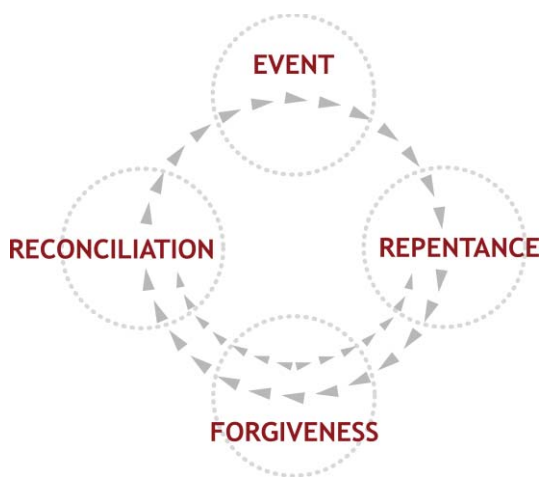
35. *See, e.g.*, W. Jonathan Cardi, *Damages As Reconciliation*, 42 LOYOLA L.A.L. REV. 5, 10 (2008). Here Cardi defines reconciliation in a narrow way. For him, to reconcile is “to accept or be resigned to something not desired.” *Id.* To him, reconciliation consists of letting go of negative emotions, a process most experts would understand as an essential part of the related but independent process of forgiveness. Yet, most critically, Cardi states that reconciliation does not “require the resumption of trust or any personal relationship with the other party going forward.” *Id.* at 11. In my understanding, the hallmark of reconciliation is restored relationship and a willingness to risk trust.

into being. In a recent article, one legal scholar borrowed from Aristotle in conceptualizing the purpose of reconciliation as a process to restore the parties to a “pre-wrong equilibrium.”³⁶ That may be a helpful conceptualization in stranger litigation, but it is an unambitious goal for those participating in collaborative processes.³⁷ Collaborators recognize that in the wake of serious harm there is no going back to a past normal; the parties seek a forward looking process to help them find a new normal. One of the gifts of collaborative processes is helping people bring that new normal into being.

In the reconciliation model I developed, the sequence is:

Harmful event > repentance > forgiveness > reconciliation

Illustrated, the process looks like this:



In the wake of harm, the party causing harm is invited to account for the harm caused through a secular adaptation of the religious process of repentance. Repentance authentically performed will, according to recent data, positively influence forgiveness in seventy-six percent of cases.³⁸ This is not to suggest that X’s forgiveness of Y depends on Y’s repentance. For-

36. *Id.* at 19.

37. Stranger litigation is litigation between strangers, like two strangers who collide in an intersection. Collaborative processes usually occur between parties known to each other, where the relationship itself matters, as between family members or members of a church or community.

38. WILLIAM WILMOT & JOYCE HOCKER, *INTERPERSONAL CONFLICT* 311 (7th ed. 2007).

giveness is an individual and sometimes unilateral process. X can choose to forgive Y regardless of any action on Y's part. The data are offered to illustrate how repentance can influence and facilitate forgiveness, and to show the relationship between the movements in the reconciliation sequence discussed here.

Just as there is a relationship between repentance and forgiveness, there is also a relationship between forgiveness and reconciliation. As just noted, forgiveness is an individual (and sometimes unilateral) experience. It is solely the prerogative of the party harmed. That is, forgiveness should not be vicariously offered or directed. Nor should it be coerced or imposed. It is not necessarily relational. X can choose to forgive Y and choose not to resume a relationship with Y. In fact, when Y has not authentically repented, forgiveness without reconciliation may be the wisest choice.³⁹

The essential quality of reconciliation is relationship. That is, reconciliation is relational if nothing else; it is the restoration of relationship where the party harmed is willing to risk trust. In the absence of engagement with another, reconciliation is a non sequitur. Yet meaningful reconciliation depends on forgiveness preceding it. Without forgiveness, X and Y may appear reconciled. Yet in reality, without forgiveness, they have constructed only a superficial peace: the political peace we witness in our war-torn world, the kind of peace that fractures when the slightest stress is next imposed. Forgiveness creates the space for reconciliation, where a new normal can be constructed. This new space holds the possibility of transforming the chaos generated by harm into peace.

In summary, harm invites the party causing harm to repent; repentance authentically performed inspires forgiveness; and forgiveness opens the door for reconciliation. Forgiveness can be experienced regardless of whether the party causing the harm repents or not and regardless of whether or not reconciliation occurs; that is, forgiveness can be a singular, non-relational experience. In contrast, reconciliation is a relational reparative movement, by definition dyadic and conditioned on the granting of forgiveness. Because this is an article on apology, I will now turn to a more focused discussion of apology and its role within the process of repentance.

Repentance

I am sometimes asked why I use the word repentance when most of my work occurs in secular contexts. After all, repentance is, for many, a heavily freighted religious concept. I am told that using that word distracts some people from the process it represents. My response is that I know of no oth-

39. See *supra* note 33 and accompanying text.

er word in the lexicon that so accurately describes what I think is required of a party who has caused harm to help the party harmed heal. Outside of twelve step programs, there is no well developed understanding in the secular civil culture of what is required of X to mend what she has broken, and even twelve-step models frequently miss the mark. Because religious communities have long concerned themselves with mending brokenness, I borrow from the wisdom that religious traditions have developed around repentance and adapt it to the work I do.⁴⁰

The religious concept of repentance “unites two linguistic and theological traditions, by combining the Greek *metanoia* with the Hebrew *shuv*.”⁴¹ *Metanoia* suggests a fundamental change in mind the same way that metamorphosis suggests a fundamental change in form.⁴² *Shuv* is a Hebrew root word meaning “to turn” or “to return,” as to turn away from behaviors that cause harm. The elements of repentance are remorse, explanation, apology, accommodation, and restructuring or lessons learned.

Apology is then an integral part of repentance: it is the voice of repentance. As the voice of repentance, it communicates remorse and offers explanation.⁴³ It can promise accommodation and new behavior. While there are some circumstances where an injured party seeks apology as the primary accommodation,⁴⁴ apology itself is usually not the only accommodation sought and is not itself evidence of new behavior. An apology should include an acknowledgment of harm done; acknowledgment is an important step in healing harm. Yet in the wake of harm, more than remorse, explanation, and acknowledgment are needed. This is why I distinguish between apology and repentance, as a chemist might distinguish between oxygen and water.

40. In my recent work I sometimes use the word accountability in place of repentance, particularly if I have concern that the word repentance will itself distract the parties from focusing on the elements within the process. Still, when I use the word accountability I define it as containing the same five elements that define repentance: remorse, explanation, apology, accommodation, and lessons learned.

41. Malcolm David Eckel, *A Buddhist Approach to Repentance*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE* 129 (Amitai Etzioni & David E. Carney eds., 1997) (citing *THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT* 978 (Gerard Kittel ed., 1967)).

42. *Id.*

43. If explanation crosses a line and becomes justification, the communication is no longer an apology but becomes instead an apologia. See Taft, *Apology and Medical Mistake*, *supra* note 1, at 70–71.

44. See, e.g., White, *supra* note 10. See also discussion *supra* p. 7.

Over the past several years, a variety of studies have examined the efficacy of apologies in health care settings. Studies suggest that, after apology, many “meritorious claims tend to drop out of the pool.”⁴⁵ Results like these are celebrated. They provide impetus for many studies examining the precise kinds of apologies that will be most effective in influencing the party harmed to forgo litigation. In fact, researchers now assume claimants will forgo or, at the very least, accept less than full compensation for an injury if an apology is offered.⁴⁶ Indeed, there is almost a cry of surprise among those investigating the efficacy of apology when they observe that, even when victims accept apologies, they may still require compensation.⁴⁷

This trend should alarm claimants and their lawyers. It describes a transaction in which a patient is first physically injured by medical error—and then financially injured when language is used to manipulate the patient into relinquishing an otherwise meritorious claim. This trend describes what can occur when a moral movement is launched instrumentally, when an apology is accepted in lieu of repentance, and when an element is mistaken for the substance of which it is only one part.⁴⁸

Yet the trend also points to the power of apology to disrupt traditional litigation cycles—a trend that has inspired a national legislative movement to protect apologies from traditional evidentiary rules.

III. LEGISLATION

A. History

In the 1970s, a Massachusetts legislator’s daughter was killed while riding her bicycle. The driver who struck her never apologized. Her father, a state senator, was angry that the defendant never expressed contrition. Later, the senator was told that the driver did not apologize because of his fear that an apology could be construed as an admission in litigation around the girl’s death. To overcome this barrier, the senator and his successor crafted a statute to create a safe harbor for apologies.⁴⁹ This statute was approved by the Massachusetts legislature on December 24, 1986, and became the first apology statute in the country.⁵⁰ It made inadmissible as an admission of li-

45. Erin Ann O’Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT L. REV. 1055, 1079 (2004).

46. O’Hara & Yarn, *supra* note 5, at 1179.

47. *Id.* at 1175.

48. This trend shows the underbelly of the full, inauthentic apology. *See supra* note 21.

49. Taft, *Apology Subverted*, *supra* note 1, at 1151.

50. MASS. GEN. LAWS ANN. ch. 233 § 23D (West 1986).

ability any “statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to pain, suffering or death of a person involved in an accident.”⁵¹

The next state to pass an apology statute was Texas, when it passed what the *Austin American-Statesman* dubbed the “I’m sorry” bill in 1999.⁵² Like the Massachusetts bill, the Texas statute protected expressions of sympathy and benevolence from evidentiary rules. Unlike Massachusetts, the Texas statute explicitly excludes from the statute’s protection “a communication, including an excited utterance . . . which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event.”⁵³ California and Florida quickly followed by enacting statutes similar to the Texas statute, in which statements of fault are explicitly excluded from the statute’s protection.⁵⁴

B. Today

Today, thirty-seven states have apology statutes.⁵⁵ The legislative trend is to expand protection given to apologies, particularly those of health care providers. Some states, like Colorado and Oklahoma, protect both expressions of benevolence and fault if the apology is offered in a health care context.⁵⁶ Oregon’s statute is the most sweeping. It protects any statement by someone licensed by the Oregon Board of Medical Examiners, regardless of the context in which the statement is offered.⁵⁷

C. Implications in ADR Settings

Apologies thus fall within three general evidentiary categories, depending on what state governs their admissibility. There are states that have not enacted apology statutes, where an apology’s admissibility will be determined under general rules regarding exceptions to the hearsay rule. There are states that offer partial protection for apologetic expressions of sympathy

51. *Id.*

52. *See Sorry’s Safe Now*, AUSTIN-AM. STATESMAN, July 2, 1999, at A14.

53. TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 1999).

54. CAL. EVID. CODE § 1160(a) (West 2000); FLA. STAT. § 90.4026(2) (2001).

55. *See supra* note 5.

56. COLO. REV. STAT. § 13-25-135 (West 2003); OKLA. STATE. ANN. tit. 63, § 1-1708.1H (2004).

57. OR. REV. STATE. § 677.082 (2003).

and benevolence, as Massachusetts and Texas do. And there are states that offer full protection for the apologies of physicians, like Colorado and Oklahoma, which protect both expressions of sympathy and fault.

In many states such as Texas, the only truly safe harbor for offering a fault-admitting apology is in a mediated setting, because of the protections granted to communications in ADR settings.⁵⁸ This means that collaborative settings are potentially ideal places for the party who causes harm to offer a fault-admitting apology, without fear that the apology can later be used as an admission. Yet the claimant and her counsel must evaluate the quality of an apology offered in this protected setting. Both its legal and moral content must be considered and its reparative value weighed.⁵⁹

For some claimants, the sincerity of an apology may not matter.⁶⁰ Some claimants may not care if an apology is offered strategically or for instrumental purposes. Some may not care that an apology offered in a safe harbor cannot be later be used in court if the collaborative process fails. Some may not consider apology within a sequence of reconciliation as I do here; some may not consider apology within a moral dialectic. Some may not hunger for an apology at all. For some, forgiveness and reconciliation are not among the desired outcomes of the process, or if they are, they are considered independently of the other party's accounting for the harm caused.

Yet there are those who hunger for apology—people for whom forgiveness and reconciliation are conditioned on authentic repentance, including an unprotected apology. There are people for whom the moral dimension of apology matters—people who will not accept an apology offered in a safe harbor—people who will insist that if the offending party is sorry they will say so without the protections the harbor offers.

There is no singular or right way to view apology or its role (if any) in reparative processes. What is essential is that all involved are aware of the evidentiary rules governing apology. In an ADR setting, X must know that Y's apology is protected, and there must be agreement with the legitimacy of that protection. As X's counsel, it is my responsibility to advise X of the limits of a communication offered within a safe harbor. I must disabuse X of the idea that if the process fails, Y's admission is of evidentiary value in the ensuing litigation. As counsel for X, I may seek an agreement to remove

58. Although the timing of an apology is outside the scope of this article, the reader should be aware that timing is itself a complicated issue. Some would suggest that waiting to offer an apology at mediation might be too late since some apologies are time sensitive, while others suggest that the dispute itself needs time to metamorphose. See, e.g., Michael B. Rainey et al., *For Practical and Legal Reasons, An Apology When Things Go Awry Is a Good Idea, but Beware of the Dangers*, 26 ALTERNATIVES 115, 116 (2008). I employ the maxim "better late than early."

59. See *supra* note 21.

60. See White *supra* note 10; see also *supra* p. 7.

the apology from ADR's safe harbor, as a negotiated apology that has full evidentiary import.

As Y's counsel, I must explore the ethical dimensions of any apology offered as well as the legal privileges that attach because of the location in which it is offered. If X seeks an unprotected apology, I must explain the legal consequences of offering an unprotected apology in unequivocal terms to Y.

Regardless of whether I represent X or Y, I must use care to be sure that my client's interest is what is being negotiated, and not persuade a client to exchange his perspective for mine. And, as outlined below, it is important that all concerned recognize that apology sometimes attains different values for lawyers and clients.⁶¹

IV. EMPIRICAL DATA

Most of the early reports suggesting that apologies positively influence a claimant's decision to settle were anecdotal, and most of those observations were made in the healthcare context. Today, researchers have conducted empirical research supporting the anecdotal observations: "apologies influence claimant's perceptions, judgments, and decisions in ways that are likely to make settlement more likely . . ."⁶² In 2008, a study empirically examined how lawyers reacted to apology. In this section, I offer a brief review of the literature.

A. Impact of Apology for Claimants

In 1999, a study published by the Institute of Medicine titled *To Err is Human* found that up to 100,000 people die each year because of preventable medical mistakes.⁶³ In 2001, the Joint Commission, the organization that accredits hospitals, responded by requiring that patients be informed of all unanticipated outcomes in the patient's care, including adverse outcomes and those resulting from medial error.⁶⁴ The communication in which a pa-

61. See *infra*, pp. 192-94.

62. Robbennolt, *supra* note 8, at 350.

63. INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 26 (Linda T. Kohn et.al., eds., Nat'l Acad. Press 1999).

64. JOINT COMM'N ON THE ACCREDITATION OF HEALTHCARE ORGS., *HOSPITAL ACCREDITATION STANDARDS* (2004), Standard RI.2.90. It is important to note that while this is the

tient is informed of an unanticipated outcome is called a disclosure. For most hospitals and providers, in spite of long-existing ethical mandates to communicate openly with patients,⁶⁵ the transparency disclosure required was new, and there was fear that disclosure would prompt claims and increase litigation and expenses. Yet there were a few bold hospitals that had already launched disclosure processes, and the experience of those systems and many since offer a very different picture.

For example, the University of Michigan began a proactive disclosure program designed and implemented by lawyer Rick Boothman in 1997, years before disclosure was imposed by the Joint Commission. When an investigation determined that an adverse outcome was the result of medical error, Boothman's team did not engage in traditional defend and deny strategies. Instead, the medical team followed a proactive and transparent plan. The patient was advised of the error, a fault-admitting apology was offered, and a fair offer of accommodation was made. By 2007, the number of pending lawsuits against the University was down by fifty percent, legal expenses were cut in half, and expenses dropped from \$48,000 per claim in 1997 to \$21,000 per claim in 2003.⁶⁶

An example of a program implemented after the Joint Commission issued its regulation is that of the Stanford University Medical Center. Several years ago, I was asked to help Stanford develop an innovative and patient-centered intervention in the wake of an unanticipated outcome in patient care. The program we developed is called PEARL, an acronym for the Process for the Early Assessment and Resolution of Loss. PEARL creates distinct processes for providers to follow depending on whether the unanticipated outcome experienced by the patient is a result of preventable medical error. When the event is the result of preventable medical error, the disclosure is coupled with an evidentiary-binding, fault-admitting apology. In

first regulatory requirement, disclosure has long been ethically mandated by professional organizations. *See, e.g.*, American Medical Ass'n Code of Professional Ethics E-8.12.

65. *E.g.*, AMA Code of Professional Ethics, E-8.12.

66. Allen Kachlia et. al., Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program, 153 ANNALS OF INTERNAL MED. 213, 215–17 (2010); *see also* Richard C. Boothman, *Transparency: The Benefits of an Open and Honest Dialogue* (presented at State Bar of Michigan Audio Conference, Apr. 25, 2006). Similar positive results have been noted outside of a healthcare setting. In 1991, the TORO Company was paying out more than \$17 million per year in claims. Then, in 1991, TORO instituted a proactive claims management strategy, which included offering a fault-admitting apology when TORO was culpable for the harm caused and, like Michigan, a fair offer of accommodation. By 2004, TORO was paying out only \$4.3 million per year in claims, and, notably, had not tried a lawsuit since 1994. Patricia Panchak, *Product Liability--Pro-Active Protection*, INDUSTRYWEEK (Oct,18,2005),

<http://www.industryweek.com/regulations/product-liability-pro-active-protection> (confirmed by author in conversation with TORO risk manager Drew Byers).

2011, Stanford published the results of the fifty PEARL claims reported from September 1, 2007 through February 28, 2011. The results mirrored those at the University of Michigan: claim frequency was down by thirty-six percent and costs had been slashed.⁶⁷

These kinds of results make perfect sense when considered in light of recent research regarding patient desires after medical mistakes. A study on patient attitudes regarding medical errors found that patients wanted to be told about all errors that caused harm, and, critically, wanted a full apology following medical error.⁶⁸ Indeed, Mediator Chris Hyman reports that in her study, ten of eleven medical negligence cases settled when the defendant doctor offered an apology, as contrasted with three of eight cases settling when no apology was offered.⁶⁹

In 2003, Jennifer Robbennolt, now Professor of Law and Psychology at the University of Illinois, conducted a study to determine how apology affects a claimant's decision to settle.⁷⁰ Robbennolt's study participants visited a website in order to read an accident scenario.⁷¹ It was a fairly simple scenario: a pedestrian was struck by a bicyclist and was injured. The participants were assigned the role of the injured party and then asked to evaluate the settlement offer. Robbennolt introduced numerous control variables into this two-party study, which enabled her to monitor how different kinds of apologies impacted settlement.

Robbennolt distinguished between a full and partial apology in her evaluation. Where a partial apology expresses only sympathy and a full apology includes both sympathy and acceptance of responsibility.⁷² This is the difference between "I am sorry you were hurt" and "I am sorry you were hurt. The accident was my fault. I was going too fast and not watching where I was going until it was too late."⁷³ The full apology positively influenced settlement seventy-three percent of the time. Importantly, no apology was more effective than a partial apology: fifty-two percent of cases settled with

67. INSTITUTE FOR HEALTHCARE IMPROVEMENT, RESPECTFUL MANAGEMENT OF SERIOUS CLINICAL ADVERSE EVENTS, Appendix E (2d ed. 2011).

68. See Thomas H. Gallagher et al., Patients' and Physicians' Attitudes Regarding Disclosure of Medical Errors, 289 JAMA 1001 (2003).

69. Chris S. Hyman & Clyde B. Schechter, *Mediating Medical Malpractice Lawsuits Against Hospitals: New York City's Pilot Project*, 25 HEALTH AFF. 1394, 1395 (2006).

70. Robbennolt, *supra* note 5.

71. *Id.* at 491.

72. See *supra* pp. 178-79.

73. Robbennolt, *supra* note 5, at 484 n.112.

no apology and a fair offer, as compared to thirty-five percent settling after a partial apology.⁷⁴

More recently, Robbennolt summarized recent research on how apologies impact the decision to settle.⁷⁵ She noted that apologies positively influence two identified settlement levers: aspirations and judgments regarding fair settlement values.⁷⁶ That is, people receiving an apology were more likely to set lower values on both levers. She also noted that people receiving a full apology “judged an offer as being more adequate, felt less need to punish the other party . . . were more willing to forgive” and more likely to accept a particular settlement offer.⁷⁷

B. Impact of Apology on Lawyers

In Robbennolt’s 2008 study, she evaluated the effect of apology on lawyers. This is an important contribution, not only because of lawyers’ presence in collaborative processes, but also because of the influence lawyers can exert on their clients. In this study, Robbennolt repeated the fact scenario outlined above.⁷⁸ Lawyers were asked to assume they represented the injured client and to give their reservation prices, aspirations, and assessments on fair settlement value. So that the effect of an apology could be evaluated, the nature of the apology offered (full versus partial) was varied. Additionally, participants were asked to assume different evidentiary standards for the apology offered, so that in one scenario the apology was protected and in others it was not. Finally, the evidence was manipulated so that in one scenario the cyclist was clearly at fault and, in another, fault was less clear.⁷⁹

In the wake of a full, fault-admitting apology, lawyers tended to set all three settlement levers higher than when no apology was offered.⁸⁰ Among the three levers, apology was most statistically significant for aspirations and less so for judgments. While reservations followed this pattern, the difference in reservation after an apology or no apology was not statistically significant.⁸¹

Like claimants, lawyers assessed full apologies more positively than partial apologies, suggesting that “attorneys and lay people made similar

74. *Id.*

75. Robbennolt, *supra* note 8, at 362–63.

76. *Id.*

77. *Id.*

78. *See supra* p. 191.

79. Robbennolt, *supra* note 8, at 370.

80. *Id.* at 376.

81. *Id.*

judgments about the relative sufficiency of the different types of apologies.”⁸² Another similarity is that both claimants and lawyers associated greater evidence of fault with higher expectations of winning at the courthouse.⁸³

A dissimilarity is the effect of apology on the claimant’s and lawyer’s own responses to the incident. Apology positively impacted claimants in areas such as the claimant’s evaluation of the cyclist’s responsibility, the claimant’s anger, and the claimant’s inclination to forgive the cyclist. Apology inclined claimants more favorably to the cyclist. This was not true of lawyers, whose evaluations were uninfluenced by apology.⁸⁴ Perhaps more to the point, clients valued the reparative capacity of apologies to reduce anger and to inspire forgiveness; their lawyers were focused on the legal advantages the apology created.

This explains why apologies pushed settlement levers for lawyers and for clients in opposite directions. In the wake of an apology, lawyers increased their aspirations and evaluations; for claimants, these numbers decreased. When the lawyers were evaluated by subgroup, plaintiffs’ lawyers’ evaluations were only higher when the apology was admissible.

Robbennolt’s findings are instructive. Claimants and lawyers both understand the distinction between the message communicated by a full apology from that communicated by a partial apology. That is, both groups understood the moral and legal distinction between the full and partial apology. Yet Robbennolt noted a significant difference in the effect of the apology on critical settlement levers. The full apology led claimants to reduce aspirations and motivated settlement. The same apology led lawyers to increase aspiration and feel emboldened for trial.

This value distinction is important for lawyers to understand. If a lawyer fails to recognize the value of apology for her client, the lawyer may resist a settlement her client desires, or worse, push for an unwanted trial. Or, as Robbennolt notes, lawyers may “not recognize the importance of clients’ demands for apologies . . . and may not, therefore, entirely understand their clients’ or opposing clients’ resistance to settlement in the absence of apologies.”⁸⁵ This is the kind of misunderstanding that not only invites impasse, but also subverts interest-based processes.

82. *Id.* at 378.

83. *Id.* at 379.

84. *Id.*

85. *Id.* at 381.

C. Impact of Apology on Attorney Mediators

Lawyer mediators may miss the value an apology has to a disputant in the same way that a lawyer may miss the value of an apology to her client.⁸⁶ This means that lawyer-mediators must be intentional when it comes to exploring the role of reparative rituals in mediated settings. Questions regarding the party's interest in reparative processes should be specifically posed so that the lawyer's inclination to undervalue apology will not eclipse the client's desire for apology. Awareness of professional biases coupled with a plan to address those biases is a safeguard lawyer-mediators should adopt.

V. PRACTICE POINTS REGARDING APOLOGIES IN MEDIATION⁸⁷

It is both a rare privilege and a deep responsibility to participate in reconciliation processes. Lawyers and mediators must be well versed in apology theory and practice, yet, at the same time, be comfortable with the mystery embedded in a process that transcends any theory or praxis. The practice tips I offer here are intended to provide a framework for apologetic discourse, yet it is my hope that the framework offered invites a much deeper conversation between counsel, client, and mediator.

A. Claimant's Counsel

1. Establish claimant's particular perspective/understanding of reparative processes and the interrelationship among those processes (e.g., does this claimant demand repentance as a condition precedent for forgiveness?);
2. Explore claimant's goals regarding reparative gestures (e.g., are forgiveness, reconciliation, or both among claimant's litigation goals?);
3. Educate claimant on the evidentiary implications of reparative expressions like apology when offered within a protected environment, including a feedback segment in order to ensure claimant understands the evidentiary implication—and, if appropriate, negotiate an unprotected apology;⁸⁸

86. *Id.* at 395.

87. These practice tips are intentionally limited to this paper's topic. They are to be considered as supplemental to a lawyer's other responsibilities in guiding a client in mediated contexts.

88. By feedback segment, I mean a specific time for the lawyer to learn what the client has understood by asking "tell me what you have heard" rather than asking "did you understand what I have told you."

4. Recognize that counsel and claimant may interpret and evaluate reparative gestures differently;
5. Recognize that impasse may mean a reparative gesture either is needed, missed, or has been botched;⁸⁹
6. Respect the value claimant places on reparative processes; and
7. Document the discussion.

B. Defense Counsel

1. Educate defendant on the strategic implications of apology;
2. Educate defendant on the ethical and moral dimensions of apology;
3. Educate defendant on the evidentiary implications of apology;
4. Educate defendant on the distinction between full and partial apologies and on how that distinction impacts both claimants and counsel;
5. Guide the defendant in constructing the apology and rehearse the apology to be offered;⁹⁰
6. Respect that a defendant's need to account for harm caused may trump legal caveats, and if the client decides to offer an apology, be sure the risks are documented.

C. Mediator

1. Explicitly establish the parties' goals regarding reparative rituals like apology;

89. When a claimant continues to negatively refer to a previous transaction, one should wonder if the accommodation previously offered is perceived as inadequate by the claimant. I describe this experience as a missed accommodation.

90. As already noted, apologies are easy to botch, especially when the party offering the apology has ambivalence about the offer. Rehearsing the apology gives the lawyer the opportunity to hear precisely what the defendant plans to say. If the apology is equivocal, then it may be better to offer no apology than to offer one that equivocates. *See supra* note 74 and accompanying text.

2. Be self-aware of personal biases, like the inclination of lawyers to undervalue apology and the human tendency to forget the diversity of views regarding forgiveness and its antecedents;
3. Establish that all present understand the evidentiary protection of communications occurring in the ADR environment;
4. Ensure that resolution agreements document the evidentiary impact of reparative gestures offered;
5. Obtain education and training about reparative processes, to establish literacy about and competency in guiding reparative processes; and
6. If an apology is to be offered, invite the defendant to rehearse the apology and evaluate whether it meets the claimant's and the defendant's litigation objectives.

Beyond these practice pointers is an invitation for all those seeking to facilitate apologetic discourse and reconciliation processes to develop skills and traits not typically taught in law school. We must learn to be careful and reflective listeners, or risk eclipsing the desires of those we are hired to serve with our own values and views. We must also practice patience and humility, ever mindful that we are participants in the sowing of the seeds of reconciliation, even if we do not witness its fruits.

VI. CONCLUSION

In the past decade, there has been an explosion of interest around apology and its role in legal contexts. In 1999, only two states had laws that addressed the evidentiary implication of apology. Today, thirty-seven states have such laws. In 1999, there were only a handful of legal articles analyzing the role of apology in litigation contexts; today there are scores of articles analyzing apology in economic, biological, psychological, and moral terms. Since 1999, anecdotal and empirical data have accumulated to suggest that apology positively influences settlement decisions by claimants. Data also have been presented to suggest that claimants and lawyers value apologies differently in settlement negotiations—data that is critical for claimants, lawyers, and mediators to know.

Clearly, professionals must be aware of apology's significance as a litigation resource—especially those engaged in interest-based ADR processes. At the same time, they must be cognizant of the ethical and moral dimen-

sions of apology when understood within a reconciliation sequence. Nowhere does the role of apology hold more potential impact in the legal arena than in ADR settings. This means that people charged with creating educational programs, especially for those in ADR specialties, must be proactive in offering courses that train professionals on apology and its capacity to resolve—and to transform—litigation.